

SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH
IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2023] SC EDIN 18

EDI-PG101-22

JUDGMENT OF SHERIFF ROBERT D M FIFE

in the cause

ELIZABETH LOVE
on behalf of the estate of the late LETITIA LOVE

Pursuer

against

NATIONAL HEALTH SERVICE FIFE HEALTH BOARD

Defender

Edinburgh, 21 June 2023

Introduction

[1] The pursuer's mother died on 28 October 2018. The pursuer wished to pursue a claim for clinical negligence against the defender in relation to the care of her mother.

Factual circumstances and timeline

[2] Around the end of August 2021, the pursuer consulted Drummond Miller, Solicitors, about a potential claim. On 31 August 2021, Drummond Miller contacted the defender's agents (CLO) indicating they were treating timebar cautiously as 9 October 2021 and requesting a timebar extension.

[3] On 3 September 2021, CLO confirmed to Drummond Miller they had instructions to agree an extension of the triennium until 9 October 2022. On 22 March 2022, Drummond Miller confirmed they were no longer instructed for the pursuer.

[4] Following communication between CLO and the pursuer direct in October and November 2022, CLO confirmed they had instructions to further extend the triennium, but that proceedings had to be raised by 16 November 2022, otherwise they would consider the claim timebarred.

[5] On or about 12 or 13 November 2022, the pursuer instructed Mr Watson of GS Watson Law, Solicitors (“Mr Law”) to act on her behalf. On 15 November 2022, Mr Watson copied in CLO on a letter to the Sheriff Clerk, Edinburgh attaching an initial writ and requesting a warrant for service.

[6] On 16 November 2022, Mr Watson sent a letter to Edinburgh Sheriff Court with an amended initial writ requesting a warrant.

[7] On 23 November 2022, Mr Watson sent a further amended initial writ to Edinburgh Sheriff Court requesting a warrant.

[8] On 24 November 2022, Mr Watson sent a further amended initial writ to Edinburgh Sheriff Court requesting a warrant.

[9] On 6 December 2022, Mr Watson sent a copy of a warranted initial writ to CLO asking if they would accept service. Service of the initial writ was effected on 12 December 2022.

[10] On 15 December 2022, CLO asked Mr Watson if he wished to sist the cause. Mr Law advised no reports had been obtained in relation to liability or causation. The pursuer lodged no motion to sist the cause for investigation or for legal aid.

[11] On 12 January 2023, CLO sent an email to Mr Watson indicating they would take instructions on a no expenses basis if Mr Law obtained instructions from the pursuer to abandon the action. There was no response to that proposal.

[12] On 12 January 2023, defences were lodged.

[13] On 12 January 2023, the defender lodged a motion, number 7/1 of process, to grant decree of absolvitor in respect that:

1. The action is timebarred.
2. The action is lacking specification and relevancy.
3. The pursuer does not have title to sue; and
4. To award expenses of the process to the defender.

[14] The motion was opposed. A hearing on the opposed motion took place on 30 January 2023. After hearing parties, the sheriff continued consideration of the motion for three weeks until 20 February 2023, requiring the defender to submit a revised motion to seek summary decree in terms of OCR 17.2.

[15] On 30 January 2023, the defender lodged a revised motion, number 7/1 of process, seeking summary decree in terms of OCR 17.2.

[16] On 20 February 2023, after hearing parties, *ex proprio motu* the sheriff continued consideration of the motion until 13 March 2023 for the pursuer to secure funding.

[17] On 13 March 2023, prior to the calling of the continued opposed motion, Mr Watson withdrew from acting for the pursuer. After hearing from the pursuer personally and the defender, the sheriff (Sheriff Fife) continued consideration of the motion for summary decree, part 5 of the motion in respect of expenses to be continued to a later date, until 27 April 2023 to allow the pursuer to seek further legal representation and pending the outcome of a legal aid application.

[18] On 27 April 2023, the sheriff (Sheriff Fife) granted summary decree. The interlocutor is in the following terms:

Act: personally present

Alt: Russell, adv for the defender

The sheriff,

1. allows the interlocutor of 13 March 2023 to be amended and that by the deletion of the words "part 4" where they appear therein and substitution thereof with the words "part 5";

2. having resumed consideration of the defender's opposed motion for summary decree, number 7/1 of process, and having heard from the pursuer personally and counsel for the defender, grants same and in terms that:

(i) the pursuer having no title to sue;

(ii) the action being timebarred; and

(iii) there exists no other compelling reason why summary decree should not be granted.

assolzie the defender from the craves of the initial writ;

3. reserves all questions of expenses meantime.

Note:

This is an action for clinical negligence following the death of the late Letitia Love on 28 October 2018. A motion by the defender for summary decree called before the court on 27 April 2023, having been continued from 13 March 2023 to enable the

pursuer to seek further legal representation and pending the outcome of an application for legal aid.

The pursuer advised the court she had not been able to obtain further legal representation and that legal aid had been refused.

The alleged negligence took place on 21 October 2018. A timebar extension of 15 November 2022 was agreed with the pursuer (daughter of Ms Love) but no action was raised within the extension. The action was served on 12 December 2022. The action is timebarred.

The pursuer was the next of kin of Ms Love. Ms Love left no will. The pursuer required to be appointed as executrix-dative to pursue the action. No petition has ever been made for appointment of the pursuer as executrix dative. The pursuer has no title to sue.

The pursuer applied for legal aid. Legal aid was refused by letter intimated to the defenders on 17 March 2023. No application for review of the refusal was submitted within 15 days, by 1 April 2023.

Further, the pursuer has no supportive causation report, which is an essential requirement for any clinical negligence action.

Ms Love asked for further time to instruct another solicitor, but the pursuer has previously instructed two firms of solicitors, who have withdrawn from acting. I was not persuaded the pursuer should be allowed more time to instruct another solicitor.

The action should not be allowed to continue any longer. In terms of rule court 17.2, I concluded the pursuer's case has no real prospects of success.

In all the circumstances and, for the reasons above, I also concluded there exists no other compelling reason why summary decree should not be granted. Accordingly, I granted the motion for summary decree.

At the request of counsel for the defender, I reserved expenses in order to be dealt with at a later date.

[19] A hearing on expenses proceeded on 26 May 2023. The pursuer was present.

Mr Watson was present. Ms Russell, Advocate, was present for the defender.

Motion for defender

The motion for the defender was:

1. To disapply the Rules in relation to expenses in terms of Section 8 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (“the 2018 Act”) on the basis of the application of sub-section 4 where the pursuer and/or her previous legal representative behaves in a manner which is manifestly unreasonable in connection with the claim or proceedings, or otherwise, conducts the proceedings in a manner that the court considers amounts to an abuse of process.
2. To find the pursuer’s previous legal representative, G S Watson Law, liable to the defender in the expenses of the action from the date that the action was raised until his withdrawal from acting on behalf of the pursuer on 13th March 2023, failing which to find the pursuer liable in the expenses of the action from the date the action was raised until her previous legal representative’s withdrawal from acting on her behalf on 13 March 2023; and

3. To find the pursuer liable to the defender for the expenses of the action from the date of the withdrawal of the pursuer's legal representative on 13th March 2023 to date.

Submissions

[20] The defender and Mr Watson lodged written submissions, which were adopted together with brief supplementary submissions.

Submissions for defender

[21] It was recognised QOCS will be disapplied only in exceptional circumstances. There were exceptional circumstances:

- a. The pursuer knew she had an unsupportive expert report on causation.
- b. Drummond Miller withdrew from acting as her case had no reasonable prospects of success.
- c. The pursuer had difficulty in obtaining further legal representation.
- d. The pursuer's application for legal aid was refused as there was no evidential basis that supported a claim for clinical negligence.
- e. Mr Watson ought to have carried out reasonable enquiries to assess whether the pursuer's claim had a stateable basis and that she had title to sue before initiating proceedings, even when he was instructed by the pursuer very shortly before the extended timebar expired.
- f. Mr Watson continued with the court action despite being aware from the defences that the pursuer had no title to sue, and in the submissions lodged with the motion for summary decree.

Conduct of the pursuer and Mr Watson

[22] The conduct of the pursuer and Mr Watson was manifestly unreasonable in terms of section 8(4)(b). The whole litigation procedure was run by the pursuer and Mr Watson in a manner that was not appropriate and was obviously unreasonable.

[23] The conduct of Mr Watson was manifestly unreasonable and an abuse of process in terms of section 8(4)(c). The action had no chance of success at the time of raising the action. The action has culminated in a waste of court time and public funds.

[24] A finding of no expenses against the pursuer or Mr Watson would undermine principles that are fair, just and equitable and would set an unreasonable precedent, allowing litigation with no real chance of success to utilise valuable court and public resources.

Summary of submissions for defender

[25] The defender seeks expenses against G S Watson Law from the raising of the action until 13 March 2023, failing which an order against the pursuer herself.

[26] Thereafter, the defender seeks expenses against the pursuer from 13 March 2023 to date.

[27] The defender seeks sanction for junior counsel in relation to the defence of the action, the motion for summary decree, and the motion for expenses given the complexity, importance and the value of the claim, in terms of section 108(3)(i) and (ii) of the Court Reform (Scotland) Act 2014 ("the 2014 Act").

Submissions for Mr Law

[28] The defender's motion for disapplication of QOCS and for an award of expenses to be made against Mr Law should be refused.

[29] While the triennium had long since elapsed, the defender's agents 'effectively encouraged' the pursuer to raise proceedings by agreeing to an extension of the timebar to 15 November 2022.

[30] The pursuer "frantically" sought to instruct a solicitor to raise proceedings on her behalf.

[31] Mr Law accepted instructions from the pursuer "at the 11th hour" two or three days before 15 November 2022.

[32] Mr Law drafted an initial writ which he sent to the court with a copy to CLO on 15 November 2022.

[33] Due to pressure of other business and the deadline, Mr Law was not able to conduct a thorough examination of the voluminous papers before raising proceedings.

[34] In the circumstances, having regard to the imminent deadline and taking account of all the papers available to him, it was Mr Law's *bona fide* opinion the pursuer had a stateable case and "that she enjoyed reasonable prospects of success".

[35] Mr Law was able to obtain special urgency legal aid to cover initiating proceedings and the conduct the proceedings post warrant. SLAB did not refuse the legal aid application until 17 March 2023.

[36] Mr Law withdrew from acting on behalf of the pursuer on 13 March 2023.

[37] Mr Law submitted he had conducted the proceedings in an appropriate manner.

The defender had failed to satisfy the court that Mr Law had committed a serious breach of his duties to the court in terms of section 11 of the 2018 Act.

[38] If the court made an award of expenses against Mr Law personally, a dangerous precedent would be set. Solicitors, particularly from smaller practice units, would hesitate to accept instructions in similar circumstances.

Submissions for the pursuer

[39] The pursuer disputed she had behaved in a manifestly unreasonable manner. She wished to pursue the negligence claim in relation to the care of her mother and for the court to look at “her side of the story”.

[40] The pursuer was never led to believe she would be liable in expenses and that she had legal aid to cover any legal expenses.

Decision and reasons

The Law

[41] I refer to the decision in *Lennox v Iceland Foods Limited* 2022 SC Edin 22 at paras [4] to [6] and the comments in respect of the 2018 Act.

2018 Act

[42] In terms of sections 8(1) and 8(2) of the 2018 Act, the default position is that the court must not make an award of expenses against a person bringing proceedings for a claim for damages for personal injury where the person conducts the proceedings in an appropriate manner.

[43] Section 8(4) provides for three categories of conduct which are not conduct of an appropriate manner. The conduct covers both that of the person or the person’s legal representative.

[44] For the purpose of this motion the defender relies on sections 8(4)(b) and (c):

“...

(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.”

[45] In his submissions, Mr Law refers to the test in section 11 of the 2018 Act, but that provision is not yet in force and that submission falls to be disregarded.

Section 8(4)(b) manifestly unreasonable

[46] Each case must be considered on its own facts and circumstances. It is also necessary to take account of the context in which the proceedings were raised in this case.

[47] Mr Law submitted CLO “effectively encouraged” the pursuer to raise proceedings by agreeing to an extension of the timebar to 15 November 2022. That submission has no basis and is misconceived.

[48] In the present case, proceedings were raised in December 2022 and summary decree was granted in favour of the defender on 27 April 2023. The first attempt at a motion for summary decree by the defender was by motion lodged on 12 January 2023, some 5 weeks after the initial writ was served on the defender.

[49] The only formal procedure has been as follows: the hearings on 30 January 2023, when the motion for summary decree was not in proper form and the motion continued for 3 weeks for the defender to lodge a revised motion; 20 February 2023, 13 March 2023 and 27 April 2023, when summary decree was granted; and the hearing on expenses on 26 May 2023.

[50] Mr Law accepted instructions to act for the pursuer some two to three days before the extended timebar expired on 15 November 2022. He secured special urgency legal aid and raised proceedings against the defender, albeit out of time. Service was not effected until 12 December 2022 nearly 3 weeks after the extended timebar had expired.

[51] Having accepted instructions to act for the pursuer, was it manifestly unreasonable for Mr Law to raise proceedings immediately and effect service as soon as possible?

[52] According to his submissions, in Mr Law's *bona fide* opinion taking account of all the papers available to him, the pursuer had a stateable case and that "she enjoyed reasonable prospects of success".

[53] 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.

[54] In considering section 8(4)(b) reference is made to not behaving in an appropriate manner in connection with the claim or proceedings.

[55] 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.

[56] As for the proceedings, Mr Law was under pressure to raise proceedings as a matter of urgency given the extended timebar expired on 15 November 2022. 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. 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.

Section 8(4)(c) abuse of process

[57] I refer again to the decision in *Lennox* at para [63] in respect of abuse of process referring to MacPhail Sheriff Court Practice (4th edition) at para 2.23:

“...It is an abuse of process for a pursuer unreasonably to initiate or continue an action when it has no or substantially no chance of success...”

It is acknowledged this is a high test.

[58] As I have decided it was not manifestly unreasonable for Mr Law to raise proceedings in all the circumstances, it is then necessary to decide if Mr Law conducted the proceedings in a manner that the court considers amounts to an abuse of process.

[59] Mr Law failed to lodge a motion to sist the cause for investigation. There is no obvious explanation why he chose not to do so in spite of the suggestion from CLO. As Mr Law was acting under special urgency legal aid, it is reasonable to infer that Mr Law would not wish to undertake any further work in the proceedings pending the outcome of the legal aid application.

[60] The only procedure was the motion for summary decree, which was unusual at such an early stage in the proceedings. There was an outstanding legal aid application. It was reasonable for Mr Law to oppose the motion. The motion for summary decree was subsequently granted. Mr Law had no opportunity to continue the action when there was no chance of success. The test for abuse of process has not been met. Accordingly, it could not be said the conduct of the proceedings by Mr Law amounted to an abuse of process.

The pursuer

[61] While the pursuer wished to raise court proceedings for clinical negligence against the defender, she relied on advice from solicitors. She did not raise proceedings as a party litigant.

[62] The pursuer has been determined and robust in her views as to the care her mother received. The pursuer has been critical of the defender and CLO.

[63] An application for legal aid was submitted on her behalf. Proceedings were raised by Mr Law on her instructions. The pursuer could not afford to raise or conduct proceedings without the benefit of legal aid. Legal aid was eventually refused in March 2023. The procedure in the proceedings was effectively restricted to the motion for summary decree.

[64] In all the circumstances, and in the exercise of my discretion, I have concluded the pursuer did not behave in a manner that was manifestly unreasonable or conducted the proceedings which amounts to an abuse of process.

Summary of Decision

[65] The circumstances of this case are unusual, but not exceptional.

[66] If there had been further substantive procedure and/or if the pursuer and Mr Law had persisted on continuing with the action over a period time when it had no or substantially no chance of success, the circumstances might well have been exceptional.

[67] The motions in respect of section 8(4)(b) and (c) are refused.

Sanction for counsel

[68] The test for sanction of counsel in terms of section 108(3)(a)(i) and (ii) of the 2014 Act has been satisfied. It is reasonable to sanction the proceedings as suitable for the employment of junior counsel.

[69] In the exercise of my discretion, I find the expenses occasioned by the defender's opposed motion, number 7/1 of process, including the hearing on 26 May 2023, to be on the basis of no expenses due to or by any party.