SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2018] SC EDIN 56

PN280/17

JUDGMENT OF SHERIFF KENNETH J MCGOWAN

in the cause

MICHAEL BARRIE COCKER

Pursuer

against

(FIRST) DUMFRIES AND GALLOWAY HEALTH BOARD

and

(SECOND) MR RUPERT DAVID FERDINAND

Defenders

Pursuer: Laing; Slater & Gordon
First Defender: Campbell QC; NHS Scotland CLO
Second Defender: Combe; Clyde & Co

Introduction

[1] This is a clinical negligence claim. It came before me on (a) the first defender's opposed motion number 7/11 of process, the substance of which was to (i) discharge the diet of proof and fix a new diet, with consequent alterations to the timetable and (ii) to remit the case to the Court of Session in terms of section 92(2) of the Courts Reform (Scotland) Act 2014 ("the 2014 Act") to proceed under Chapter 42A of the Court of Session Rules ("CSR"); and (b) the pursuer's opposed motion number 7/12 of process to withdraw the cause from

Chapter 36 of the Ordinary Cause Rules ("OCR") and to allow the action to proceed under Chapter 36A thereof.

[2] The first defender's motion was opposed only insofar as remit to the Court of Session was concerned; and parties were agreed that whatever else happened, the case should proceed under either Chapter 42A CSR or Chapter 36A OCR.

Submissions for first defender

[3] The first defender's position was summarised in the note of argument appended to the motion, the terms of which were adopted.

[4] There was no direct authority on section 92(2) of the 2014 Act but assistance could be derived from the case of *B* v *NHS Ayrshire & Arran* 2016 SLT 977, paragraph 5 and from *Mullen* v *Anderson* 1993 SLT 835.

[5] The claim was for £1.5m and a number of parties were accused of negligence.

Importance

[6] It was clear that the case was of importance to the pursuer. He asserted ongoing and significant problems attributable to the alleged negligence of the first defender's employees. The case was also important to the first defender. Five members of staff were blamed. Their professional standing had been put in issue and accordingly the case was important to them in that respect and to the first defender on their behalf. In a similar way the case was important to the second defender. Furthermore, the claim involved a large sum and the first defender was rightly concerned about the potential impact of such a claim on public funds.

Complexity

[7] The pursuer's case was summarised in statement 5 of the initial writ. Liability was complex because blame was levelled at a number of different people across a number of medical specialties. Thus, there would require to be evidence about what the duty of each of these persons was in the relevant circumstances and whether those duties had been breached. The interactions between these strands of the case added an additional layer of complexity.

[8] The question of liability was rendered more complex by the possible issue of apportionment as between the first defender and the second defender. That might not be a straightforward exercise. It was accepted that given the time bar plea, which was understood to remain live as far as the second defender was concerned, that issue might be resolved before proof, though exactly how it fell to be resolved remained to be seen.

[9] Causation was likely to be extremely complex. The pursuer himself had a long history of physiological problems, particularly osteoarthritis. That was the initial differential diagnosis.

[10] The first defender's position is that the difficulties which the pursuer now has are ones which would have accrued in any event: see answers 6, 7 and 8.

[11] The questions arising and to be answered about causation took this case well beyond the norm.

[12] That flowed through to the issue of quantification of damages where a large range of outcomes was possible, depending on what was proved or not in relation to issues of liability and causation.

[13] It was accepted that in principle separating the questions of liability and causation on the one hand from those of quantum on the other might be possible and might assist in

simplifying matters but of course that technique could be used equally in the Court of Session.

Appropriateness

[14] Three points fell to be made. First, the cumulative effect of the matters relied on as demonstrating importance and complexity made remit to the Court of Session appropriate.

[15] Second, it was likely that a number of case management decisions would require to be made by the court. It was accepted that the tools for such as provided for in Chapter 36A OCR on the one hand and Chapter 42A CSR on the other were in more or less identical terms, but it was suggested that the tools available to the Court of Session were sharper.

[16] In particular, there was the ready availability of court time to deal with case management issues. Although arrangements had been made to hear these two motions quickly, that was not always the case in this court and those instructing Mr Campbell had experience of having to wait six or seven weeks, whereas motions in the Court of Session would ordinarily be dealt with within days. Similarly, where case management was required by order of the court, the Court of Session could programme time for that. That was relevant because both under Chapter 36A and Chapter 42A it was envisaged that there would be a mix of direct judicial management and case-flow management.

[17] In the present case there were a number of difficult issues which would require to be explored which in turn would require appropriate management of the preparatory stages as the case moved towards proof.

[18] The speed with which the case might get to proof was not a matter which bore on the competence of the motion to remit. It was accepted that a potential delay caused by a remit

would be a relevant factor – but it would only be relevant where there was a real and substantial difference to the progress of the case.

[19] In the present case it was suggested that a new timetable should be issued and the case should proceed under Chapter 36A and that a proof be fixed no earlier than February 2019, although the reality was that the proof might well be later. For example, the most recent information suggested that a diet of proof in this court could not be accommodated until April next year.

[20] The Keeper of the Rolls had been approached and had indicated that the earliest that a two- to three-week proof might be accommodated in the Court of Session would be February 2020.

[21] Accordingly, the prospective delay was ten months which was in the circumstances of the case not material.

Submissions for the pursuer

[22] The first defender's motion was opposed on the grounds that the remit was not appropriate. It was accepted that the case was important to all parties and that it was complex but it was submitted that neither of these factors was sufficient in degree to justify a remit.

Importance

[23] The pursuer was elderly. He was soon to be 74. He suffered significant ongoing difficulties which he attributed to his treatment or lack thereof. It was accepted that questions of causation were in dispute.

[24] The pursuer had ongoing care needs and to fund that properly required compensation. The question of possible delay was relevant – the pursuer wishes to expedite the process towards proof. He presently has a carer for one hour in the morning and for 30 minutes in the evening and other than that was reliant on his wife who is of a similar age and will undergo knee replacement surgery shortly. His current accommodation is unsuitable comprising a small detached farmhouse of which the bedroom and wet room which had been installed were too small. He was not in a position where he could be left unsupervised as he required assistance to mobilise safely, for example to use the toilet.

[25] The pursuer's position could be contrasted with that of the clinicians. The case against them was of an alleged delay in diagnosis and proceeded on the basis that each of them had had the opportunity to properly diagnose the treatment required and that this all happened between November 2013 and May 2014. The pursuer finally had a decompressive laminectomy in April 2014 and his argument was that he would have had a better result from that treatment had he had it earlier. It was accepted that the issue of professional standing was important but that applied in all professional negligence cases whether or not they were of a significant value.

Complexity

[26] Whichever judge heard this case would require to consider the evidence concerning whether each or any of the clinicians had been negligent and what the outcome would have been if that was established. There will be a number of medical witnesses and the question of quantum flowed naturally from decisions about liability and causation. This was typical in personal injury cases and the same questions required to be asked and answered whether the case proceeded in the Court of Session or the Sheriff Court.

[27] The case of *B* v *NHS Ayrshire & Arran* could be distinguished: see paragraphs 9-11.

[28] The present case raised no novel matters of law. Ultimately on behalf of the first defender very little had been said of why it was appropriate to remit this action. The cost of an action here or in the Court of Session would tend to be similar or perhaps lower.

[29] The factors identified by Lord Penrose in *Mullen* at 848L-849C could usefully be considered.

[30] In this court the judicial and other officers were specialists. There was no difference in the form of procedure.

[31] There was a suggestion that the "tools were sharper" in the Court of Session but a proof diet in this case would be fixed fairly quickly and this motion had been brought before the court quickly.

[32] This court regularly heard cases involving considerations of negligence, causation and quantum.

[33] The question of location of the court was effectively unchanged.

[34] Persons of appropriate qualifications and experience could and did appear both here and in the Court of Session.

[35] There was no material difference in the issue of expense.

[36] The efficiency of programming favoured this court. The proof diet available in the Court of Session in February 2020 would be if a proof was fixed today but it is likely that there would be further delay before that would happen, leading to a later proof diet.

[37] Apart from that, further procedure required to be determined. A proof split between liability and causation on the one hand and quantum on the other could be undertaken both in the Court of Session and here.

[38] In short, there was no obvious advantage in remitting the case to the Court of Session and accordingly no remit was required from this court which would provide an earlier proof diet.

Submissions for second defender

[39] The second defender's position was broadly neutral with a slight preference for the case remaining in this court and proceeding under chapter 36A.

Grounds of decision

B* v *NHS Ayrshire & Arran

[40] Although this case concerned section 92 of the 2014 Act, the circumstances of it fell under subsection 92(4) which deals with cases where there is no concurrent jurisdiction (because the claim is valued at less than £100,000) and where the power of the sheriff is to *request* a remit on the grounds of "importance or difficulty". It is then a matter for the Court of Session to decide whether it is appropriate to accept the remit. It is clear that the exercise being carried out by the Court of Session at that stage is a different one to that which I am being asked to carry out in the present case and this is reflected in the basis for the court's decision in that case summarised at paragraphs 5, 6 and 13 of the judgement. Accordingly, I find it of little assistance.

Mullen* v *Anderson

[41] This decision is of more assistance. The question of remit was at that stage regulated by section 37(1)(b) of the Sheriff Court (Scotland) Act 1971 ("the 1971 Act") which provided

that a sheriff "may … if he is of the opinion that the importance or difficulty of the cause makes it appropriate to do so, remit the cause to the Court of Session".

[42] (Section 92(2) of the 2014 Act provides:

> "On the application of any of the parties to the proceedings, the sheriff may, at any stage, remit the proceedings to the Court of Session if the sheriff considers that the importance or difficulty of the proceedings makes it appropriate to do so."

So the substance of the test to be applied has not changed.)

[43] While there was not unanimity among the judges who heard that case as to whether the sheriff's task, in applying section 37(1)(b), encompassed a one or two stage process (see for example 838 J-J and 845 E-F) it appears to have been common ground among all the judges that the making of such a decision encompassed an evaluation of all relevant factors, including what might be called practical issues about the operation of the court.

[44] I was specifically referred to and found helpful the following:

> "In forming an opinion whether it is appropriate to remit a cause to the Court of Session rather than to dispose of it in the sheriff court, whatever other limiting factors there might be, one must have in mind at least certain of the characteristics of the two courts, to provide some context for the decision. In my opinion there is nothing in the terms of this provision which would assist one to define exclusively those characteristics of the two courts which alone were relevant to the choice. A court, in general terms, is defined not only by the characteristics of its judicial and other officers, but also, for example, by its forms of procedure, the classes of work it customarily deals with, its location relative to the residence or place of business of the parties appearing before it, the qualifications and experience of those who are entitled to practise before it, the expense incurred in using the court, and the efficiency of its programming for the disposal of work. Other factors might be identified and added to the list. The question whether it is appropriate for a case of defined importance or difficulty to be remitted from the sheriff courts to the Court of Session appears to me necessarily to require consideration of those factors relevant to the processing and disposal of the particular cause in the respective fora which a sheriff acting reasonably, and being fully conversant with the characteristics of the two courts, would have in mind." - Lord Penrose, 848L – 849C.

[45] Against that background, I now consider the matter under three broad headings.

Importance

[46] The case is evidently important to the parties for the reasons stated. The sums potentially involved (both damages and legal expenses) are substantial. A large award of damages in favour of the pursuer may change his life substantially for the better. That result would be material to the first defender, but not, I suspect, ruinous. The first defender's employees who are blamed would be (directly) financially unaffected, but their professional reputations are at stake. All of these matters point towards importance.

[47] Furthermore, it appears to me that the issue of (financial) importance to the pursuer has a bearing on the issue of delay about which I say more below. In short, it is very much in his interests that his claim be vindicated (assuming it is successful) as soon as possible. Likewise, delay for those who are blamed simply means that they have the matter hanging over them for longer.

[48] The case raised no issues of public policy or novel questions of law which require resolution.

[49] So in my view, while the case is important to the parties, that could be a factor pointing away from a remit, if that might give rise to delay in resolution.

Difficulty

[50] The case is undoubtedly far from straightforward but professional negligence cases rarely are. There may be additional complexity here because of the number and different categories of medical professionals who are blamed which means that issues about the duty of care will be particular to each element of the case. But whether there is one or five alleged breaches of duty does not in my opinion in itself make the case so extraordinarily complex as to require remit.

[51] I acknowledge also the questions of causation may not be straightforward as may be the questions of quantum. But even in relatively straightforward injury cases, where for example there are pre-existing conditions and loss of future employment or pension responsibilities these types of questions arise in many cases.

Other relevant matters

[52] A comparison exercise is required. Approaching the matter that way, the following can be said.

[53] It must be acknowledged that Outer House judges are appointed to and are sitting in a court superior to this one in the hierarchy, albeit still at first instance level. On the other hand, this court was specifically set up to deal with personal injuries (including clinical negligence) cases and the judiciary here have been selected for their knowledge and experience of these cases and the matters arising in them.

[54] Forms of procedure (Chapter 36A and Chapter 42A); classes of work routinely dealt with; location; qualifications and experience of those entitled to practice in both courts (counsel are routinely instructed in clinical negligence cases here and are instructed in this case); and expense appear to me to be neutral: in other words the Court of Session does not evidently offer advantages in these areas over this court.

[55] On behalf of the first defender it was suggested that it was the judicial and administrative arrangements around case management which could be a deciding factor.

[56] Before turning to the practicalities, it is clear that it was envisaged that Chapter 36A cases would require greater case management than those proceeding under Chapter 36. In short, particular provision was made in the rules for that to happen in Chapter 36A cases, whereas in Chapter 36 cases, the timetable which provides the structure for case-flow and

judicial involvement is limited (unless a case goes "off the rails" procedurally) until the hearing itself.

[57] But the reality is this. A substantial number of clinical negligence cases proceed in this court. Very often – and this is a reflection of the skill and professionalism of those routinely dealing with and instructed in these cases – there is a large degree of co-operation and hence common ground as to how the cases should be dealt with. For example, very often parties, in their written proposals for further procedure, are very much in agreement. Accordingly, whilst in theory a significant amount of judicial case management is required in Chapter 36A cases, the reality is that that is the exception rather than the rule.

[58] Turning to the availability of lengthy hearings, it will be apparent from the interlocutor issued with this Note that there is no material difficulty with these. The court programme is flexible enough here to accommodate longer hearings. It is also clear that even lengthy hearings in this court can be fixed significantly earlier than in the Court of Session.

[59] It was (diplomatically) suggested, on behalf of the first defender, that the Court of Session "tools were sharper" in that there could be delays in having opposed motions heard in cases and having cases allocated for by order hearings where judicial case management was required.

[60] I acknowledge that where routine opposed motions are lodged (in other words, where these are not time sensitive), there can be delays in having these heard, because of the limited time available in the weekly procedural court. But if a matter which is pressingly urgent (and this applies to all civil business in this court) is drawn to the attention of the administrative staff, then with appropriate communication, these can be accommodated and hearings can be arranged quickly.

[61] For example, because of the relatively high settlement rate in personal injuries cases generally, there is, more often than not, a personal injuries sheriff available on days when there is no procedural court who is not engaged on proofs business who can be available to deal with urgent motions if required.

[62] In any event, it is not entirely clear to me why, given what I have said about the level of cooperation and communication between parties' representatives in clinical negligence cases, it is thought to be likely that this case would necessarily give rise to an unusually high number of issues, requiring urgent case management.

[63] By order hearings are relatively rare. Procedural Hearings under Chapter 36A are routinely fixed and usually proceed in the normal way without major difficulty.

[64] In short, while one can never say that no difficulties will arise, it does seem to me that the supposed difficulties relied on are more apparent than real; and where such might arise, with cooperation among representatives, courts administration and the judiciary, these can be addressed without serious difficulty or delay.

Conclusion

[65] In summary the position is this:

a. The case is important and difficult.

b. It is not so important or so difficult that those factors alone merit a remit to the Court of Session.

c. This court has concurrent jurisdiction; the case was brought here; this is a specialist court.

d. There are no issues about expense, location and so on which would justify a remit.

e. As this case proceeds, access to the court or its judiciary is not likely to be limited in the way suggested.

f. The case is likely to reach proof materially earlier if the motion to remit is refused than if it is granted. That is in the interests both of the pursuer and those who are criticised.

[66] Looking at the circumstances as a whole, I have concluded that the first defender's motion should be refused. The pursuer's motion to remit the action to Chapter 36A OCR will be granted. An interlocutor reflecting the foregoing will be issued.