SHERIFFDOM OF LOTHIAN & BORDERS AT EDINBURGH

IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2019] SC EDIN 61

PIC-PN2394-18

JUDGMENT OF SHERIFF KENNETH MCGOWAN

in the cause

BRIAN MILLER

Pursuer

against

NORTH LANARKSHIRE COUNCIL

Defender

Pursuer: Wardell Solicitor; Dentons
Defender: Scott, Solicitor; Ledingham Chalmers

Edinburgh, 8 July 2019

Introduction

[1] This case came before me for debate on 3 June 2019. In the course of discussion I was referred to the following cases:

Allan v *Barclay* (1864) 2 M 873;
Jamieson v *Jamieson* 1952 SC (HL) 44;
McArthur v *Raynesway Plant Ltd* 1980 SLT 74;
Miller v *SSEB* 1958 SLT 229;
Macdonald v *Glasgow Western Hospitals* 1954 SC 453;
Page v *Smith* (1996) AC 155;
Simmons v *British Steel Plc* 2004 SC (HL) 94.

[2] I also considered *Charlesworth & Percy on Negligence*, 14th Edition.

Outline of pursuer's case as averred

[3] The pursuer is an employee of Scotland's Rural University College ("SRUC"). The defender is a local authority. Under an agreement known as the "Partnership Agreement" the pursuer, as about 2017, had been attending a primary school operated by the defender about once a week for about 10 years in order to carry out teaching duties there.

[4] On 20 March 2017, the pursuer was at one of the defender's schools when his foot went into a crack in a paving slab. This caused him to lose his balance and fall, whereupon he sustained certain physical injuries. In due course, he intimated a claim for damages to the defender.

[5] In August 2018, the defender indicated to the pursuer's employers that the pursuer was not to return to any of its schools because of his outstanding legal claim against it. As a result of that, the pursuer suffered stress and anxiety and thereafter developed a psychological condition.

[6] The pursuer seeks damages for the physical injuries he suffered in 2017 and for the consequences of the psychiatric injury he sustained in 2018 as a result of his "exclusion" from the defender's school.

The averments under attack

[7] The passage of the pursuer's pleadings under attack is found at claim paragraph 5, page 2, line 20 of the Amended Record lodged at the bar on 3 June 2019 and is as follows:

> "On or around 22 June 2018, the pursuer's line manager, Ann Burns (Team Leader, Horticulture and Landscaping, Oatridge Campus SRUC) met with a representative of the defender, Mr Michael Dolan. The purpose of that meeting was to discuss likely timetable requirements for the forthcoming academic year 2018 - 2019. The outcome of the meeting was that SRUC employees would continue to cover classes and attend schools, as required by the defender, as per the Partnership Agreement. On or around 20 August 2018, Ms Burns met Mr Dolan for what she thought to be a

> further pre-term update meeting. At that meeting, Mr Dolan informed Ms Burns that it had come to his attention that the pursuer had intimated a claim against the defender. Mr Dolan noted that until the legal claim had been investigated a 'holding position' would be put in place. Ms Burns understood that to mean that the pursuer could not resume his teaching duties within North Lanarkshire Council as he normally would. The pursuer has not been permitted to take up his normal teaching duties under the Partnership Agreement. His timetabling obligations have been filled by replacement staff. The pursuer was provided with no explanation as to why he was not permitted to return to his teaching timetable. The 'holding position' put in place by the defender prohibited the pursuer from fulfilling the duties incumbent upon him under the Partnership Agreement. The pursuer attended his GP on or around 1 October 2018. The defender's unilateral implementation of a 'holding position' prohibited the pursuer from fulfilling his employment. This has caused the pursuer stress and anxiety. The pursuer has developed a psychiatric illness. He has been signed off work by his GP since 1 October 2018. He has attended an Occupational Health appointment which concluded that the pursuer is unfit for work. The defender ought to have known that the pursuer was at risk of developing a psychiatric illness. The pursuer has suffered a detriment by exerting his right to raise a personal injury claim."

Submissions for defender

[8] The averments set out above should not be remitted to probation.

[9] On the pursuer's pleadings any psychiatric illness that he had developed was not causally connected to and was too remote from the accident on 20 March 2017 with which the present action was concerned ("the index accident").

[10] In particular, the defender relied upon the averments that the "holding position" put in place by the defender prohibited the pursuer from fulfilling the duties incumbent upon him under the Partnership Agreement; that this had caused the pursuer stress and anxiety and the development of a psychiatric illness; and that the pursuer had suffered a detriment by exerting his right to raise a personal injury claim.

[11] The pursuer, on his own pleadings, attributed the development of stress, anxiety and psychiatric illness not to the circumstances of the index accident, nor to the physical injury suffered by him as a result of the index accident nor to the reaction of the defender to the

index accident but to the reaction of the defender to the pursuer's intimation of a claim against it in respect of the index accident.

[12] It appeared that the pursuer's pleadings dealt with two separate wrongs on the part of the defender. The first was a delictual wrong, the second one was arguably a contractual wrong. Each wrong had a separate factual background. The delictual wrong arose from alleged failures on the part of the defender to provide a safe workplace and to take such care as was reasonable to ensure that the pursuer did not suffer injury as a result of the condition of the school premises in which he was working. The contractual wrong was the refusal by the defender to allow the pursuer to return to his teaching duties in accordance with the partnership agreement and on account of the pursuer having raised a claim in respect of the index accident.

[13] The defender's contention was that the pursuer's psychiatric injury on the pursuer's pleadings did not arise naturally and directly out of the wrong said to have been done by the defender.

[14] It was accepted that the pursuer did say that the exclusion was a consequence of the accident, but that averment did not sit comfortably with the other averments setting out the full history of the matter.

[15] What had become known as the "grand rule" had been derived from *Allan:*

> "The grand rule on the subject of damages is, that none can be claimed except such as naturally and directly arise out of the wrong done; and such, therefore, as may reasonably be supposed to have been in the view of the wrongdoer."

[16] Reliance was also placed on what Lord Rodger had said in the case of *Simmons* at paragraph 60-67. In the present case, there was a gap of about 15 months. The pursuer did not suggest that the index accident was the cause of his psychiatric difficulties.

[17] It was also noticeable that prior to the accident in *Simmons* the pursuer and his colleagues had complained about the working conditions. The pursuer's anger in *Simmons* was not simply attributable to the fact that he thought that the accident could have been avoided and that the defender had failed to heed warnings nor simply to the fact that he was angry that his condition had prevented him returning to work but in addition to that the defender had not been in touch with him or visited him. Accordingly in *Simmons*, the House of Lords took the view that there was no reason to try and disaggregate the cluster of reasons why the pursuer became angry and which in turn led to his psychiatric injury.

[18] The facts in *Simmons* could be distinguished from the present case where the pursuer was not averring a cluster of factors which led to his injury and moreover did not make an averment linking it back to the index accident.

[19] Indeed, the pursuer in this case specifically averred that the psychological injury was attributable to the steps taken to exclude him. This was repeated in the pursuer's note of argument.

[20] The pursuer also sought to argue that notice had been given of why it ought to have been reasonably foreseeable by the defender that the pursuer would suffer a psychiatric injury by reference to the averments to the effect that he had been signed off work since 1 October 2018 and had attended an occupational health appointment which had concluded that he was unfit for work. The difficulty was that those averments related to the period after the decision had been taken to exclude him.

[21] For all of these reasons the averments complained of should be excluded from probation; a 4 day proof should be allowed on the remainder of the averments and the pursuer should be found liable to the defender in the expenses occasioned by the debate.

Submissions for pursuer

[22] The averments attacked by the defender were relevant and not ought to be excluded from probation.

[23] It was trite law that a claim would only be dismissed on the grounds of relevancy if it was bound to fail even if all of the pursuer's averments were upheld; the pursuer's averments were to be treated as *pro veritate* for the purposes of a debate; and it was unusual for a case based on negligence to be dismissed on the grounds of relevancy; *Jamieson*, 50; *Miller*, 32 and 33.

[24] The case advanced was clear. The pursuer sustained loss, injury and damage as a result of the index accident in March 2017.

[25] The injuries sustained by the pursuer were not limited to his physical injuries. The pursuer averred that he had suffered psychiatric injury as a result of the index accident.

[26] It was not accepted that there was an insufficient nexus in the pleadings between the index accident and the pursuer's development of stress, anxiety and psychiatric illness so as to allow a causal link to be established. On the balance of probabilities, the alleged negligence caused the damage. That was a question of fact. The pursuer now averred (*post* amendment) that "had the defender not excluded the pursuer, a consequence of the accident herein before condescended upon, he would not have developed a depressive illness".

[27] The pursuer's psychiatric injuries were the response to the "holding position" adopted by the defender, a product of the index accident. At proof, evidence would be led from Dr Harper on this point. The defender offered no other explanation as to why the holding position was adopted in other words, on the balance of probabilities, but for the index accident there would have been no holding position and therefore no psychiatric illness.

[28] The pursuer did not accept the proposition by the defender in relation to the averments about what the defender ought to have known about the pursuer being at risk of developing a psychiatric illness. In terms of the common law, the pursuer required to aver and prove that it was reasonably foreseeable to the defender that its treatment of him was likely to cause a psychiatric illness: *Sutherland*, appealed in part to the House of Lords sub norm *Barber* v *Somerset County Council*.

[29] The pursuer averred "He has been signed off work by his GP since 1 October 2018. He has attended an occupational health appointment which concluded that the pursuer is unfit for work". This was a clear averment as to why it ought to have been reasonably foreseeable to the defender that the pursuer would suffer a psychiatric illness. The court could not say that if the pursuer proves all of the existing averments in relation to foreseeability he was bound to fail. Detailed medical evidence required to be led in relation to this point and it could not be resolved on the pleadings alone. In claims of negligence, the full nature and extent of duties owed to the pursuer can only properly be understood after a hearing on evidence. Actions relating to personal injuries are not a matter of bare legal pleading, as contractual or property cases often are, and actions ought not to be dismissed without consideration of the evidence unless it is clear that the pursuer is bound to fail.

[30] The pursuer had pled a relevant case such as would entitle him to a hearing on the evidence on the pleadings as currently presented.

Grounds of decision

[31] The starting point is to look at the terms of the pursuer's pleadings. Statement of claim 4 outlines the arrangement between the defender and the pursuer's employer, SRUC, whereby he had attended a primary school on a weekly basis for the past 10 years to teach

certain classes. In particular, this statement refers to a "Partnership Agreement" between the defender and SRUC. No further details of that are provided and it was not produced.

[32] Statement of claim 4 then goes on to describe the pursuer's accident on 20 March 2017 when he sustained certain physical injuries.

[33] Statement of claim 5 commences with an explanation of the nature and effects and treatment which the pursuer received in respect of his physical injuries over the succeeding months and certain ongoing difficulties that he still has. The averments under attack by the defender are noted above.

The law

[34] The question of what the "grand rule" actually means and how it is to be applied is not altogether straightforward, but a recent authoritative statement of it can be found in Lord Rodger's opinion in *Simmons*:

> "66. The picture is confused, largely because of the obiter dicta in *M'Killen* v *Barclay Curle & Co Ltd*. If those dicta are put on one side, however, there is a line of Scottish authority, stretching back to *Allan* v *Barclay*, that is consistent with *The Wagon Mound* in that it limits a defender's liability to damage that was reasonably foreseeable. While there are references to damage that arises 'naturally and directly' or to consequences that are 'natural or necessary or probable', it has long been recognised that these formulae are vague and by no means easy to interpret. See, for instance, the comments of Lord Sumner on 'natural, probable and necessary' in *Weld-Blundell* v *Stephens* [1920] AC 956, 983 - 984. In *Overseas Tankship (UK) Ltd* v *The Miller Steamship Co Pty* [1967] AC 617, 634E - 635A Lord Reid described the word 'natural' as 'peculiarly ambiguous' and pointed to the different ways it could be used. He also drew attention to the shades of meaning that could be attached to the adjective 'probable'. While in *Weld-Blundell* Lord Sumner had thought that 'direct cause' was the best expression, Lord Reid [1967] AC 617, 635E - 636D, highlighted the different meanings of 'direct', depending on the context. Indeed the present case illustrates all too clearly that the use of that word is liable to introduce confusion, while contributing little of value to the solution of practical cases. As was recognised in *Allan v Barclay* and *The Wagon Mound*, the ultimate test is whether the damage was reasonably foreseeable.

> 67. These authorities suggest that, once liability is established, any question of the remoteness of damage is to be approached along the following lines which may, of course, be open to refinement and development. (1) The starting point is that a defender is not liable for a consequence of a kind which is not reasonably foreseeable: *M'Kew* v *Holland & Hannen & Cubitts (Scotland) Ltd* 1970 SC (HL) 20, 25 per Lord Reid; *Bourhill* v *Young* 1942 SC (HL) 78, 85 per Lord Russell of Killowen; *Allan* v *Barclay* (1864) 2 M 873, 874 per Lord Kinloch. (2) While a defender is not liable for damage that was not reasonably foreseeable, it does not follow that he is liable for all damage that was reasonably foreseeable: depending on the circumstances, the defender may not be liable for damage caused by a *novus actus interveniens* or unreasonable conduct on the part of the pursuer, even if it was reasonably foreseeable: *M'Kew* v *Holland & Hannen & Cubitts (Scotland) Ltd* 1970 SC (HL) 20, 25 per Lord Reid; *Lamb* v *Camden London Borough Council* [1981] QB 625; but see *Ward* v *Cannock Chase District Council* [1986] Ch 546. (3) Subject to the qualification in (2), if the pursuer's injury is of a kind that was foreseeable, the defender is liable, even if the damage is greater in extent than was foreseeable or it was caused in a way that could not have been foreseen: *Hughes v Lord Advocate* 1963 SC (HL) 31, 38, 40 per Lord Reid. (4) The defender must take his victim as he finds him: *Bourhill* v *Young* 1942 SC (HL) at p 92 per Lord Wright; *M'Killen* v *Barclay Curle & Co Ltd* 1967 SLT 41, 42, per Lord President Clyde. (5) Subject again to the qualification in (2), where personal injury to the pursuer was reasonably foreseeable, the defender is liable for any personal injury, whether physical or psychiatric, which the pursuer suffers as a result of his wrongdoing: *Page* v *Smith* [1996] 1 AC 155, 197F - H, per Lord Lloyd of Berwick."

[35] From that it may be concluded that the ultimate test is whether the damage was "reasonably foreseeable".

[36] That test is of course to be applied through the eyes of the "reasonable man" at the point when the putative cause of the damage complained of occurred. In other words, it is important to bear in mind that it is the defender's state of knowledge as at 20 March 2017 (the date of the index accident) which matters, because the pursuer's case is that there was a causal connection between that accident and the onset of his psychiatric injury. To put that in that way, the pursuer's case is that the defender was negligent on the 20 March 2017; and thus is responsible in law not only for the physical injuries and related losses which the pursuer sustained immediately thereafter, but also for the psychological injury which he began to suffer in the autumn of 2018.

[37] Ms Wardell was at pains to point out that an application of the "but for" showed that the latter would have not occurred without the former.

[38] I have no difficulty with that proposition. If the pursuer had not had his accident in March 2017 he would not have been injured, he would not have been off work, he would not have made a legal claim against the defender and what became in the course of the debate to be called his "exclusion" by the defender would not have occurred.

[39] But while the establishing of factual causation in the foregoing manner is essential, it is not the same as meeting the test of legal causation. A defender is not liable for consequences which are too remote and the question of remoteness is to be evaluated according to what was reasonably foreseeable at the time that the alleged legal wrong occurred. In other words, it was what was within the contemplation of the defender as being reasonably foreseeable at 20 March 2017 which must be examined.

[40] One factor which is relevant is the passage of time. For example, Lord Hope in *Simmons* said:

> "12. The longer the interval between the accident and the dermatological condition which preceded the depressive mental illness the more difficult it becomes to ignore the possibility that there was a break in the chain of causation and to avoid the conclusion that these consequences were too remote to sound in damages".

[41] As is evident in this case, there was a substantial period of time between the pursuer's accident in March 2017 and the onset of his psychological condition which appears not to have happened until some 15 or so months later at the earliest.

[42] In addition to that, the pursuer expressly attributes the onset of his psychological injury to the decision to "exclude" him rather than to the accident.

[43] The pursuer does not seek to plead a case that the decision to "exclude" him which is said to have been arrived at in August 2018 was a legal wrong (under the law of delict or

contract). Ms Wardell's position was that whether or not the decision taken in August 2018 was a legal wrong did not matter.

[44] I have doubts as to whether that is correct. If the decision to exclude the pursuer was a legal wrong, actionable by the pursuer, then it appears to me that that would be likely to be relevant to the issues of causation and foreseeability. (I observe in passing that the defender suggested in argument that there might be a contractual claim, but in my view that seems doubtful also, as the pursuer was not in contractual relations with the defender.)

[45] In addition, although not directly bearing on the main argument debated before me, there are a number of averments which appear to me to be of doubtful relevancy.

[46] For example, the pursuer avers:

> "Mr Dolan informed Ms Burns that it had come to his attention that the pursuer had intimated a claim against the defender. Mr Dolan noted that until the legal claim had been investigated a 'holding position' would be put in place. Ms Burns understood that to mean that the pursuer could not resume his teaching duties within North Lanarkshire Council as he normally would."

Thus, the pursuer does not specifically aver what the "holding position" articulated to Ms Burns was said to entail; nor does he aver the basis on which it was interpreted by Ms Burns in the manner averred.

[47] The pursuer avers: "The pursuer has not been permitted to take up his normal teaching duties under the Partnership Agreement." Thus, the pursuer does not offer to prove that the withdrawal of permission to take up his normal teaching duties was taken by the defender. Indeed, taken along with the immediately preceding averment, the inference is that it was a decision taken by his employer. It is also difficult to see how the pursuer could be said to have any duties under the Partnership Agreement, when it seems doubtful if he was a party to it.

[48] The pursuer avers: "The pursuer was provided with no explanation as to why he was not permitted to return to his teaching timetable." If that is a complaint directed against the defender, why would it have a duty to provide an explanation to somebody who was not its employee? If it is directed at SRUC, why is it relevant to a claim against the defender?

[49] The pursuer avers: "The defender's unilateral implementation of a 'holding position' prohibited the pursuer from fulfilling his employment."

[50] This is not consistent with the averment set out at para [47].

[51] The pursuer avers: "The pursuer has suffered a detriment by exerting his right to raise a personal injury claim." Why is such an averment relevant in a claim based on personal injury?

[52] Furthermore, the terms and scope of the Partnership Agreement may be a relevant factor in assessing the question as to what was reasonably foreseeable as at March 2017. For example, what would be the position if the defender had an absolute right in terms of that arrangement to say which of the SRUC's employees could be sent to their school and which could not - that type of term being not uncommon in agency type arrangements?

[53] In any event, it is clear that the question which must be addressed at this stage is whether the pursuer is entitled to an enquiry on whether it was or should have been reasonably foreseeable to the defender in March 2017 that the sequence of events which occurred and which are said to have caused the pursuer psychological injury would have taken place. Two factors are particularly relevant here: the number (and nature) of the links in the "causal chain" and the time frame within which those steps occurred.

[54] The defender would have to have foreseen that the pursuer, having been injured by an accident at the defender's premises in March 2017, would have sought legal advice and intimated a claim. I think those matters were eminently foreseeable.

[55] But things become less clear when it is said that the defender should have foreseen that it itself would have (on some basis or another) taken the decision to implement a "holding position" which the pursuer's line manager would have interpreted as a prohibition on the pursuer returning to schools operated by the defender; and that the pursuer as a result of that decision would have developed a psychiatric illness. In my opinion, that sequence of events was not reasonably foreseeable, particularly as they occurred long after the index accident.

[56] The pursuer does seek to bolster his case by referring that he had been off work since 1 October 2018 and that he had attended for an occupational health appointment which concluded that he was unfit for work. That is followed by an averment that the defender ought to have known that the pursuer was at risk of developing a psychiatric illness. But how should the defender have known that? The defender was not the pursuer's employer and there is no suggestion in the pleadings that they were notified about the onset of any illness or him being signed off as unfit for work. Moreover, these matters occurred *after* the date of the "holding position" being intimated to the pursuer's line manager in August 2018, so they cannot have informed what the defender should have reasonably foreseen in March 2017.

[57] It is true that certain qualifications are articulated in *Simmons*, but these are not relevant to the present case.

[58] Reliance was placed on the decision in the case in *Page* to the effect that where personal injury to the pursuer was reasonably foreseeable, the defender is liable for any

personal injury either physical or psychiatric as a result of his wrongdoing. But the important phrase is "… as a result of his wrongdoing." In the present case, the pursuer does not seek to say that the decision to exclude him was a legal wrong (ie it is not said that there is a separate cause of action); and in terms of his own pleadings attributes the onset of the psychiatric injury not to his accident in March 2017 but instead to the decision taken to exclude him in August 2018.

Disposal

[59] In the circumstances, I am satisfied that parts of the pursuer's case under attack in the debate before me are irrelevant and that accordingly the averments complained of should not be admitted to probation. It was accepted that if that was to happen then the following averments of the defender in answers 5 and 6 would become redundant:

> "The occurrence of the averred meetings between Ann Burns and Michael Dolan, the discussions which occurred during these meetings, and the terms of any correspondence between the two, are not known and not admitted. Not known and not admitted that the averred 'legal claim' is the claim currently before the Court. Ann Burns' understanding of the position following the averred meetings is not known and not admitted. The consequences for the Pursuer of his understanding of the Defender's position following the averred meetings is not known and not admitted. Not known and not admitted that the Pursuer suffered psychiatric illness under explanation to follow.";
>
> "*Esto* the Pursuer has developed a psychiatric illness, and *esto* he developed this psychiatric illness in the circumstances and for the reasons averred, the Defender contends that there is no causal link between the development of this illness and the index accident, and that the development of this illness is too remote from the index accident."; and
>
> "(1) the Pursuer's averments being irrelevant and, separately, lacking in specification, the action should be dismissed; (2) the Pursuer's averments being irrelevant and, separately, lacking in specification, they should not be admitted to probation…".

[60] The remaining numbered subparagraphs in answer 6 require to be re-numbered appropriately.

[61] As I understood it, parties were agreed that expenses should follow success. Accordingly, I will pronounce an interlocutor excluding from probation the averments identified above; finding the pursuer liable to the defender on the expenses occasioned by the debate; ordaining the pursuer to lodge an amended record incorporating the changes identified above within 14 days hereof; and allowing parties a four day proof on the remaining averments.