SHERIFF APPEAL COURT

[2019] SAC (Civ) 31
GLW-A579-18

Sheriff Principal D L Murray
Appeal Sheriff N C Stewart
Appeal Sheriff N L Ross

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL D L MURRAY

in an appeal in the cause

JOHN PATON

Pursuer and Respondent

against

THE SCOTTISH MINISTERS

Defenders and Appellants

Defenders and Appellants: McKinlay, advocate; Scottish Government Legal Directorate
Pursuer and Respondent: Duling, advocate; JC Hughes Solicitors

21 August 2019

Background

[1] The respondent was convicted at Glasgow Sheriff Court on 21 January 2015. He was sentenced to a total of nine months' imprisonment backdated to 29 December 2014. This resulted in an earliest release date of 14 May 2015. The respondent thereafter applied for release on Home Detention Curfew Licence ("HDCL") on 30 January 2015 and his application was granted on 16 March 2015. The respondent was released on HDCL on

24 March 2015 subject to eight conditions which are set out in the licence. Those included a condition that from 25 March 2015 he must be present at the designated address each day between the hours of 19:30 and 07:30, and that he must not commit any offence. The seventh condition provided that the respondent must be in possession at all times of the appellants' handbook entitled "Home Detention Curfew – a Prisoner's Guide on Release".

[2] On 28 or 29 April 2015 G4S who administer the monitoring equipment for those on HDCL issued a home detention breach report which included the following information:

> "A 'Left home during curfew' alert was recorded at the G4s Electronic Monitoring Centre on the 28th April 2015 at 21:22hrs. G4S received a telephone call from PC Martin McKussock at 21:27hrs advising that he was with Mr Paton as he had been arrested from his restriction address on an arrest warrant. Mr Paton was taken to Cathcart Police Station to appear at Glasgow Sheriff Court on the 29th April 2015."

The offence for which the respondent was arrested by the police on 28 April 2015 had been committed on 3 September 2014; prior to the imposition of the HDCL conditions on which he was released. On 29 April 2015 the governor of HMP Barlinnie revoked the respondent's HDCL and required him to return to custody. The respondent was returned to custody on 29 April 2015. On 11 May 2015 the respondent made representations challenging his recall, on the grounds that he had not committed any new offence while on HDCL, and that he should not have been recalled. These were referred to the Parole Board. He was liberated on 14 May 2015. The Parole Board on 1 December 2015 upheld the respondent's appeal and directed the appellants to cancel the revocation of the respondent's HDCL. This decision of the Parole Board had become academic given the respondent's release. The respondent raised the present action, claiming damages for the wrongful revocation of the HDCL, which had caused him to spend 14 days in custody.

[3] The matter called for a debate before the sheriff on the defender's preliminary pleas. As the sheriff records in his Note, at the debate the primary issue for discussion was

whether in exercising the functions under Section 17A of the Prisoners and Criminal Proceedings (Scotland) Act 1993 ("the 1993 Act") for the recall of prisoners, the appellants were subject to a common-law duty of care, breach of which could support a claim by a prisoner for damages. The appellants challenge the decision of the sheriff to allow a proof before answer. In addition the appellants submit that the sheriff erred in concluding that there was sufficient specification to support a case that had the appropriate checks been carried out the respondent would not have been recalled. The appellants also challenge the sheriff's conclusion that no further specification of loss was required. They submit the sheriff was in error in accepting that specification of the number of days for which it was said the respondent was wrongly imprisoned was sufficient.

Submissions for the appellants

[4] The appellants invited us to allow the appeal to sustain the defenders and appellants' first plea-in-law, repel the first, third and eighth pleas-in-law for the respondent and dismiss the action with expenses with sanction for employment of junior counsel.

[5] As a short-term prisoner the respondent was entitled to be released unconditionally having served one half of his sentence on 14 May 2015 by virtue of Section 1 of the 1993 Act.

[6] Section 3AA of the 1993 Act makes provision for certain prisoners to serve part of their sentence at home. This is at the discretion of the Scottish Ministers and is for that reason to be distinguished from a short term prisoner's entitlement to be released at the half way point in terms of section 1(1) of the 1993 Act. Section 17A of the 1993 Act provides:

> "Recall of Prisoners released under Section 3AA
>
> (1) If it appears to the Scottish Ministers as regards a prisoner released on licence under section 3AA of this Act that–

> (a) he has failed to comply with any condition included in his licence; or
> (b) his whereabouts can no longer be monitored remotely at the place for the time being specified in the curfew condition included in the licence,
>
> they may revoke the licence and recall the person to prison under this section.
>
> (2) A person whose licence is revoked under subsection (1) above–
>
> (a) must, on his return to prison, be informed of the reasons for the revocation and of his right under paragraph (b) below; and
> (b) may make representations in writing with respect to the revocation to the Scottish Ministers.
>
> (3) The Scottish Ministers are to refer to the Parole Board the case of any person who makes such representations.
>
> (4) After considering the case the Parole Board may direct, or decline to direct, the Scottish Ministers to cancel the revocation.
>
> (5) Where the revocation of a person's licence is cancelled by virtue of subsection (4) above, the person is to be treated for the purposes of section 3AA of this Act as if he had not been recalled to prison under this section.
>
> (6) On the revocation under this section of a person's licence, he shall be liable to be detained in pursuance of his sentence and, if at large, shall be deemed to be unlawfully at large."

[7] The basis of the respondent's claim was that the appellants owed a duty of care in deciding to order the recall of the respondent in terms of Section 17A of the 1993 Act. This duty of care was breached, which resulted in loss to the respondent. It had been conceded by the respondent that there was no breach of statutory duty on the part of the appellants in the exercise of their discretion under Section 17A of the 1993 Act. It was not therefore a matter of dispute that the sheriff was correct to repel the respondent's third plea in law. The appellants accepted that it is possible that a common-law duty of care may arise in the performance of statutory functions but noted that questions of justiciability can arise when the statute involves an exercise of discretion. They criticised the sheriff for failing to having regard to the case of *X (Minors)* v *Bedfordshire County Council* [1995] 2 AC 633 and in

particular the speech of Lord Browne-Wilkinson, pages 735 – 739, to which he had been referred. The sheriff erred in his approach by taking as a starting point the tripartite test for imposing a duty of care set out in *Caparo Industries plc* v *Dickman* 1990 2 AC 605, namely (i) that harm was reasonably foreseeable; (ii) that there was a relationship of proximity; and (iii) that it is fair, just and reasonable to impose a duty of care. Rather he should have first considered whether or not in the circumstances of this case a common law duty of care arose in the context of the statutory function to recall a prisoner released under HDCL.

[8] Had the sheriff had proper regard to the statutory framework he would not have fallen into error. He had not properly had regard to whether a common-law duty of care could arise in the context of the statutory function to recall a prisoner released under HDCL. He ought to have concluded that no such common-law duty of care could arise in these circumstances. The appellants were exercising a discretion provided for by Section 17A of the 1993 Act in recalling the respondent to prison. In the ordinary case, a breach of statutory duty does not by itself give rise to any private law right. To have such a cause of action, the respondent would require to show that as a matter of construction of the 1993 Act, the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. The proper question for the sheriff and this court was whether a duty of care arose when the appellants were exercising the statutory function imposed by section 17A of the 1993 Act, where it was accepted that there was no breach of statutory duty. The respondent had failed to plead a relevant case as there was no specification of the particular breach which was said to have occurred.

[9] A distinction fell to be drawn between cases in which it is alleged that the authority owes a duty of care in the exercise of its statutory discretion, and those cases in which the

duty of care is alleged to arise in the manner in which the statutory duty has been implemented. This action was an instance of the former. These circumstances are not actionable at common-law, and the sheriff ought to have concluded that no claim based on a breach of duty of care can arise in these circumstances. As Lord Browne-Wilkinson stated in *X (Minors)* at page 736 A – B:

> "Most statutes which impose a statutory duty on local authorities confer on the authority a discretion as to the extent to which, and the methods by which, such statutory duty is performed. It is clear both in principle and from the decided cases that the local authority cannot be liable in damages for doing that which Parliament has authorised. Therefore if the decisions complained of fall within the ambit of such statutory discretion they cannot be actionable in common law."

The respondent's case was properly analysed as being an allegation of careless performance of a statutory duty which was not justiciable. In *X (Minors)* Lord Browne-Wilkinson drew a broad distinction between cases where the authority is exercising its discretion where a claim is not justiciable and cases in which the duty of care is alleged to arise in the manner in which this statutory duty has been implemented in practice. The decision whether or not to recall a prisoner falls into the first category and the manner in which the prisoner was re-arrested or transported back to prison falls into the second.

[10] Parliament having conferred a statutory duty on a public authority in the instant case, the appellants acted entirely within the ambit of their discretion. It was a matter for the governor to determine whether the conditions of the HDCL had been breached. Section 17A of the 1993 Act authorises the appellants to decide whether "it appears" to them that the conditions have been breached, and if so they may revoke the HDCL. The statute gives no further specification as to the nature and extent of the information on which such a decision is to be taken. Accordingly a claim that the appellants did not have sufficient information and ought to have made further enquiries is not justiciable.

[11] Patently such decisions required to be taken quickly and it was for the appellants through the governor to exercise their discretion in taking such decisions. Protection against a wrong decision was afforded by the making of representations which would be considered by the Parole Board. It was also possible for a complaint to be made through the Scottish Prison Service ("SPS") complaints procedure and then through the Scottish Public Services Ombudsman, although such a complaint would be restricted to the process of taking the decision, and not about the decision itself.

[12] The sheriff had erred in finding that a relevant case had been pled, to the effect that if appropriate checks had been carried out the respondent would not have been recalled. During the debate counsel for the respondent made suggestions about the actions which could have been taken by the appellants, but there were no averments on record, as there required to be, of what these checks should have been.

[13] The respondent had failed to give adequate specification of his loss. It was not sufficient to simply refer to the number of days for which it was said the respondent had been wrongfully detained.

Submissions for the respondent

[14] The respondent relied on the decision and reasoning of the sheriff and invited us to adhere to his interlocutor and refuse the appeal. Section 3AA of the 1993 Act allows the appellants, through SPS, at their discretion, to release prisoners on HDCL prior to the expiry of their sentence. Section 17A of the 1993 Act, provides that where it appears to Scottish Ministers that a prisoner released on licence under Section 3AA has failed to comply with any condition included in his licence, they may revoke the licence and recall the person to prison under this section. This places an onus on SPS, who being delegated to undertake the

function, are required to take reasonable care to be satisfied that the condition of the licence has in fact been breached. SPS in the instant case were careless in not recognising that the warrant on which the respondent was arrested was issued and related to a historic offence and did not involve breach of the HCDL requirement as it predated the release. That is a criticism of how they exercised their statutory duty. It was extraordinary and a culpable omission that this was not clarified in the phone call from PC McKussock.

[15] The situation thereby created of a mistaken recall was one which was not straightforward to cure. Under reference to *McCreaner* v *Ministry of Justice* [2015] 1 WLR 354 paragraph 51 there would have been minimal resource requirements for SPS to have asked the relevant questions. In that regard the sheriff was correct to have regard to the tripartite test as set out in *Caparo.*

[16] The sheriff identified the decision in *McCreaner* was given after evidence had been led. He correctly identified that his task was to decide whether, taking the respondent's case at its highest, it could be said that the appellants through SPS had assumed a responsibility to obtain sufficient information before taking the decision to revoke the respondent's HDCL. Evidence was required to establish whether they were in a proximate relationship with the respondent which meant it would be fair, just and reasonable for a duty of care to be imposed on SPS to have established a *prima facie* case that there had been a breach of licence conditions before taking a decision to revoke.

[17] The sheriff was correct to read the handbook "a Prisoner's Guide on Release" as a clear indication of an assumption of responsibility to obtain sufficient information before taking the decision to revoke a HDCL. The averments gave the appellants adequate notice of this position, particularly where the document relied upon was their own document. It was counterintuitive to require the respondent to refer to the appellants' document. The

appellants failed to exercise reasonable care to establish that the crime which gave rise to the respondent being detained was committed in breach of the HDCL. They had a duty to take reasonable care to establish the crime for which he was arrested was committed in breach of the HDCL. The respondent's arrest did not in itself establish a breach of licence conditions; indeed the fact that he had been arrested on an arrest warrant suggested an old offence. They should have sought further information to establish the position and the circumstances of his being detained. They had a duty at common-law to take reasonable steps to only recall the respondent as a consequence of a breach of his licence conditions. As in *McCreaner* v *Ministry of Justice,* a proximate relationship was created between the appellants and respondent which resulted in the *Caparo* three-fold tripartite test being satisfied. The appellants should have made further enquiry, but did not and were therefore not entitled to conclude that the respondent had failed to comply with the conditions of his HDCL. Accordingly they were in breach of their duty of care to the respondent in revoking the HDCL. Short-term prisoners are particularly vulnerable to any mistake SPS might make in deciding to revoke a HDCL as it is likely that the review process will not be concluded prior to their release. The sheriff was correct to determine that the respondent's pleadings entitled them to a proof before answer.

[18] In relation to the specification of the quantification of loss this is a jury point and adequate specification was given by setting out the period of wrongful imprisonment for which damages were sought.

Analysis

[19] The starting point for the sheriff should have been whether a common law duty of care arose in the statutory context. In that regard his omission to recognise the importance

of *X (Minors)* v *Bedfordshire County Council* resulted in his falling into error. That case arose from allegations that public authorities negligently carried out or failed to carry out statutory duties imposed on them for the purpose of protecting children from child abuse. In the leading judgment Lord Browne-Wilkinson sets out what he described as a logical approach. We have derived considerable assistance from his judgment which is a highly persuasive authority that if a pursuer avers carelessness in the taking of a discretionary decision that is not justiciable. Consideration of tests proposed in *Caparo Industries Plc* v *Dickman* only becomes relevant where the claim arises from the practical manner in which an act has been performed

[20] Lord Browne-Wilkinson's starting point is that in the ordinary case a breach of statutory duty does not by itself give rise to any private law obligation. However, if as a matter of construction the statutory duty may be said to be imposed for a limited class of the public, and Parliament intended to confer a private right of action such a right may be identified. He suggests that where Parliament creates a right of review of a discretionary decision that militates against a separate private law right of action being conferred. Lord Browne-Wilkinson also identified a distinction between cases where the authority is said to owe a duty of care in the manner in which it exercises a statutory discretion, ie whether or not to do an act, and cases where the duty of care is said to arise from the manner in which the statutory discretion has been implemented in practice. He makes it clear that the application of a common law duty of care having regard to the principles laid down in *Caparo Industries Plc* v *Dickman* only arises in relation to claims arising from the manner in which the discretionary decision has been implemented.

[21] It can be accepted that section 17A relates to a limited class of the public: those who might be recalled from HDCL. The terms of section 17A do not demonstrate the Parliament

intended to create a private right of action for a failure in the exercise of the discretion to recall. The section imposes a wide discretion in making the decision, and there is nothing to bring the section close to conferring a specific right. Further, section 17A(2)(b) provides a power of review, even if such a power of review may be of limited benefit.

[22] We are satisfied that the decision taken here was a discretionary one which falls into the first category identified by Lord Browne-Wilkinson. Accordingly the power conferred by section 17A and a claim for damages arising from a recall to detention is not justiciable and the appellants succeed in the appeal. The sheriff fell into error in applying the *Caparo* test to the instant case. He should have identified that this is a claim founded in the exercise of the statutory discretion conferred by section 17A to which the tripartite test has no application.

[23] A key purpose of pleadings is to give fair notice of the case being made and while abbreviated pleadings are to be encouraged we observe there are a number of material deficiencies in the respondent's pleadings, which serve to deprive the appellants of fair notice of the case they face. We do not accept that there was fair notice of the argument which the respondent sought to make before us of the import of the handbook "a Prisoner's Guide on Release". It is not referred to, nor incorporated in the respondent's pleadings. It was only considered by the sheriff because it was annexed to the letter of 17 March 2015 from SPS to the respondent which set out the conditions of his release on HDCL, yet it is founded upon by the sheriff as a clear indication of an assumption of responsibility to the pursuer. Counsel who appeared before this court, but had not drafted the pleadings, in response to an enquiry from the court, categorised the alleged breach of duty as being a failure by SPS to make enquiry about the circumstances surrounding the respondent's arrest on 28 April. But no such case is set out in the respondent's pleadings. The assertion that

reliance on the handbook "a Prisoner's Guide on Release" did not require to be pled and any relevant section of it founded upon on record by the respondent because it was the appellants' document is fundamentally misconceived. A party is always entitled to fair notice of the case against it. The respondent's pleadings also omit to make reference to the warrant which had resulted in the respondent being detained on 28 April 2015 and no averments are incorporated of the duty which was said to have been breached.

[24] The form of the respondent's pleadings fail to meet elementary requirements of pleading. The respondent avers that:

> "It is believed that HMP Barlinnie simply assumed that he had been arrested for a new offence committed during his period of [HDCL]. It is believed that no checks were made by HMP Barlinnie …."

These are not averments of primary facts, nor are they averments of a legitimate inference to be derived from primary facts. They provide no foundation for whether those beliefs were accurate.

[25] Although in article 6 of condescendence it is averred that when the appellant appeared in court on 29 April 2015 it was in relation to an offence which had been alleged to have been committed in August 2014, it is not averred by the respondent that this was something which should have been ascertained by SPS prior to revocation of the HDCL. There is no specification of the actions which should have been undertaken as a result and of what duty was thereby breached. Even if the tripartite test enunciated in *Caparo* had been relevant the respondent's pleadings would not satisfy the test set out in *Jamieson* v *Jamieson* 1952 SC (HL) 44. Even taking the respondent's pleadings at their highest the case is irrelevant.

[26] For completeness we would explain that we consider *McCreaner* v *Ministry of Justice* falls to be distinguished on its facts from the present case. It involved a claim which can be

categorised as a claim arising from the implementation of a discretionary decision. The court found that the Ministry of Justice owed a duty of care because it had assumed a responsibility to complete the final stage of the process for Mr McCreaner's release on HDC (the equivalent of HDCL) having accepted in principle his eligibility for release and there were no, or minimal, resource implications in making further enquiries to establish the true position. That is a materially different situation from the present case.

[27] Accordingly we do not agree with the sheriff that by taking the respondent's pleadings at their highest the case should have been admitted to a proof before answer. Even taking the pleadings at their highest we find that the respondent was bound to fail. The sheriff failed to identify the deficiencies in the respondent's pleadings and in doing so was also in error in not upholding the appellants' first plea in law on that basis.

[28] Had we not reached this conclusion which results in the claim being dismissed we would have however refused the final ground of appeal. We agree with the sheriff's decision that in the event of liability being established the assessment of damages is a jury question to be resolved by the court on the basis of experience and awards in other cases of wrongful imprisonment. The respondent's pleadings were not in this regard irrelevant.

[29] We have had regard to the fact that Parliament provided for a review procedure in section 17A(2)-17A(4) and it is unsatisfactory that the decision by the Parole Board was in this case issued more than six months after the respondent had been liberated. We note it was conceded by the appellants that the respondent has a right to make a complaint about the process followed through the SPS complaints process and if dissatisfied may complain to the Scottish Public Services Ombudsman. The Ombudsman will not consider the decision to recall but will consider the process followed and that may result in an award of compensation.

[30] We also observe that the recall of the respondent may not have arisen had SPS made enquiry as to whether there were any outstanding warrants prior to the respondent being released on HDCL. This appears an obvious step and we would recommend that a review is undertaken of the process for release on HDCL to identity any outstanding warrants prior to release. We also note that this was the second occasion when the respondent was arrested while on HDCL. It is surprising that the police did not establish that there was a second outstanding warrant which emanated from Glasgow Sheriff Court when the respondent was first detained on 31 March 2015. It may be that Police Scotland too could usefully review their practice to identify where multiple warrants are outstanding.

[31] We therefore dismiss the respondent's claim. We shall accordingly also recall the sheriff's interlocutor in relation to the expenses of the debate, in respect of which he made no award of expenses, but sanctioned the case as suitable for the employment of junior counsel. We find the respondent liable to the appellants in the expenses of the action including the appeal and sanction the employment of junior counsel for the proceedings at first instance and for the appeal.