SHERIFF APPEAL COURT

[2024] SAC (Civ) 16
PIC-PN2311-22

Sheriff Principal S F Murphy KC
Appeal Sheriff R D M Fife
Appeal Sheriff D J Hamilton

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL S F MURPHY KC

in the appeal in the cause

NATALIE MANLEY

Pursuer and Appellant

against

THOMAS MCLEESE

Defender and Respondent

Pursuer and Appellant: Milligan KC; Digby Brown LLP
Defender and Respondent: Davidson KC, Thomson; Clyde & Co (Scotland) LLP

17 April 2024

Introduction

[1] The appellant Ms Manley was driving her vehicle east along Thorn Brae, Johnstone on 12 December 2021. The respondent Mr McLeese was driving north along Overton Road, Johnstone when he arrived at its junction with Thorn Brae. He pulled out on to Thorn Brae to join the eastbound carriageway. A collision occurred: who caused it? Following proof, the sheriff determined it was Ms Manley. The sheriff found her evidence was incredible.

Ms Manley appeals whether the sheriff was correct to: (i) find her incredible and (ii) find for Mr McLeese in respect of the evidence led at proof.

[2] A motion was lodged under rule 31A.2(1) of the Ordinary Cause Rules 1993 ("OCR") for an award of expenses against Ms Manley by finding that all three grounds specified in section 8(4)(a), 8(4)(b) and 8(4)(c) of the Civil Litigation (Expenses and Group Proceedings (Scotland) Act 2018 ("the 2018 Act") were established. The sheriff granted the motion.

[3] Ms Manley contends that, whether or not her appeal on liability is allowed, the sheriff erred in granting that motion and finding that she had (a) made a fraudulent representation; (b) acted in a manner that was manifestly unreasonable; and (c) conducted the proceedings in a manner that amounted to an abuse of process.

The pleadings

[4] Ms Manley averred that on 12 December 2021, while she was travelling in the eastbound carriageway of Thorn Brae, Johnstone, Mr McLeese pulled out on to Thorn Brae from Overton Road. Mr McLeese failed: (i) to give way to oncoming traffic and (ii) to observe her vehicle which was established on the eastbound carriageway. The front of his vehicle collided with the rear offside of her vehicle. She maintained her lane position within the eastbound carriageway at all times. As a result of the impact, she had suffered a soft tissue injury to her neck, her lower back and a specific phobia.

[5] Mr McLeese averred he edged out of Overton Road with the intention to turn right and head east along Thorn Brae. He saw Ms Manley's vehicle approaching from the left. He stopped his vehicle. She drove past. However, while doing so, she crossed over into the westbound lane and there was contact between the rear offside of her vehicle with the front side of his vehicle. There was no significant pressure applied to the side of Ms Manley's

vehicle. The speed, force and mechanism of contact was insufficient to cause Ms Manley to be displaced within the vehicle.

Summary of evidence at proof

Ms Manley

[6] Ms Manley was travelling in the eastbound lane of Thorn Brae. She was travelling at 25-30 miles per hour. She first saw Mr McLeese's vehicle as it approached the junction with Thorn Brae. She drove past the junction and then recalled feeling a big bang to the back of her car. Her evidence was that the collision happened adjacent to where Overton Crescent met Thorn Brae (slightly further to the east of where Overton Road joins Thorn Brae). She did not accept the collision occurred where Mr McLeese suggested it did. Her position on his defence was that it was a lie. She thought he had failed to look to the left when exiting the junction.

Mr Vaquerizo

[7] Mr Vaquerizo, a collision investigation expert instructed on behalf of Ms Manley, considered the cause of the accident was due to Mr McLeese exiting the junction when it was unsafe to do so. He thought Ms Manley was incorrect on where the vehicles had collided on Thorn Brae. He considered it was further west of where she said ie on Thorn Brae adjacent to Overton Road - not Overton Crescent. If it was accepted that Ms Manley did not leave the eastbound lane at any stage, the sole explanation for the cause of the accident was that Mr McLeese had exited the junction and collided with her vehicle. Mr Vaquerizo considered the defence implausible. If Ms Manley had crossed into the westbound lane and collided with Mr McLeese's stationary vehicle, as Mr McLeese argued,

there ought to have been additional damage along other areas of the offside of Ms Manley's vehicle. As it was, there was only damage to the rear offside corner.

Mr McLeese

[8] He approached the junction with Thorn Brae and stopped. He saw no traffic to his right and just one vehicle to his left (Ms Manley's vehicle). He edged slowly out of Overton Road. He then stopped his vehicle in the middle of the westbound lane to allow Ms Manley's vehicle to pass. Ms Manley's vehicle then crossed the carriageway into the westbound lane and clipped his vehicle.

[9] Following the accident, both parties parked their vehicles. Mr McLeese alleged that Ms Manley and her then partner were aggressive towards him and swore at him. Ms Manley took photographs of the vehicles. He stated the ex-partner then suggested that Mr McLeese make a cash settlement. However, parties exchanged insurance details. Later that same day Mr McLeese alleged he was called by Ms Manley, who repeated the earlier suggestion of her ex-partner for a cash settlement.

Mr Bathgate

[10] Mr Bathgate was led as an engineering expert to comment upon the impact damage to each vehicle. Ms Manley's vehicle had sustained damage to the rear bumper cover which was ripped from its mountings. There was horizontal scraping and light denting in a front to rear direction on the offside rear wheel section. The angle at which damage was sustained was significant, in his opinion, as it confirmed Mr McLeese's vehicle was stationary at the point of collision.

The sheriff's findings – grounds of appeal

[11] The sheriff issued an ex tempore judgment. The sheriff subsequently set out the basis for her judgment in a note appended to the interlocutor of 3 August 2023. For the purposes of the appeal on liability, Ms Manley only takes issue with two of the sheriff's findings, namely:

i. that the collision occurred in the westbound lane of Thorn Brae; and

ii. that Mr McLeese's vehicle was stationary at the time of collision.

Sheriff's ex tempore judgment

[12] Ms Manley was not reliable on where the accident took place. Although she was consistent in her evidence that it occurred in the eastbound lane, she was vague about where precisely the point of collision was. Ms Manley's evidence that the point of collision was adjacent to Overton Crescent (rather than Overton Road) was, in the sheriff's opinion, inconsistent with her earlier evidence of seeing Mr McLeese approach the junction at Overton Road and travelling at a speed of 25-30 miles per hour.

[13] Mr McLeese, in contrast, was a credible and reliable witness. The sheriff accepted his evidence in its entirety: he was stationary; the collision occurred in the westbound lane of Thorn Brae; and his evidence on the events following the collision. Those supported his credibility and undermined Ms Manley.

[14] Having reviewed the evidence of both parties, the sheriff considered that was sufficient to determine the question of liability, and that she did not need to assess the evidence of either Mr Vaquerizo or Mr Bathgate.

[15] The sheriff also held that Ms Manley was incredible, as well as unreliable. She did so given Mr McLeese's description of the collision and Ms Manley's behaviour after the accident.

***Sheriff's decision on expenses – Qualified One-Way Cost Shifting* ("QOCS")**

[16] Mr McLeese lodged a motion for an award of expenses against Ms Manley. The sheriff granted that motion on 16 August 2023. She held that each of the three grounds in section 8(4) of the 2018 Act had been established.

[17] The sheriff had already made a formal finding that Ms Manley's evidence had been incredible for the reasons outlined in the ex tempore judgment. The sheriff did not accept the submission of Ms Manley's counsel that averments of fraud required to be made by a defender, or that a finding in fact of fraud required to be made before a sheriff could hold that the exception at section 8(4)(a) applied.

[18] On the balance of probabilities, the sheriff held that Ms Manley had made a fraudulent representation by lying about the circumstances of the accident at proof. That being so, the test for section 8(4)(a) was met. The sheriff determined the tests for section 8(4)(b) and section 8(4)(c) were also met. Ms Manley had lied about the circumstances of the accident at proof. Her doing so was manifestly unreasonable and an abuse of process. Ms Manley did not conduct the proceedings in an appropriate manner.

Submissions for the appellant

Motion

[19] The appellant seeks recall of the interlocutors pronounced on 3 August 2023 and 16 August 2023 granting decree of absolvitor and expenses in favour of the respondent.

Liability

[20] Where a sheriff had reached a decision on credibility and reliability of the witnesses on the question of liability that was a very high hurdle to overturn in an appeal.

[21] Each party was consistent in the manner in which they presented their case. Ms Manley argued Mr McLeese's vehicle clipped the back of her vehicle as she drove past in the eastbound lane. By contrast, Mr McLeese said he had seen her vehicle, stopped in the westbound lane and that Ms Manley's vehicle swerved across into his lane and clipped the front of his vehicle.

[22] The sheriff erred in determining liability by considering only the evidence of Ms Manley and Mr McLeese. The sheriff ought to have considered the totality of the evidence, including the testimony and reports of the independent experts, before coming to a conclusion on credibility and reliability: *Armstrong* v *First York Ltd* [2005] 1 WLR 2751 per Brooke LJ at 2758-2760.

[23] The requirement to consider all of the evidence is particularly important where an allegation of fraud or similar misconduct is made: *Jafari-Fini* v *Skillglass Ltd & Ors* [2007] EWCA Civ 261 per Moore-Bick LJ at para [76]; and *Martin* v *Kogan* [2019] EWCA Civ 1645 per Floyd LJ at para [88]. Although there was no documentary evidence upon which the sheriff could base a conclusion, there was the physical damage as spoken to by the experts. The sheriff has deliberately ignored this evidence, apparently believing that this was the correct approach, and erroneously applied *Armstrong*.

[24] The sheriff failed to consider the inherent improbability of Mr McLeese's account: *Secretary of State for the Home Department* v *Rehman* [2003] 1 AC 153 per Lord Hoffman at 194. Ms Manley had been consistent in her evidence of the collision occurring in the eastbound

lane. The expert evidence led by Mr Vaquerizo was that the physical damage sustained by both vehicles was consistent with Ms Manley's account of the collision.

[25] At proof, the respondent's counsel had failed to put the defence case to Ms Manley. It was not put to her that she crossed into the westbound lane. What was put to her was that she had crossed into the middle lane. No evidence was led to explore or justify such a lane deviation. There was no credible reason for Ms Manley to cross into the westbound lane. The most plausible explanation for the collision was that Mr McLeese misjudged his timing when crossing Thorn Brae and hit Ms Manley's vehicle.

[26] Mr Vaquerizo was a more suitably qualified expert than Mr Bathgate. Mr Vaquerizo was the only expert with sufficient qualifications to provide the court with an opinion on the forces and dynamics of the collision, including the force required to cause displacement within the vehicle. Moreover, unlike Mr Bathgate, Mr Vaquerizo did not stray outwith the boundaries of his role as an expert to the court.

[27] On the evidence of Ms Manley and Mr Vaquerizo, the sheriff ought to have held Mr McLeese at fault for the collision. However, even if the sheriff was entitled to absolve Mr McLeese, there was no basis in the evidence to find that Ms Manley was incredible and had lied to the court. The respondent's counsel did not allege Ms Manley was lying in cross-examination. As a matter of procedural fairness a witness should not be held to have committed perjury without an opportunity to respond to such an allegation: *McKenzie* v *McKenzie* 1943 SC 108 per LJC (Cooper) at 109; *Currie* v *Clamp's Executor* 2002 SLT 196 per Lord Clarke at para [10]; and *A* v *Glasgow City Council* 2021 SLT 1577 per Lord Brailsford at para [81].

Expenses – QOCS

[28] Section 8 is mandatory in its terms. If a pursuer "conducts the proceedings in an appropriate manner" the court must not make an award of expenses against them in the event their claim is not successful: section 8(1) and 8(2). Section 8(4) sets out the circumstances in which a pursuer can be held not to have conducted the proceedings in an appropriate manner.

[29] In any personal injury proof it is likely that some evidence will be rejected as being incredible or unreliable. Accordingly, for section 8 to have the content intended, it can only be in extreme cases that such a finding will lead to QOCS being disapplied. Obvious examples would be where no collision had actually occurred or no injury had resulted eg *Howlett and anr* v *Davies and anr* [2018] 1 WLR 948.

[30] The only factual disputes were: (i) the precise location of the impact; and (ii) whether Mr McLeese's vehicle was stationary at the point of impact. The extent of the dispute was standard for a road traffic accident. There was nothing in the nature of the dispute or within the evidence led to infer a fraudulent representation, manifest unreasonableness or an abuse of process on the part of Ms Manley.

[31] The sheriff was referred to *Lennox* v *Iceland Foods* 2023 SLT (Sh Ct) 73, *Gilchrist* v *Chief Constable Police Scotland* 2023 SLT (Sh Ct) 119 and *Love* v *Fife Health Board* [2023] SC EDIN 18. The sheriff distinguished all three cases from the present action on the basis of the facts, rather than considering the propositions of each of those authorities and how they ought to have been applied to assess whether or not Ms Manley had conducted the action in appropriate manner.

[32] Fraud is a very serious allegation. There was no notice in the pleadings. No question was put in cross-examination to Ms Manley alleging that she was making a fraudulent representation. Under normal circumstances, fraud required to be pled: *Marine & Offshore (Scotland) Ltd* v *Hill* 2018 SLT 239 per LP (Carloway) at para [16]. That being said, it was accepted that fraud may only become apparent after proof. That was not the position in this action. The sheriff was provided with evidence of two separate versions of how the accident occurred. Neither version was unexpected. Both versions had been foreshadowed in the parties' pleadings.

[33] The sheriff erred in holding that there was no need for her to make a finding in fact that the pursuer was either not credible or guilty of a fraudulent representation. Such a finding by a sheriff is required before expenses can be awarded against a pursuer under section 8(4)(a): *Gilchrist* per Sheriff Campbell KC at para [24] and *Nelson* v *John Lewis plc* [2023] SC EDIN 44 per Sheriff Primrose KC at paras [34]-[40].

[34] The sheriff held that if the test for section 8(4)(a) was met, the tests in section 8(4)(b) and 8(4)(c) were also met. The sheriff's reasoning was flawed. She required to consider each ground separately. There was no basis on the evidence for holding Ms Manley acted unreasonably, let alone manifestly unreasonably in the conduct of the proceedings. With respect to section 8(4)(b), for a pursuer's conduct to be manifestly unreasonable, the conduct must be of a similar degree to fraud or abuse of process, otherwise subsections (a) and (c) would have no content. Ms Manley considered she was entitled to damages as a result of the accident. She had obtained a supportive expert report: that of itself strongly mitigated against the suggestion that Ms Manley had made a fraudulent representation or had been manifestly unreasonable.

[35] There was no basis in the evidence for holding that Ms Manley had committed an abuse of process. The sheriff appeared to consider that the abuse of process arose from Ms Manley's conduct in contacting Mr McLeese for a cash settlement before any action was raised. If that were so, as the contact had preceded the raising of an action, it could not be perceived to be an abuse of the judicial process.

Submissions for the respondent

Motion

[36] The motion for the respondent is to: (a) refuse the appeal and adhere to the sheriff's interlocutors of 3 August 2023 and 16 August 2023; (b) grant the expenses of the appeal in favour of the respondent; and (c) sanction the appeal as suitable for the employment of senior counsel.

Liability

[37] In the absence of some other identifiable error such as a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge on the basis that they have gone plainly wrong, only if it is satisfied that their decision cannot reasonably be explained or justified: *Thomas* v *Thomas* 1947 SC (HL) 45 per Lord Thankerton at 54 and *McGraddie* v *McGraddie* 2014 SC (UKSC) 12 per Lord Reed JSC at paras [1] - [6].

[38] Both in the pleadings and at proof, the case turned on the sheriff's view of the disputed versions of what happened to cause the collision. The decision on the merits

turned on the credibility and reliability of the two parties. The proof was conducted on that basis.

[39] The critical findings in fact were 8, 9 and 14. On liability, the sheriff found Mr McLeese credible and Ms Manley not credible. That was an insurmountable hurdle for the appellant, even if there was no basis that Ms Manley had lied or committed perjury.

[40] The critical facts of Mr McLeese's case were put to Ms Manley "clearly, succinctly and robustly". She was left in no doubt as to what the defence case was. Her response to his defence was "No, that's lies". Ms Manley's credibility was the subject of attack in cross-examination. During cross-examination, no direct question was put to her that she was lying. There was no need to put a direct question. The issue was fairness. A pursuer ought to be afforded an opportunity to respond to contradictory evidence: *McKenzie (supra)* per LJC (Cooper) at 109. As the defence case had been put to Ms Manley, there was no substance to the criticism of the appellant that it had not been fairly put.

[41] The sheriff was correct to hold that Ms Manley was unreliable. Her evidence as to the circumstances of the accident was difficult to reconcile with her evidence about the precise location of the collision. The sheriff was entitled to find that Mr McLeese was, in contrast, credible and reliable. Ms Manley had failed to meet the test in *McGraddie* to allow the sheriff's findings in fact to be overturned.

[42] The sheriff was correct that she did not require to consider the expert evidence of Mr Vaquerizo and Mr Bathgate. Mr Vaquerizo's report proceeded on the basis that Ms Manley's accident happened in the manner in which she alleged. In the witness box, Ms Manley's evidence on the point of collision was different to where Mr Vaquerizo had understood the point of collision to be. Moreover, Mr Vaquerizo had conceded in cross-examination that if the sheriff determined that Mr McLeese's vehicle was stationary in

the westbound lane, then the only basis for a collision to occur would be if Ms Manley crossed lanes. The sheriff believed the account of the accident given by Mr McLeese. That trumped the expert evidence in this case.

Expenses – QOCS

[43] Each case turns on its own facts. Preference of the respondent's witnesses over the appellant's witnesses does not of itself engage section 8 of the 2018 Act: *Murray (supra)* at para [11]. In considering the facts of the case, the sheriff ought to address the number and materiality of the conduct and lies. Unreliability alone is not enough: *Lennox (supra)* at paras [57] - [62].

[44] The sheriff concluded that Ms Manley was incredible in her evidence on a core aspect of the case, namely, in which lane the collision occurred. The sheriff was entitled to hold that Ms Manley had made a fraudulent representation. That dishonesty engaged section 8(4)(a).

[45] When considering whether a party has behaved in a manner which is manifestly unreasonable in connection with civil proceedings, the sheriff was entitled to take into account the following matters in this action: (a) the telling of a lie in the written pleadings; (b) persisting with that lie in the witness box; (c) accusing the other party of lying; (d) referring to alleged photographs which were not before the court; and (e) swearing at the defender after the accident. The sheriff was entitled to conclude that such matters were, whether taken individually or cumulatively, enough to engage section 8(4)(b).

[46] Ms Manley had lied under oath. She had initiated a claim which had no chance of success unless her lie remained unexposed. The making of false averments in the pleadings

and the making of false statements in the witness box constituted the very concept of abuse of process. That the abuse was stopped by the action being defended did not cancel or mitigate her attempt to compromise the integrity of the court's procedures: *Lennox* at para [63]. The sheriff was entitled to conclude section 8(4)(c) was engaged.

Decision

Liability

[47] The sheriff issued an ex tempore judgment in the form of a note annexed to the interlocutor of 3 August 2023 granting decree of absolvitor. The assessment of witnesses, the analysis of the evidence and the reasons for the decision are set out briefly.

[48] The sheriff did not find Ms Manley to be a reliable witness in respect of her psychological symptoms. That also affected her reliability about the accident itself. Ms Manley was unreliable about where precisely the accident took place. The sheriff found Mr McLeese to be a credible and reliable witness, and accepted his description of the collision. The sheriff rejected Ms Manley's account of the accident and, having regard to Ms Manley's behaviour after the accident, the sheriff found Ms Manley to be incredible and unreliable.

[49] The sheriff disregarded the expert evidence and determined the question of liability solely on the evidence of Ms Manley and Mr McLeese. The sheriff erred in so doing. The sheriff required to consider the whole of the evidence, including the expert reports and evidence about the physical damage to the vehicles, before coming to a concluded view on credibility and reliability of the witness and reaching a decision on liability on the balance of probabilities, *Armstrong (supra)*; *Jafari-Fini (supra)*; and *Martin (supra)*.

[50] Nevertheless, given the sheriff's findings and the decision based on the determination on credibility and reliability where there are two different versions of the accident, an appellate court must exercise due caution before being satisfied the findings of the sheriff were plainly wrong or the sheriff made a material error in law: *Thomas (supra)*. Appellate courts should not interfere with findings made by the trial judge unless compelled to do so, *McGraddie (supra)*.

[51] We are not satisfied on the facts in this particular case and on the assessment of the credibility and reliability of the witnesses made by the sheriff that by ignoring the expert evidence the findings made by the sheriff were plainly wrong, or that the sheriff made a material error in law, such that we should interfere with the decision on liability.

[52] Accordingly, we refuse the appellant's motion to recall the interlocutor of 3 August 2023.

Expenses - QOCS

Statutory provision

[53] The 2018 Act provides *inter alia* as follows:

> **"8 Restriction on pursuer's liability for expenses in personal injury claims**
>
> (1) This section applies in civil proceedings where—
>
> (a) the person bringing the proceedings makes a claim for damages for—
>
> (i) personal injuries, or
> (ii) the death of a person from personal injuries, and
>
> (b) the person conducts the proceedings in an appropriate manner.
>
> (2) The court must not make an award of expenses against the person in respect of any expenses which relate to—
>
> (a) the claim, or

(b) any appeal in respect of the claim.

(3) Subsection (2) does not prevent the court from making an award in respect of expenses which relate to any other type of claim in the proceedings.

(4) For the purposes of subsection (1)(b), a person conducts civil proceedings in an appropriate manner unless the person or the person's legal representative—

(a) makes a fraudulent representation or otherwise acts fraudulently in connection with the claim or proceedings,

(b) behaves in a manner which is manifestly unreasonable in connection with the claim or proceedings, or

(c) otherwise, conducts the proceedings in a manner that the court considers amounts to an abuse of process.

(5) For the purpose of subsection (4)(a), the standard of proof is the balance of probabilities.

(6) Subsection (2) is subject to any exceptions that may be specified in an act of sederunt under section 103(1) or 104(1) of the Courts Reform (Scotland) Act 2014.

(7) In subsection (1)(a), *'personal injuries'* include any disease and any impairment of a person's physical or mental condition."

[54] The respondent's motion to disapply QOCS was in the following terms:

"The defender respectfully moves the court to award the judicial expenses of the cause, as agreed or taxed, to the defender against the pursuer by finding that one or more of the grounds specified in s.8(4)(a)-(c) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 are established (Ordinary Cause Rule (OCR) 31A.2.(1)(a)) and by exercising discretion to so award under OCR 31A.3(1)."

[55] The interpretation and disapplication of section 8 has been addressed in a number of recent decisions of the All-Scotland Sheriff Personal Injury Court. We approve the propositions taken from these decisions, as set out in in *Murray* v *Mykytyn* [2023] SC EDIN 32 per Sheriff Campbell KC at para [11]:

a) Each case in which the issue of disapplying QOCS arises must be considered on its own facts and circumstances (*Lennox (supra)*, para [61]; *Gilchrist (supra)*, para [26]).

b) "Manifestly unreasonable" means "obviously unreasonable" (*Lennox,* para [60].

c) The legislative history and language indicates that the circumstances where proceedings were not conducted in an appropriate manner are likely to be exceptional (*Lennox,* para [61]).

d) Where there is a finding that the pursuer is incredible on a core issue in the action, the issue of manifestly unreasonable conduct may arise, but does not invariably arise (*Gilchrist,* para [26]).

e) The court preferring the defender's witnesses over the pursuer's account does not of itself give rise to disapplication; whether it does depends on the court's reasons (*Gilchrist,* para [27]).

f) Unusual circumstances may or may not be exceptional; whether they are is context - specific (*Love (supra)*, paras [56] and [65]).

Grounds for disapplying QOCS

Section 8(4)(a)

> " …a person conducts civil proceedings in an appropriate manner unless the person or the person's legal representative—
>
> (a) makes a fraudulent representation or otherwise acts fraudulently in connection with the claim or proceedings"

[56] It is not disputed there was a collision between the two vehicles and Ms Manley sustained injury, the extent of which was an issue. There were two versions of what

happened. Ms Manley was driving on the major road and had right of way. Mr McLeese emerged from a minor road. The primary issues on liability were whether Mr McLeese's vehicle was stationary or moving at the point of impact, and the precise location of the accident. There was independent physical damage to both vehicles, and two expert witnesses spoke to their reports on causation.

[57] The sheriff's reasons for disapplying QOCS are in a note annexed to the interlocutor of 16 August 2023. The sheriff did not accept the submissions of counsel for Ms Manley to the effect that averments of fraud required to be made by Mr McLeese or that a finding in fact of fraud had to be made by the sheriff before expenses could be awarded with reference to section 8(4)(a). The sheriff gave no reasons for that decision. The sheriff concluded Ms Manley made a fraudulent representation by lying about the circumstances of the accident.

[58] The sheriff erred in concluding there was no need to make a finding in fact that Ms Manley had made a fraudulent representation. The sheriff required to make such a finding in fact as the basis for disapplying QOCS under the exception in section 8(4)(a). The failure to make such a finding in fact would mean a sheriff required to apply section 8(2) and not make an award of expenses against a pursuer. We agree with the observations of the sheriffs in the following cases:

- *Gilchrist* per Sheriff Campbell KC at para [24]:

> "the court would require to make a finding that a pursuer or his or her legal representative had acted intentionally to mislead the court"; and

- *Nelson (supra)* at para [34]:

> "…a finding that there had been such conduct (that the pursuer was either not credible or guilty of a fraudulent representation) is a necessary ingredient in any situation where the court considers that a pursuer…should lose the protection of QOCS."

[59] As was said in *Lennox* at para [61], the circumstances where proceedings are not conducted in an appropriate manner are likely to be exceptional. Each case concerning the disapplication of QOCS must be considered on its own facts and circumstances. The test for making a fraudulent representation is a high one.

[60] The sheriff did not find Ms Manley to be a reliable witness. She was not reliable about her psychological symptoms relating to the accident. At best, Ms Manley had forgotten how long her symptoms lasted. At worst, she had exaggerated her claim. The appellant was unreliable about where precisely the accident took place.

[61] Having accepted Mr McLeese's description of the accident and having regard to Ms Manley's behaviour after the accident, the sheriff found Ms Manley to be incredible as well as unreliable. In particular, the sheriff criticises her behaviour after the collision including her aggression, swearing, taking photographs, and she and that her ex-partner made attempts to persuade Mr McLeese to settle the costs in cash.

[62] The sheriff erred in giving no reasons why Ms Manley's behaviour post-accident amounted to a fraudulent representation. Being aggressive and swearing following an accident in which a person's child is involved would not be unexpected. The taking of photographs following a collision is usual practice. Parties involved in a collision may discuss a cash settlement in order to avoid the need to involve insurers.

[63] The sheriff erred in not considering all the facts and circumstances, before concluding Ms Manley had made a fraudulent representation. The sheriff ignored relevant evidence, namely, the independent physical damage to the vehicles and in particular to Ms Manley's vehicle, supported by the expert witness Mr Vaquerizo, which was consistent

with Ms Manley's account of the accident. The sheriff gave no reasons for disregarding that evidence when considering whether the test under section 8(4)(a) had been met.

[64] We have concluded the sheriff had no basis to find on the balance of probabilities that the appellant made a fraudulent representation. The test under section 8(4)(a) was not met.

Section 8(4)(b) and section 8(4)(c)

> "…a person conducts civil proceedings in an appropriate manner unless the person or the person's legal representative—
>
> (b) behaves in a manner which is manifestly unreasonable in connection with the claim or proceedings, or
>
> (c) otherwise, conducts the proceedings in a manner that the court considers amounts to an abuse of process."

[65] The sheriff required to consider each ground in sections 8(4)(b) and 8(4)(c) separately and set out the reasons for her decision. The sheriff decided that, the test in section 8(4)(a) having been met on the balance of probabilities, the tests in section 8(4)(b) and (c) were also met. That decision was flawed. The sheriff failed to give any separate consideration to section 8(4)(b) and 8(4)(c) and their application to the facts and circumstances in this case. The test in section 8(4)(a) was not met. The sheriff provides no reasons for the decision to disapply QOCS in respect of either of the grounds in section 8(4)(b) and section 8(4)(c).

[66] In the absence of the sheriff stating any facts or reasons for her decision, we have concluded the sheriff had no basis to find on the balance of probabilities that Ms Manley behaved in a manner which was either manifestly unreasonable or conducted the proceedings in a manner that amounted to an abuse of process.

[67] Accordingly, we recall the sheriff's interlocutor of 16 August 2023.

Disposal

[68] We sustain the appeal in part. We adhere to the sheriff's interlocutor of 3 August 2023. We recall the sheriff's interlocutor of 16 August 2023 and refuse the respondent's motion number 7/6 of process. Parties should attempt to agree the disposal of expenses of this appeal. If this does not prove successful, a hearing will be assigned.