

Compass Chambers



QOCS Update


7 June 2024

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Aim of the session

- The Rules
 - Recent Case law
 - Practical considerations
- 



Civil Litigation (Expenses and Group Proceedings)(Scotland) Act 2018 - the general rule

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.



Civil Litigation (Expenses and Group Proceedings)(Scotland) Act 2018 - Exceptions to the general rule

8 Restriction on pursuer's liability for expenses in personal injury claims

(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 or
- (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**.



Sheriff Court Ordinary Cause Rules - further exceptions

Application for an award of expenses

O.C.R. 31A.2.

(1) Where civil proceedings have been brought by a pursuer, another party to the action (“the applicant”) may make an application to the sheriff for an award of expenses to be made against the pursuer, on one or more of the grounds specified in either or both –

(a) Section 8(4)(a) to (c) of the Act;

(b) paragraph (2) of this rule.



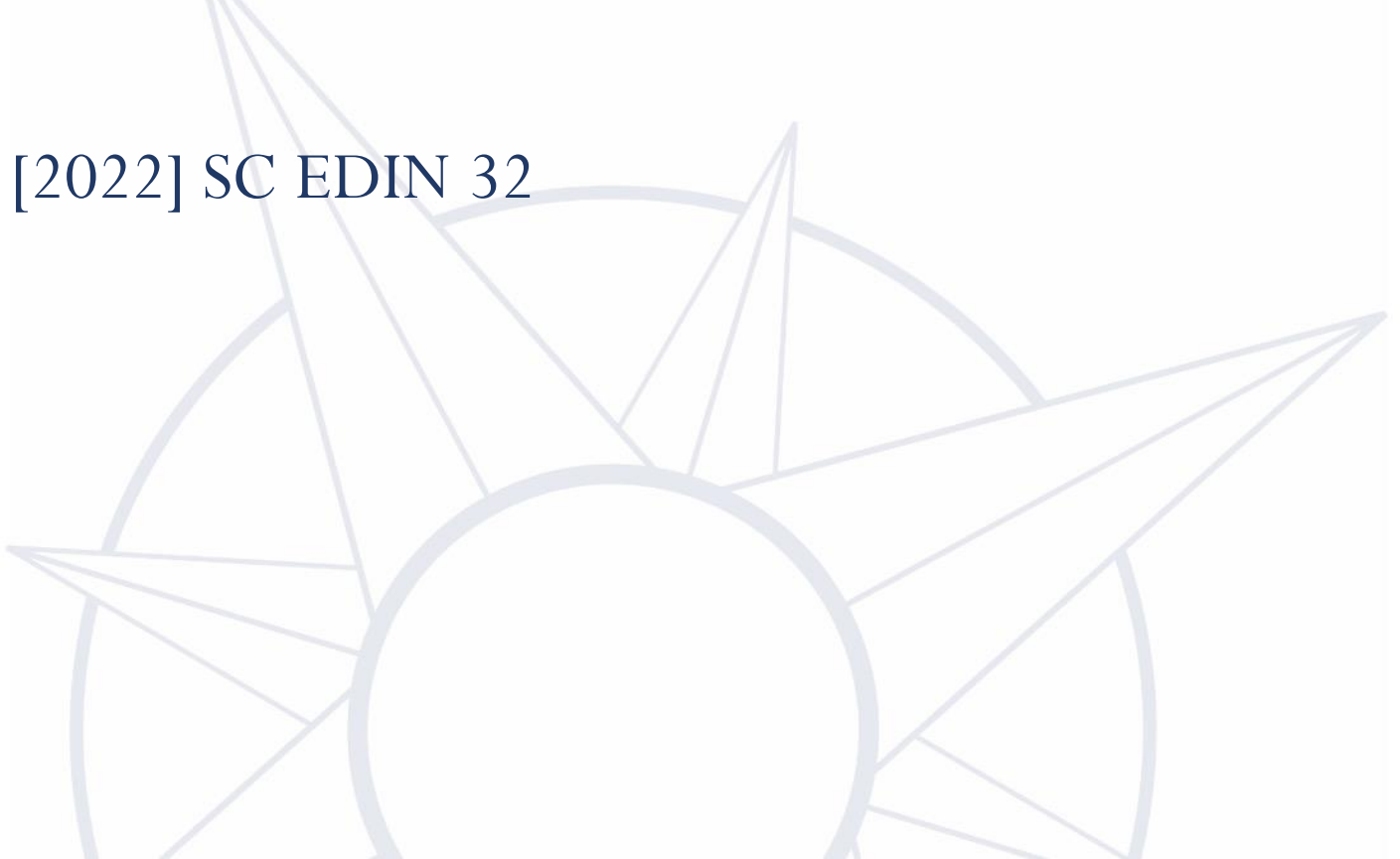
Sheriff Court Ordinary Cause Rules -31A.2.

(2) The grounds specified in this paragraph, which are exceptions to section 8(2) of the Act, are as follows -

- (a) failure by the pursuer to obtain an award of damages greater than the sum offered by way of a tender lodged in process;
- (b) unreasonable delay on the part of the pursuer in accepting a sum offered by way of a tender lodged in process;
- (c) decree of absolvitor or decree of dismissal has been granted against the pursuer in terms of rule 17.2(3)(b) (applications for summary decree);
- (d) abandonment of the cause in terms of rule 23.1(1), or at common law.



Refresh on early QOCS cases

- *Helen Lennox v Iceland Foods Limited* [2022] SC EDIN 42
 - *Gilchrist v Chief Constable* [2022] SC EDIN 32
 - Test high threshold
 - Fact specific
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Preparation and procedure





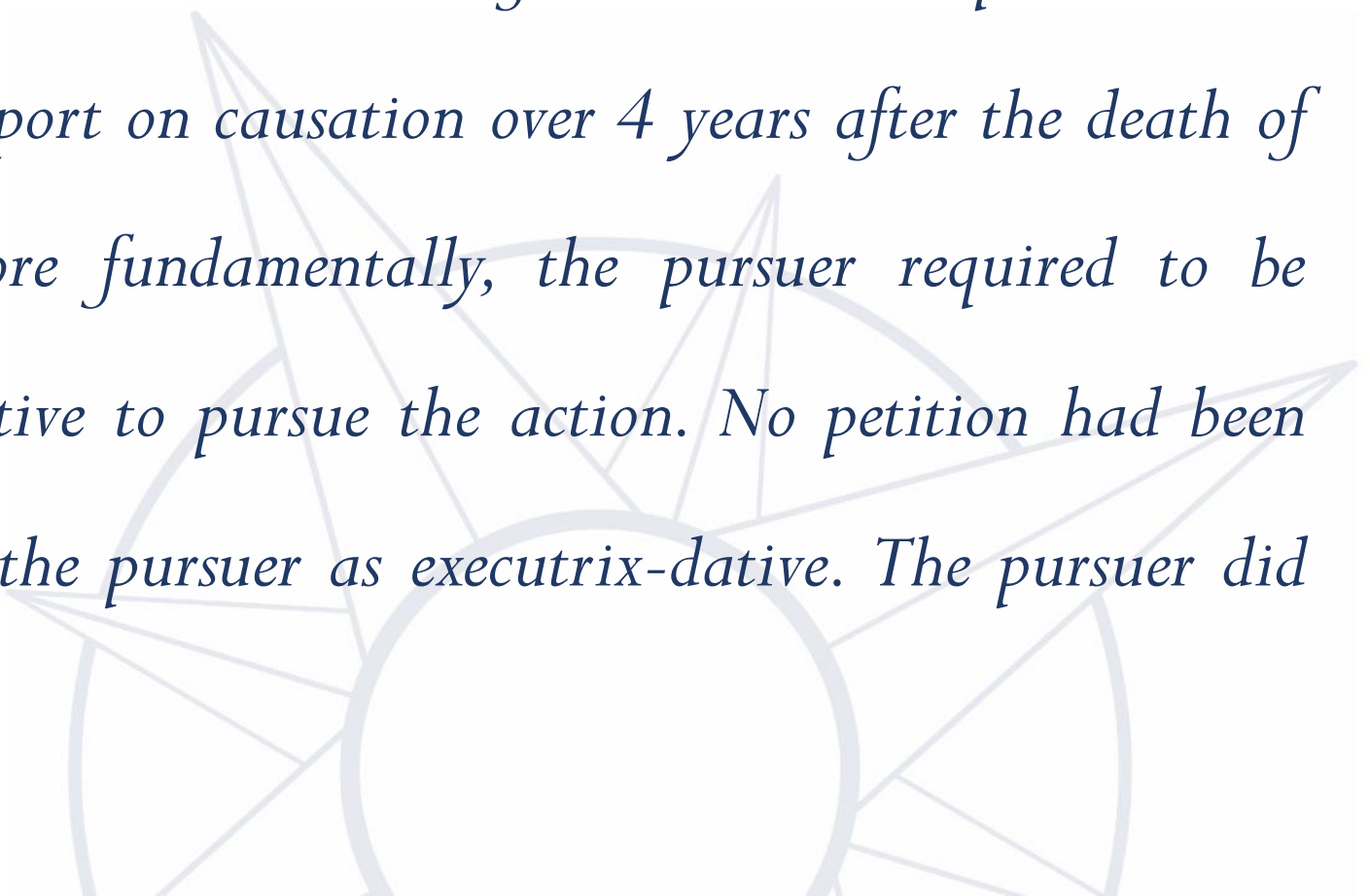
Love v NHS Fife [2023] SC EDIN 18

- Pursuer's mother died on 28th October 2018
- Extension of timebar agreed with original agents, and then pursuer directly until 16th November 2022
- Service of Writ by new solicitors on 12th December 2022 (having been instructed one month earlier)
- No expert reports; Pursuer not appointed Executrix Dative so no title to sue
- No motion to sist by pursuer's agent
- Motion for Summary Decree, eventually heard on 27th April 2023 (Pursuer's agents withdrew on 14th March 2023), at which defender succeeds.



Love v NHS Fife [2023] SC EDIN 18

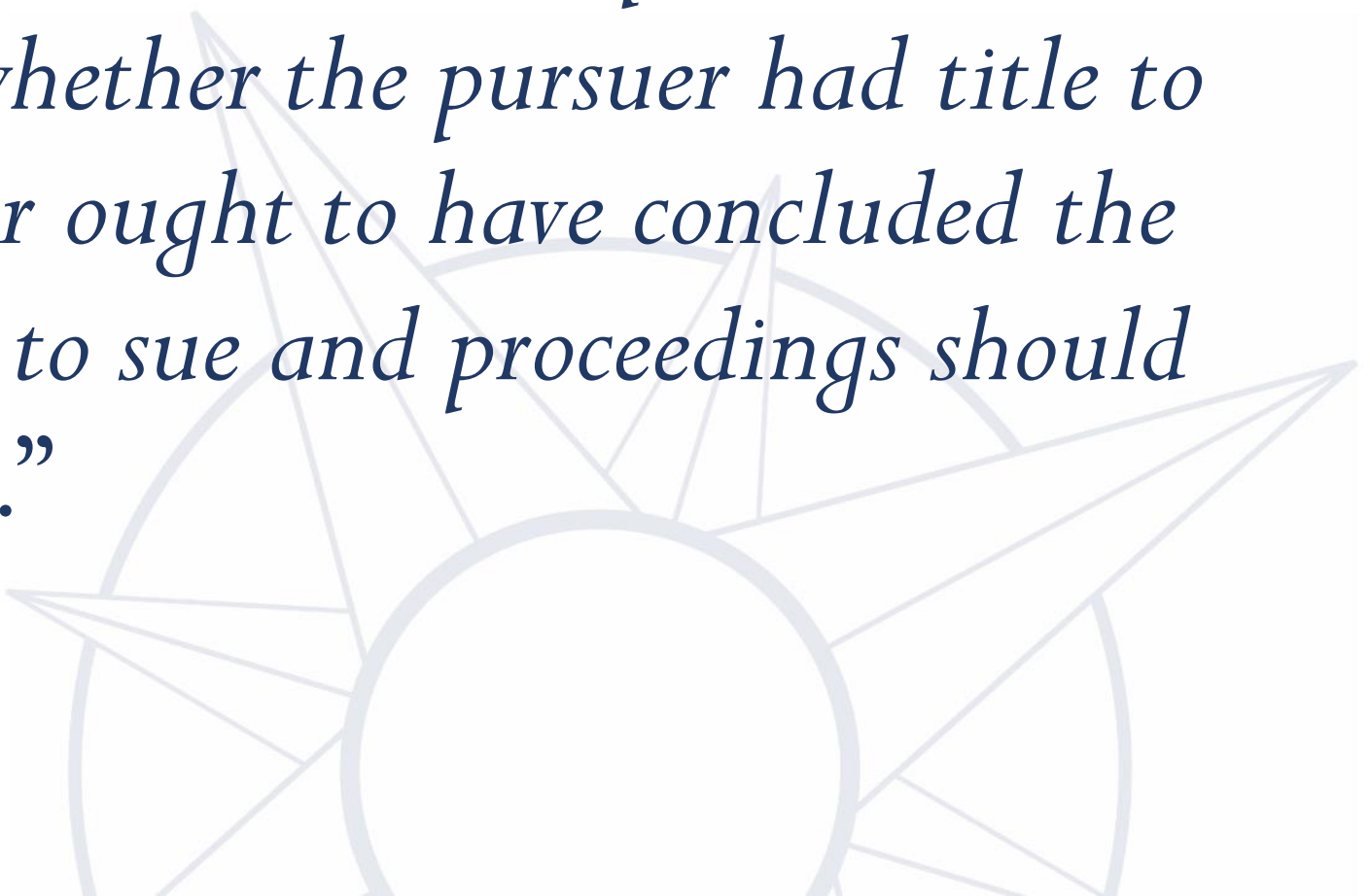
“It is difficult to see how Mr Law could have formed such an opinion when there was no favourable report on causation over 4 years after the death of the pursuer’s mother. More fundamentally, the pursuer required to be appointed as executrix-dative to pursue the action. No petition had been made for appointment of the pursuer as executrix-dative. The pursuer did not have title to sue.”





Love v NHS Fife [2023] SC EDIN 18

“Notwithstanding Mr Law’s stated opinion, had he paused to consider whether the pursuer had title to sue, he would have or ought to have concluded the pursuer had no title to sue and proceedings should not have been raised.”





Love v NHS Fife [2023] SC EDIN 18

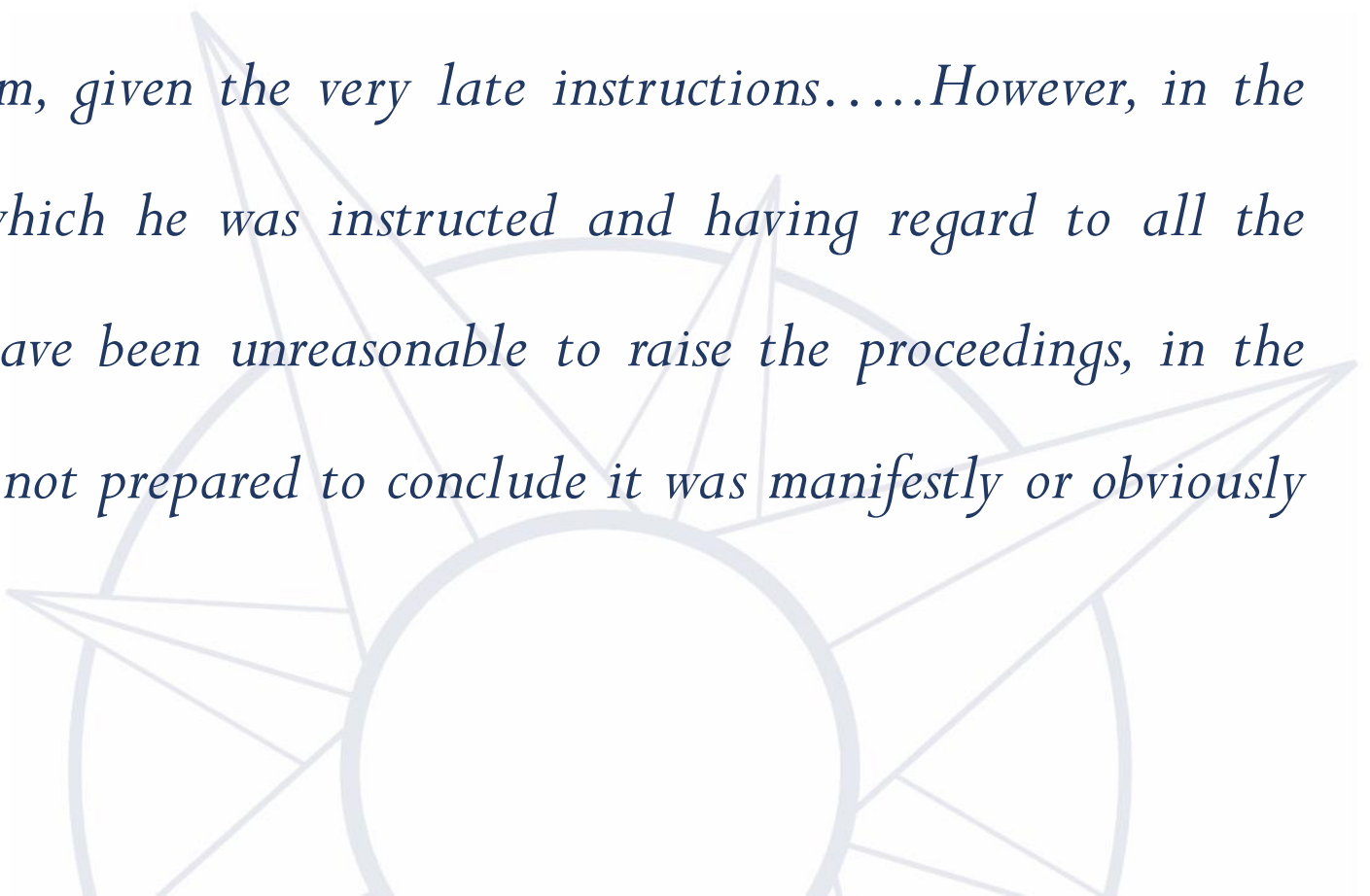
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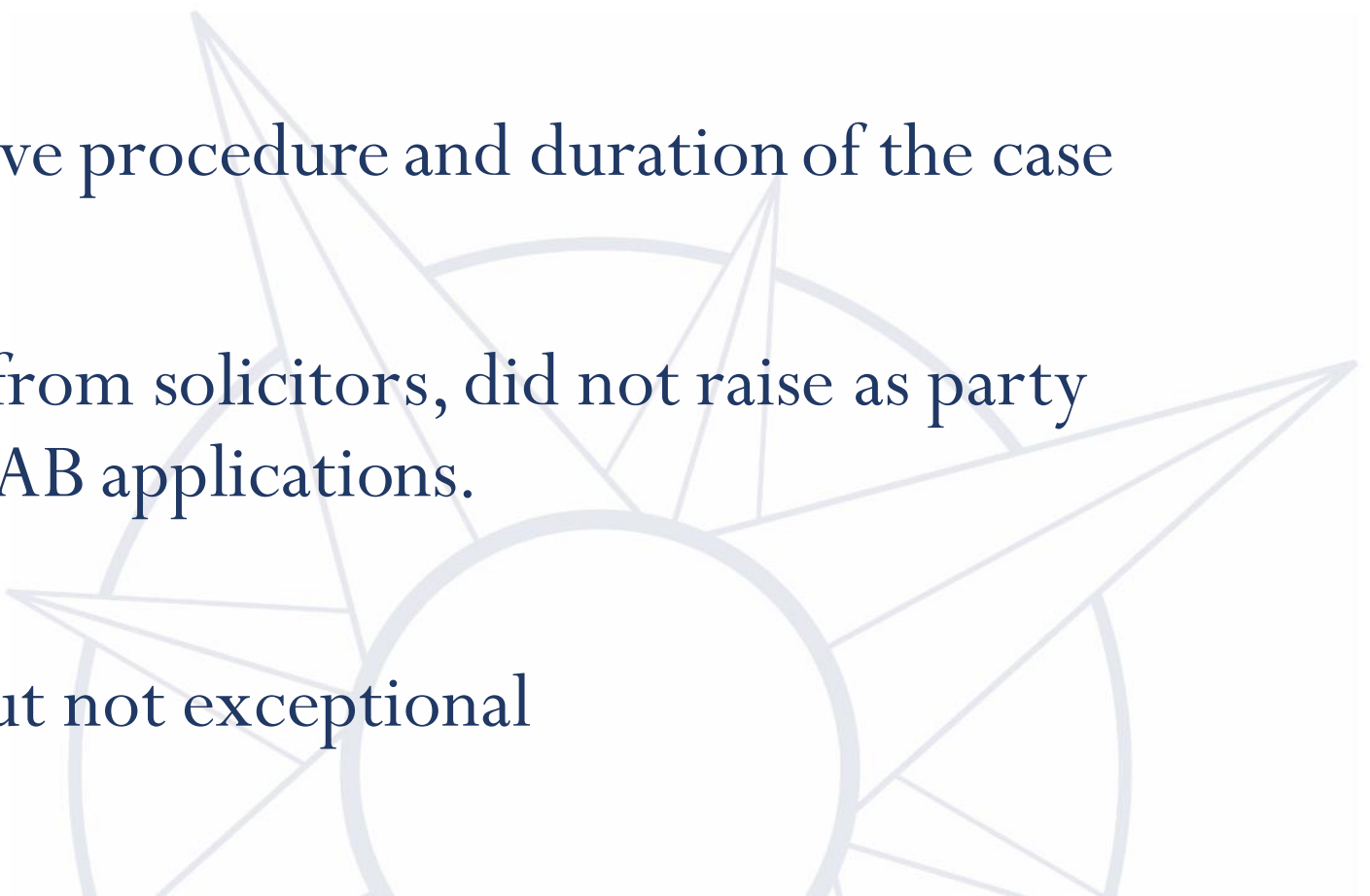
Love v NHS Fife [2023] SC EDIN 18

“I am unable to find any criticism of Mr Law in not behaving in an appropriate manner in respect of the claim, given the very late instructions.....However, in the particular circumstances in which he was instructed and having regard to all the circumstances, while it may have been unreasonable to raise the proceedings, in the exercise of my discretion I am not prepared to conclude it was manifestly or obviously unreasonable to do so.”





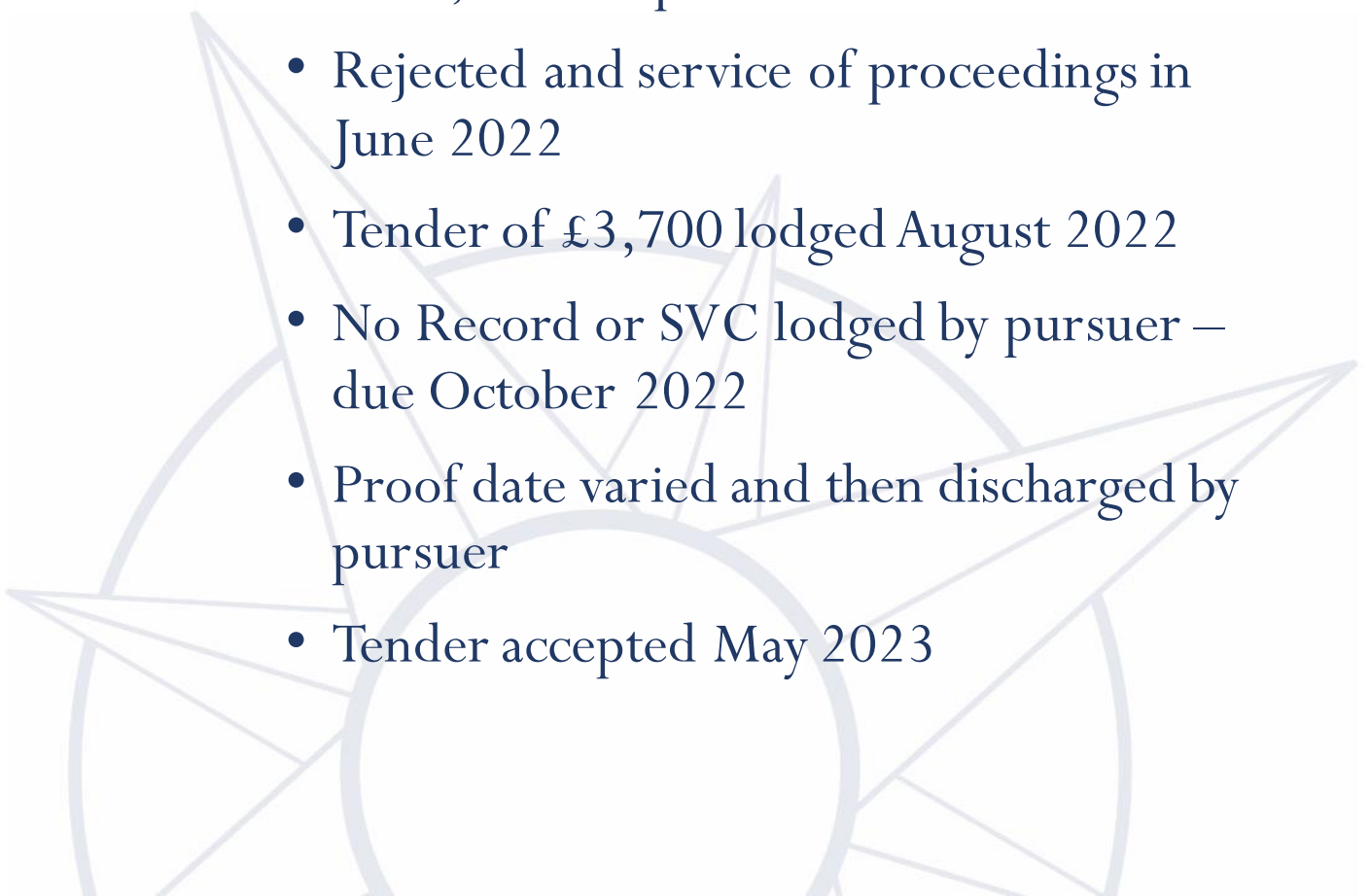
Love v NHS Fife [2023] SC EDIN 18

- Lateness of instructions
 - And the limited substantive procedure and duration of the case
 - Pursuer relied on advice from solicitors, did not raise as party litigant and submitted SLAB applications.
 - Circumstances unusual but not exceptional
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Carty v Churchill Insurance [2023] SC EDIN 31



- Liability admitted pre-litigation with offer of £3,700 in April 2022
 - Rejected and service of proceedings in June 2022
 - Tender of £3,700 lodged August 2022
 - No Record or SVC lodged by pursuer – due October 2022
 - Proof date varied and then discharged by pursuer
 - Tender accepted May 2023
- 



Carty v Churchill Insurance [2023] SC

EDIN 31

- Ill health
- Firm dissolved – pressure of work
- Not raised in bad faith
- Offer rejected as reasonably considered case worth more
- Unable to contact GP witness
- Protracted litigation so pursuer chose to accept





Carty v Churchill Insurance, para 16; and Murray v Mykytyn [2023] 10 WLUK 170, para 11

‘(a) Each case in which the issue of disapplying QOCS arises must be considered on its own facts and circumstances (*Lennox*, para 61; *Gilchrist* para 27).

(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 27).

(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 28).

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



Carty v Churchill Insurance [2023] SC EDIN 31

“I am not satisfied that the explanation offered entitles the court to overlook the persistent failures to comply with the timetable or to engage in a timely fashion with the defender’s agents. The operation of all court process depends on the due observance of the procedural framework and that is especially so in a case-flow managed court such as ASSPIC, which relies in part on appropriate engagement with the process by agents. The integrity of the process and the effective management of the cases before it depends on that, and the powers the court has to secure compliance includes section 8(4)(b) of the 2018 Act.”



What's the difference?

- Court critical of conduct of agents in both cases
- Both led to unnecessary Court time and put the defender to expense.
- Both offered mitigation, which to some degree relied upon lack of time and doing their best in the circumstances which prevailed
- Distinguishing features: i) Urgency of instructions; and ii) Prolonged duration of unsatisfactory conduct and resultant cost to defender



Benefit of hindsight





Murray v Mykytyn [2023] 10 WLUK 170

- Pursuer accepted she was forgetful due to narcolepsy. Concerns about her reliability on specific aspects of case.
- Husband (Driver) gave multiple accounts, none of which aligned with the pursuer's version of events. Found not to be reliable.
- Conjunction of these on which the defender relied to say no prospects of success, and so manifestly unreasonable to have raised and proceeded with action. Should have been discontinued.



Murray v Mykytyn [2023] 10 WLUK 170

- Pursuer's husband not found to be lacking in credibility
- Pursuer not found to be unreliable due to forgetfulness or memory issues
- Difficult to reconcile with inevitability pursuer would be found to be unreliable due to narcolepsy or that husband would be found not credible
- Pursuer consistent with pleadings, lodged documents, versions of events provided throughout claim
- Not need husband's evidence to be accepted in order to succeed.



Carty v Churchill Insurance, para 16; and Murray v Mykytyn [2023] 10 WLUK 170, para 11

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Murray v Mykytyn [2023] 10 WLUK 170

“While it will be evident that I was unimpressed by the evidence of a key witness for the pursuer, that is not of itself sufficient to make the pursuer’s conduct manifestly unreasonable. Nor did I find her to be incredible in her own evidence, albeit I had some concerns about her reliability, these were based on matters external to her evidence. Again, that is not sufficient to meet the threshold of manifestly unreasonable conduct. Similarly, I do not consider that analysis of the evidence discloses any circumstances which are exceptional.”



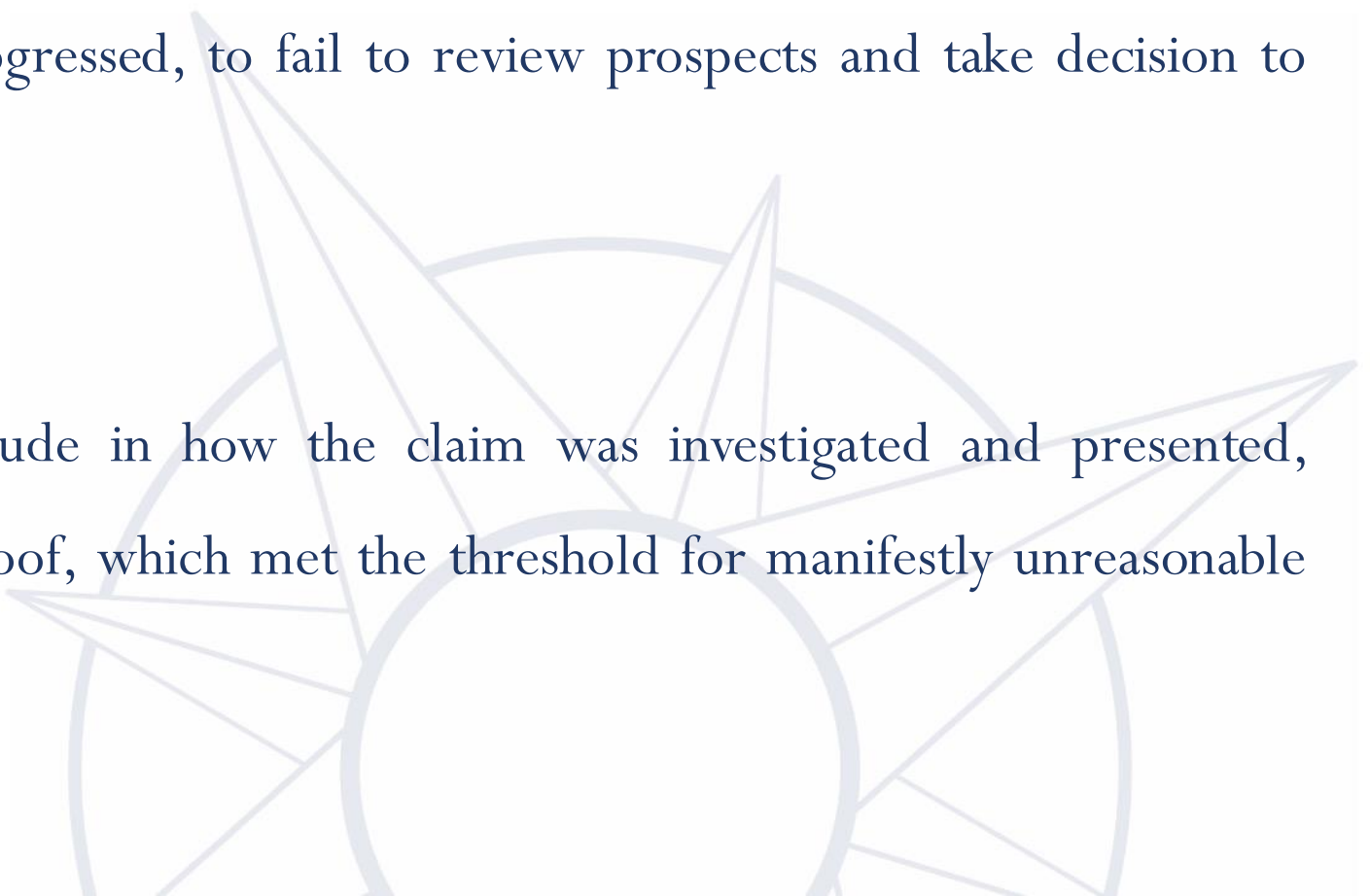
Henry Clarke v Marks & Spencers Plc, [2023] SC EDIN 42

MARKS &
SPENCER

- Refused Summary Decree motion at start of Proof
- Whether tape on floor was a foreseeable hazard critical to outcome
- Evidence insufficient to allow Court to make any finding as to nature of risk, if any, posed by the tape



Henry Clarke v Marks & Spencers Plc, [2023] SC EDIN 42

- Prospects of success so lacking that it was manifestly unreasonable to pursue the claim at all, or at least, as the claim progressed, to fail to review prospects and take decision to discontinue the claim; and
 - There was a degree of ineptitude in how the claim was investigated and presented, including the conduct of the proof, which met the threshold for manifestly unreasonable behaviour.
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Henry Clarke v Marks & Spencers Plc, [2023] SC EDIN 42

- Not to second guess professional judgements taken by legal adviser.
- Consider at time of the behaviour/judgements, not through 20/20 hindsight
- If reasonable explanation as to why claim progressed as it did, then less likely there will be sufficient basis for finding of manifestly unreasonable behaviour
- Finding that pursuer's evidence not sufficiently reliable to find in his favour not equate to manifestly unreasonable behaviour
- Summary Decree being refused was important factor
- Agents not require to be of view prospects greater than 50% - simply stateable case.



Henry Clarke v Marks & Spencers Plc, [2023] SC EDIN 42

- Wrong to equate ineptitude, which is at the level of innocent mistakes, with manifestly unreasonable behaviour.
- Where mistakes are innocent, even careless, resulting from the pressures which an agent is under during the conduct of a proof they should not be viewed as constituting behaviour which is manifestly unreasonable.
- The threshold required for manifestly unreasonable behaviour does not in ASSPIC compared to other courts simply because it is a specialist personal injury court.



Fraudulent misrepresentation

**FRAUD
ALERT**





Ali and Hussain v RSA, [2023] SC EDI 35

- Description of collision by 1st and 2nd pursuer not match with CCTV
- Images taken of vehicle not show any damage, in contrast to evidence of pursuers
- No entry in GP records despite evidence 1st pursuer spoke to surgery
- Post-accident description provided to agents by 2nd pursuer, contradicted evidence at Proof.
- GP records of 2nd pursuer inconsistent with him having suffered injuries he claimed to have suffered



Musialowska v Zurich Insurance Plc

[2023] SC EDIN 36

- Evidence was that damage to the pursuer's vehicle was to front offside and damage to the defender's vehicle was to the rear nearside.
- When recreated collision in evidence using toy cars, they both indicated a collision in which rear offside of defender's vehicle struck the pursuer's vehicle.
- Despite this they both maintained rear nearside had collided with their vehicle and was damaged
- Alleged photographs of damage to defender's vehicle had been tampered with
- Pursuer's absence records inconsistent with physio appts she said caused her to miss work and lose earnings



Sheriff Keir in both judgements

- Agreed with principles outlined in *Murray* and *Carty*
- What is fraudulent misrepresentation? Agree with what said in *Gilchrist* (Paras [23] to [25])
- High threshold. Pursuer or legal representative has acted intentionally to mislead the Court.



Ali at para [31] and Musialowska at para [22]

“...neither pursuer was credible or reliable in relation to the core issues of their claims....they were both wholly incredible witnesses. The significant issues with their evidence went far beyond the more common scenario where there are competing versions of events, and the court has preferred one version over the other.”





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Nelson v John Lewis [2023] SC EDIN 44



- GP records and referral letter which recorded onset of deafness and tinnitus as occurring prior to incident at work.
- No mention of being struck by ball
- Spoken to at Proof by Doctor who wrote them
- Pursuer denied deafness was spontaneous and Doctor must have wrongly recorded history.

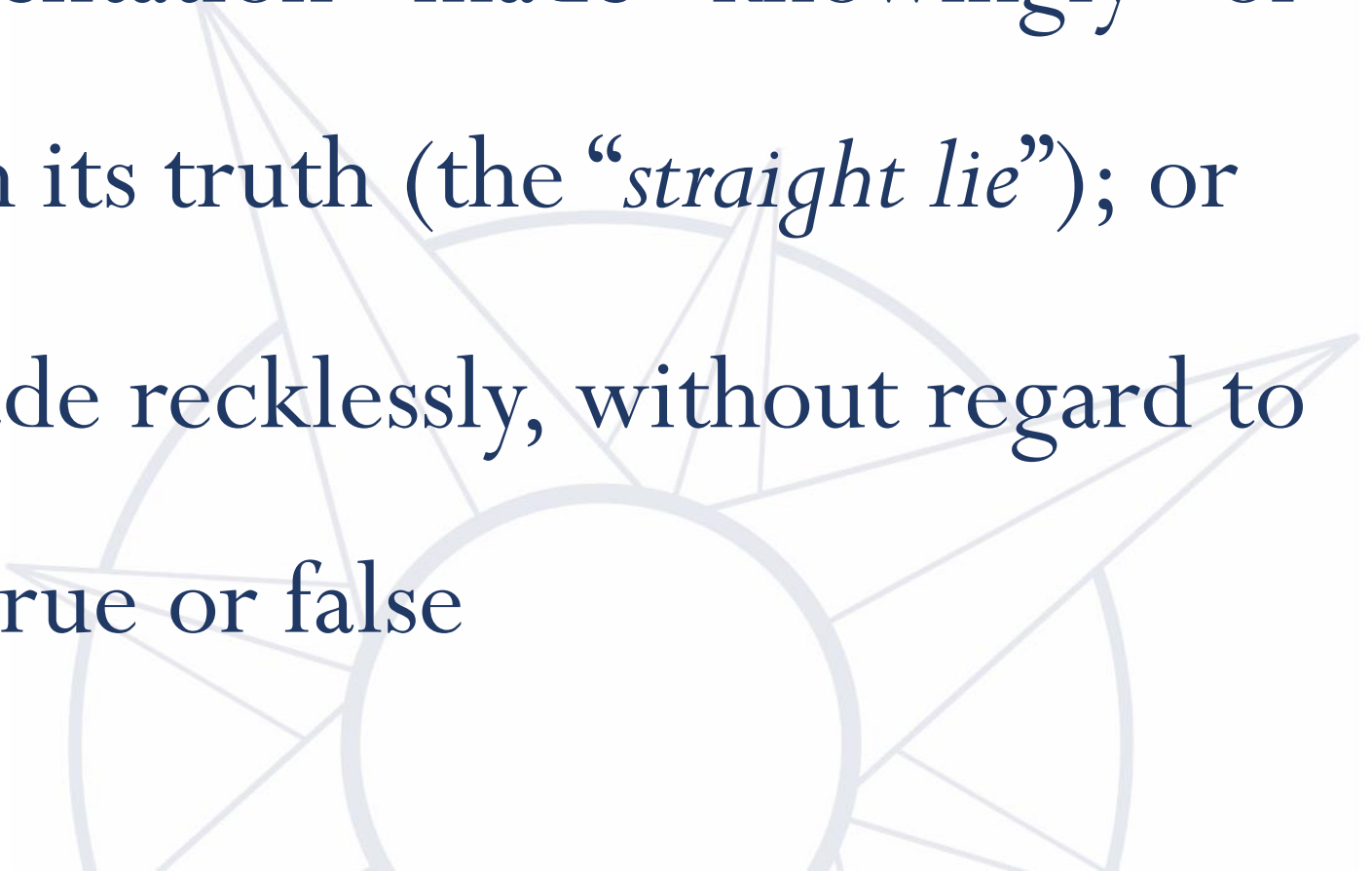


What defender argued

- Not need specific finding pursuer not credible nor of fraud
- Pursuer's claim that hearing issues caused when struck by ball obviously false and made knowingly and without regard to its truth.
- Obviously unreasonable for pursuer and legal representatives to have continued with case alleging hearing issues caused by incident at work in light of medical records.
- Also, some reliance on failure to have ENT expert deal in reports or in evidence with what recorded in the medical records



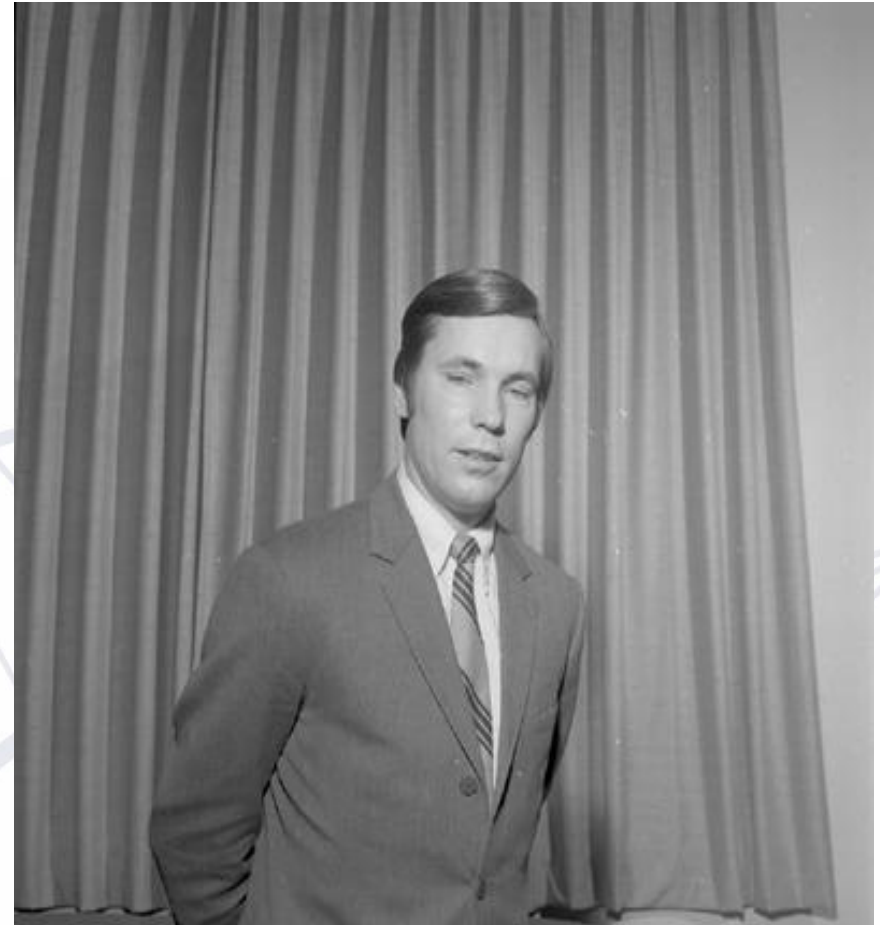
Nelson v John Lewis [2023] SC EDIN 44

- A false representation made knowingly or without belief in its truth (the “*straight lie*”); or
 - A statement made recklessly, without regard to whether it was true or false
- 



Nelson v John Lewis [2023] SC EDIN 44

“It seems to me to be self-evident that the court has thus to come to a clear view that this conduct has occurred as a matter of fact, and then make the requisite finding that the conduct has been established before the protection from an award of expenses established by the QOCS regime is lost.”





Nelson v John Lewis [2023] SC EDIN 44

- Pursuer always maintained deafness had come on after struck by ball. Pleadings, evidence and in reports to experts.
- Maintained position that he had not said to Doctor he had woken with spontaneous hearing loss.
- Absent any finding that deliberately misled the Court, ought not to be found to have acted with manifest unreasonableness simply for maintaining his position



Nelson v John Lewis [2023] SC EDIN 44

“I rejected the pursuer’s evidence on causation when I contrasted this with the other relevant evidence on the point in the case.... and I preferred one body of evidence over another and provided reasons for doing so. It is difficult to accept the proposition that the action ought to have been abandoned, just because there was a contradictory causal mechanism narrated within the GP records. Most cases which proceed to proof have some difficulty in the evidence which a pursuer may or may not overcome. That is why some cases do not settle. The pursuer was entitled to go to proof and to assert that the incident with the ball had occurred (in respect of which I found him to be both credible and reliable) and that this incident had been responsible for his deafness, and the fact that he failed to establish the latter point does not, in my view make his conduct manifestly unreasonable “



Manley v Mcleese [2024] SAC (civ) 16

- Formal finding that pursuer was not credible in respect of lane in which collision occurred.
- Not accept submission of pursuer's Counsel that finding in fact of fraud required to be made before s.8(a) exception applied
- Defender's Counsel not allege pursuer was lying, nor put to her in cross examination
- Sheriff found pursuer made fraudulent misrepresentation by lying about circumstances of the accident, and so conduct amounted also to manifestly unreasonable behaviour, and an abuse of process



Manley v Mcleese [2024] SAC (civ) 16

Approve propositions articulated in *Murray* and *Carty*

Sheriff required to make a finding in fact that fraudulent representation made

Affirmed what was said in *Gilchrist re.* “*acting intentionally to mislead the Court*” and in *Nelson re.* such a finding is a “*necessary ingredient*”





Manley v Mcleese [2024] SAC (civ) 16

- Sheriff criticised pursuer's behaviour after collision, including aggression, swearing and taking photographs, and that attempted to persuade defender to settle the costs in cash, but gave no reasons why that amounted to fraudulent representation.
- Ignored relevant evidence, particularly the independent physical damage to vehicles, which pursuer's expert witness opined was consistent with her account.
- Should have given separate consideration to s.8(b) and (c)



Practical Considerations

- Propositions in Murray/ Carty widely accepted. Can add to those with definition of fraud in *Gilchrist* and *Nelson*?
- Clear outline as to what fraudulent misrepresentation is, so easier to spot?
- “Manifestly unreasonable” behaviour a little like an elephant
- Firmer ground establishing “manifestly unreasonable” behaviour in failures in adhering to procedure than retrospective analysis of prospects of success after lost Proof

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