SHERIFFDOM OF LOTHIAN AND BORDERS

IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2019] SC EDIN 70

PIC-PG38-18

JUDGMENT OF SHERIFF R B WEIR QC

in the cause

(1) BARRIE SPARK, and (2) EILEEN ELIZABETH STUART SPARK

Pursuers

against

(1) WESTERN ISLES NATIONAL HEALTH SERVICE; (2) BENBECULA MEDICAL PRACTICE; (3) UIST AND BARRA HOSPITAL; (4) DR SUSANNAH KATHARINE DAWSON; (5) DR MARK JOHNSON; and (6) DR FRANCIS TEARNEY

Defenders

Pursuers: Parties
First and Third Defenders: Pugh, Advocate, NHS Scotland Central Legal Office
Second, Fourth and Sixth Defenders: Thomson, BTO Solicitors LLP
Fifth Defender: Comiskey, Advocate, Clyde & Co (Scotland) LLP

EDINBURGH, 29 July 2019

The Sheriff, having resumed consideration of the cause:

(i) sustains the second plea-in-law for the first and third defenders, the first plea-in-law for the second, fourth and sixth defenders, and the second plea-in-law for the fifth defender, and dismisses the action;

(ii) reserves meantime the question of expenses of the debate, and appoints parties to be heard thereon at Edinburgh Sheriff Court on a date to be afterwards fixed.

Note:

Introduction

[1] The pursuers are married and reside on the island of South Uist in the Outer Hebrides. They are unrepresented in the instant proceedings. They seek to recover very substantial damages from the defenders arising from what they contend were failings in the treatment and diagnosis of symptoms affecting the first pursuer's right leg and foot. In the broadest terms it is contended that these failings, which included a failure to recognise and diagnose the development of wet gangrene, resulted in the first pursuer having to undergo emergency surgery involving the amputation of the second toe, additional physical pain and suffering, leading to mental breakdown and also patrimonial loss. The second pursuer's claim appears to be predicated on the undue anxiety and distress suffered by her in consequence of her husband's undiagnosed condition and consequent suffering.

[2] The case called before me for debate on the defenders' general pleas to the relevancy of the action. In advance of the debate the defenders tendered a joint note of arguments which rehearsed detailed criticisms of the pursuers' pleadings. The pursuers also tendered a written note of arguments in which they sought to address the criticisms to which their pleadings had been subjected. I heard arguments from all parties, who adhered to their respective notes of argument and made *avizandum.*

The pleadings

[3] The closed record adopted an unusual format in which the pursuer's averments, the relative answers and pleas-in-law, were printed side by side. The pursuer's averments are of some length. However, given that they were subjected to detailed criticisms by all three

representatives of the defenders, it is unavoidable that they be narrated, so far as relevant to the discussion which follows, in full:

> "4…The first pursuer has been a patient of the Benbecula Medical Practice since 2004, and had received treatment for previous diabetic foot ulcers and been noted as high risk as a result, both in the Uist and Barra Hospital (third defender) and at the Benbecula Medical Practice (second defender). This included eighteen months of podiatry care and removal of necrotic tissue in the right big toe. He attended Benbecula Medical Practice in October 2014 and several times subsequently, seeing Dr Tierney (Sixth Defender) in October and Dr Johnson (Fifth Defender) in November, with concerns about a black spot on his second toe, leg cramps and varicose veins, all to his right leg and foot (not left as stated in the amended defence, which also inaccurately refers to the toe having been hurt 4 days previously rather than the black spot having been evident and examined by other GPs over a period of 4 months), but was told by both these Defenders that these symptoms were unconnected and there was nothing to worry about. It is therefore averred that the Fifth and Sixth Defenders were negligent in their failure to diagnose the wet gangrene, or if this was beyond their level of competence, in their failure to investigate further and follow the trail or to refer the First Pursuer to a specialist until the proper diagnosis could be made. In addition, during this period kidney function tests showed problems, which the GPs stated were due to excessive alcohol consumption and would not accept that the first pursuer was not drinking at the time. In fact such test results can also be a sign of severe infection, but this avenue was not investigated, which would have led to further evidence of the seriousness of his condition. It is averred that this failure to investigate further was negligent in that it would have assisted in a correct diagnosis much earlier than was the case. It is further averred that the Practice, Dr Johnston and Dr Tierney (second, fifth and sixth defenders) failed in their duty of care to the first pursuer in that they failed to follow the trail of the worsening wet gangrene and infection (sepsis) together with the fact that he had been noted on his file as ischaemic; with information published in the BMJ (BMJ 1999 Apr 3: 318(7188): 925-926: Lesson of the week: The painful red foot-inflammation or ischaemia? By William Humphreys, consultant (https://www.ncbi.nim.nih.gov/pmc/articles/PMC 1115342/)): and their own Practice procedures indicating the necessity for referral to a vascular surgeon in any case, but especially in the case of problems with his feet.
>
> It is further averred that the instances of negligence noted above led to the emergency surgery required to save the First Pursuer's life and also to the life changing condition in which it left him, with the loss of balance, pain, suffering and mental illness, together with the Second Pursuer's mental breakdown and inability to return to work, and ongoing debilitating anxiety to both Pursuers, all as proven to the DWP's assessors in relation to long term Benefits awards.

Explained and averred that at the time of most if not all the events referred to Dr Tierney was a full time Partner and GP at the surgery and has since retired and undertaken part time locum work there.

The Fifth and Sixth Defenders are called upon to aver on record why they did not act upon the Practice protocol for urgent treatment and onwards referral to a vascular surgeon of a diabetic patient known since May 2011 to have ischaemic heart disease, historic peripheral neuropathy due to diabetes since November 2001, and previous problems of ulceration to the feet, presenting with symptoms of poor circulation (internal blackening of the toe, varicose veins, tracking up through the leg, and cramp).

Averred that the Second, Fourth and Fifth and Sixth Defenders had good notice of the First Pursuer's complaint and potential litigation. The Pursuers had met with the Fourth Defender at the Benbecula Medical Practice (Second Defender) to discuss the initial complaint and the actions taken by the Practice as a result of their Significant Event Analysis dated 25 October 2015 (now lodged into process, although it should be noted that this document contains inaccuracies). Averred that the Fourth Defender wrote to the Chief Executive of the Health Board (First Defender) on 29 October 2015 informing him of the First Defender's [sic.] intention to sue and stating that she was contacting the defence unions. The Fourth Defender wrote to the First Pursuer on behalf of the Second Pursuer on 8 August 2016 (now lodged in process) in which she stated that if any financial compensation were required the First Pursuer would need to take legal action.

The Defenders' agents' comments indicate that there is some discrepancy between the averred defences and the First and Third Defenders imply that they do not know of the actions of their own employees or servants.

5… Over the next three months these symptoms worsened despite further consultations with doctors until the entire toe was black and the leg extremely painful in February 2015. At this stage he attended A&E at the Uist and Barra Hospital (Third Defender) asking for the toe to be amputated as he was in so much pain. He was informed in the presence of his wife (second pursuer) by Dr Johnson (Fifth Defender) in his role as the Third Defender's hospital doctor and a podiatrist employed by the First Defender (on duty in the premises of the Third Defender) that the infection would have to be treated before any surgery could be carried out or even a transfer to a mainland hospital and was put onto intravenous antibiotics for 14 days. In fact it was not an infection but wet gangrene and the effects of this could be seen in the red lines tracking up his leg and body with the pain of this poison being felt as far up as his neck. The Fifth Defender, whilst acting as a Hospital Doctor and taking responsibility for the comments of any of his support staff and under the vicarious control of the Third Defender, should have referred the First Pursuer immediately to a Vascular Surgeon. It is averred that the Third and Fifth defenders breached their duty of care to the First Pursuer by the failure to diagnose the wet gangrene and sepsis that was by this time so obvious. It is further averred

that they breached their duty of care in that they failed to refer the First Pursuer to a vascular surgeon.

The First and Third Defender's Answer is averred to be incompetent due to inaccuracy in that the admission to the Hospital was not via the Podiatry Clinic and further that he was admitted to the Ward at around 11am.

It is further averred that they are inaccurate in saying that the First Pursuer had noticed a small back area with surrounding redness on the previous Thursday. It is averred and explained that the small black dot had been noted and treatment sought in October 2014 and further that on the previous Thursday the First Pursuer had consulted Dr Dawson (Fourth Defender) at the Benbecula Medical Practice with serious concerns about the large amount of necrotic tissue on the toe and had asked for it to be debrided. Dr Dawson had stated that this should be done by a podiatrist and she immediately requested an emergency appointment with a podiatrist. When the notice of this arrived at the First Pursuer's home by mail, the appointment was set for some two weeks away (and not for 16 February as stated in records provided by Benbecula Medical Practice) by which time, according to Mr Siddiqui, Consultant Vascular Surgeon, the First Pursuer would have been dead.

The Defenders are called upon to aver on record why the First Pursuer was treated for cellulitis when he was known to suffer from ischaemic heart disease.

It is averred that Dr Dawson was unaware of the differences between wet and dry gangrene, the former being life threatening and the latter not, by a statement that she thought the toe would drop off.

It is further averred that the use of Metronidazole was negligent due to the First Pursuer's notes showing adverse reaction to this drug.

6… During the First Pursuer's time in Hospital he discussed his condition with Dr Dawson in her role as Hospital Doctor, a Locum Hospital Doctor, Dr Jens Luedders, and members of the nursing staff. After two days in hospital receiving intravenous antibiotics he discussed his condition again with Dr Luedders who immediately upon recognition of classic red foot white foot consulted with a Raigmore Hospital vascular consultant (Mr Wolf) and this resulted in the first pursuer's being evacuated to Raigmore Hospital by Air Ambulance the following morning where the toe was amputated within hours of his arrival as the vascular consultant (Mr Siddiqui) considered the condition to be life threatening.

7… Further infections, hospitalisations and surgeries followed over the period to July 2016 causing physical pain and mental stress which continues to the present time all stemming from the initial failure in diagnosis. Advice to General Practitioners and Podiatrists is that patients exhibiting symptoms of this nature should be referred within 3 days to a Vascular Surgeon. Had this been done in October 2014 it is averred that the toes may not have needed amputation and it is certain that the first pursuer would not have suffered the physical and mental pain and distress that

resulted, including financial losses, or the second pursuer her mental breakdown and consequent loss of earnings and pension. The fact that the locum doctor immediately consulted a Vascular Surgeon demonstrates that this is the course of action that would be taken by any professional doctor of ordinary skill with hospital experience and further that the First, Second and Third Defenders should have ensured that the Hospital was staffed by doctors of that level of skill…

…8. The second pursuer has been a patient of the Benbecula Medical Practice since 2004. As the wife of the first pursuer she was worried by the state of her husband's health both physical and mental, particularly when he was told in her presence that the doctors would not send him for amputation of the blackened toe and that it could be treated with antibiotics, particularly when the truth of the matter later became apparent to her in Dr Luedders' diagnosis and resultant actions. It is averred that the defenders owed a duty of care to the spouse of the first pursuer not to cause undue anxiety and distress and further that this duty of care was breached by the failure to identify wet gangrene and sepsis or to recognise the need to refer the first pursuer to a vascular surgeon. She had previously consulted the fifth defender as well as the fourth and sixth defenders regarding her emotional state which had been exacerbated by the ongoing problems with the first pursuer's big toe with constant pain and the developing necrosis that had required removal, and had been prescribed medication for stress for some time before the first pursuer's eventual hospitalisation, but the worry over the seriousness of his condition and the fact that he was taken away to Raigmore Hospital by Air Ambulance without even a chance to say goodbye caused her to suffer a complete mental collapse, resulting in her inability to continue in employment or to interact with officialdom or strangers, particularly by telephone, or even at times to leave the house for normal purposes such as shopping due to panic attacks and shaking.

It is averred that the Second Pursuer is not too far removed from the events to consider that no duty of care is owed to her, by reason of her close relationship to the First Pursuer and also to her physical presence at certain of the specific events. It is therefore reasonable to expect that she would be seriously distressed by any injury suffered by the first pursuer, unlike the situation in *Bourhill* v *Young*. Reference is also made to the case of *McLoughlin* v *O'Brian* (1982) 2 All ER 298…"

Submissions for the defenders

[4] It was recognised on behalf of the defenders that, in an action for negligence resulting in personal injuries, dismissal at debate will only be appropriate in exceptional circumstances (*Jamieson* v *Jamieson* 1952 SC (HL) 44; *Miller* v *SSEB* 1958 SC (HL) 20). It was further accepted that a preliminary plea of lack of specification finds its proper application

in a case where a defender does not know the case against him and objects to being taken by surprise at the proof, and that the degree of specification which will be deemed sufficient for fair notice depends on the particular circumstances of each case (*Macphail; Sheriff Court Practice,* paragraph 9.29).

[5] The defenders' submissions were divided into a number of separate chapters which I now seek to summarise under their respective headings. In doing so, it is expedient to summarise first the arguments relating to the claim by the second pursuer as reflecting the order in which submissions were made at the debate.

Submissions for the defenders – duty of care

[6] It was submitted that none of the defenders owed a duty of care to the second pursuer. That submission was founded on the following propositions which I was invited to accept: (i) for there to be a right to claim damages, a relevant duty of care must be owed by the alleged wrongdoer to the person claiming to have been wronged; (ii) where, based on existing authority, it is clear that a class of relationship does or does not create a duty of care, that will be determinative of the issue; (iii) as a general rule, a doctor will not owe a duty of care to a third party arising out the treatment of a patient (*Jones: Medical Negligence,* paragraph 2-082); (iv) in deciding whether a duty of care arises in a situation not already established in authority, the common law will develop incrementally and by analogy with existing authority. In novel situations where it is sought to invoke a duty of care, consideration will focus on the proximity between the parties, reasonable foreseeability and whether the imposition of a duty of care is "fair, just and reasonable" (*Robinson* v *Chief Constable of West Yorkshire* [2018] AC 736).

[7] The claim by the second pursuer was set out in statement 8, where the duty is expressed as one not to cause her undue anxiety and distress. The common position of the defenders was that, as the spouse of the first pursuer, the second pursuer was a third party to the events said to give rise to the claim for damages by her husband. There was no basis in law for such a novel duty of care as was pled. The averments in article 8 of condescendence did not attempt to address the tests of proximity, reasonable foreseeability or what was fair, just and reasonable. To the extent that there was some reference in the pleadings to previous involvement between the second pursuer and the fourth, fifth and sixth defenders, the averments in that respect could not advise the existence of a duty of care not to cause anxiety and distress to her arising from the treatment received by the first pursuer. Accordingly, the second pursuer's claim was irrelevant and should be dismissed.

Submissions for the defenders – second pursuer as secondary victim

[8] A further criticism common to all defenders was that the averments in statement 8 of condescendence appeared to invoke secondary victim status. The second pursuer was to be characterised, if she was anything, as a secondary victim. To recover damages it was submitted that (i) the claimant must have a close tie of love and affection with the person killed, injured or imperilled; (ii) the claimant must have been close to the incident in both time and space; (iii) the claimant must have directly perceived the incident rather than hearing about it from a third person, and (iv) the claimant's illness, for which she sought damages, must have been induced by a sudden shocking event. Moreover, whether an event was sufficiently horrifying fell to be judged by objective standards and under reference to persons of ordinary susceptibility (*Liverpool Women's Hospital NHS Trust* v

Ronayne [2015] PIQR 20, founding on *Alcock* v *Chief Constable of South Yorkshire Police* [1992] 1 AC 310). It was the defenders' submission that the averments in article 8 of condescendence were wholly inadequate to establish an entitlement to recover damages. Fundamentally, there were no averments of a sudden shocking event such as could satisfy the necessary objective test just mentioned.

[9] In a separate, but related, submission the defenders argued that the averments of loss, as they related to the second pursuer, were irrelevant because they stopped short of pleading the development and diagnosis of a physical, or recognised psychiatric, injury (*Rorison* v *West Lothian College* 1999 Rep. LR 102; *JD* v *Lothian Health Board* 2018 SCLR 1). Essentially, the second pursuer's claim was based on emotional distress experienced as a result of what she claims to have been inadequate care by the first pursuer's GPs and while he was in hospital. The claim by the second pursuer should, on this ground, be dismissed.

Submissions for the defenders – standard of care

[10] Turning to the averments of negligence in the treatment of the first pursuer's condition, it was submitted that there was no prospect, based on the averments of negligence in statements 4 and 5, of the pursuers satisfying the test for professional negligence in *Hunter* v *Hanley* 1955 SC 200. I was reminded that to establish liability, where a deviation from normal medical practice is alleged, a pursuer must prove (i) that there was a usual and normal practice, (ii) that the doctor did not adopt that practice, and (iii) that the course adopted by the doctor was one which no professional man of ordinary skill would have taken if he had been acting with ordinary care. Moreover, the relevant "professional man" should be one, exercising ordinary care, who possesses the equivalent specialism to

the doctor in respect of whom negligence is claimed (*Honisz* v *Lothian Health Board* 2008 SC 235, applying *Hunter* v *Hanley*, *supra.*).

[11] The defenders submitted that the pursuers' averments failed adequately to aver (i) the relevant specialism, at least as regards the fifth defender (acting as a hospital doctor) and the podiatrist referred to in statement 5; (ii) the ordinary and usual practice relative to the treatment provided by those criticised, and (iii) in what way that practice was not followed. In particular, where the averments related only to the second, fourth, fifth and sixth defenders, when acting in a general practice, there were no averments as to what would have constituted the ordinary and usual practice of an ordinarily competent general practitioner in the circumstances. The inadequacies in the pleadings were unsurprising given the defenders' collective understanding that the pursuers were not in possession of any relevant expert report supporting the allegations of negligence made. Accordingly, the action on these grounds should be dismissed.

Submissions for the defenders - causation

[12] This chapter of the defenders' submissions rested on the uncontroversial proposition that there must be a causal link between the alleged breach of duty and the damage sustained by the claimant, based on the "but for" test of causation (*Jones: Medical Negligence, supra.*, paragraph 5-005 *et seq.*). The pursuers' pleadings made no such link. There was no attempt to make any relevant or specific averments about what would have happened, or what alternative clinical course would have been followed, had the purported failures on the part of all of the doctors who treated the first pursuer not occurred. In one respect, statement 7, there was an attempt to link an alleged failure by the first pursuer's GPs to refer

him to a vascular surgeon in October 2014 by the averment that "the toes may not have needed amputation". That was not a relevant basis for recovery even if fault on the part of the GPs were to be established. In relation to the first and third defenders, the pursuers' case appeared to proceed on the basis that the first pursuer had attended the Accident and Emergency Department of the local hospital in February 2015 asking for a toe to be amputated (statement 5). But that was ultimately the result following his evacuation to Raigmore Hospital on the 18th of that month. In so far as a criticism appears to be advanced that the first pursuer was treated for cellulitis and given Metronidazole the averments in statement 5 were irrelevant in the absence of any explanation of how the first pursuer's condition was adversely affected thereby.

[13] Accordingly, there were no relevant or specific averments to support any causal link between any alleged breach of duty on the part of the defenders and the damage sustained by the first pursuer.

Submissions for the defenders – expert report

[14] It was submitted that it was incumbent on the pursuers to discharge the onus of establishing whether any of the doctors under attack deviated from that which a professional of ordinary skill acting with ordinary care would have done. It followed that allegations of professional negligence should always be buttressed by a report from an appropriately qualified witness to the effect that the course taken was one which no professional exercising ordinary skill and care would have taken. Without such a report the court would not be in a position to make a finding in favour of the party claiming negligence. To maintain an action in the absence of supportive expert evidence was an

abuse of process (*Tods Murray* v *Arakin* [2010] CSOH 90). In the context of the defenders' criticisms of the pursuers' pleadings it was possible to see that the absence of such supportive evidence had led to the difficulties relating to relevancy, specification and causation. The practical result was that the pleadings did no more than identify aspects of the first pursuer's care which appeared (to the pursuers) to be worthy of criticism.

Pursuer's reply

[15] In advance of the debate the pursuers also tendered a note of legal arguments to which they adhered in the course of replying to counsel for the defenders. That reply was advanced substantially by the first pursuer. The second pursuer followed him with submissions which dealt with the particular circumstances of her claim, as set out in statement 8. In their replies, both pursuers spoke essentially to the contents of their note of legal arguments.

[16] It was apparent from his reply that the first pursuer considered that the matter before the court was ultimately one of quantum of damages. As foreshadowed by the note of arguments, his reply comprised a largely factual explanation for why he contended that he and the second pursuer were entitled to recover damages. That said it was apparent from the discussion that the pursuers were aware that a legal test for professional liability applied, and was relevant, to the circumstances of this case. Indeed, paragraph 3(f) of the pursuers' note of arguments acknowledged that:

> "the case of *Hunter* v *Hanley*, *supra* sets out the basis on which medical negligence liability can be established and three facts require to be established: (i) that there is a usual and normal practice, (ii) that the defender has not adopted that practice, and (iii) that the course they adopted is one which no professional man of ordinary skill would have taken if he had been acting with ordinary care."

[17] The pursuers' reply was advanced in chapters relating to (i) duty of care and (ii) negligence.

Pursuers' submissions – duty of care

[18] On the first matter it was submitted that the pursuers were both patients of the second defenders (Benbecula Medical Practice), and had over time been treated by each of the fourth, fifth and sixth defenders. The pursuers had each received treatment at Uist and Barra Hospital (convened as third defenders), the first pursuer having been both an inpatient and an outpatient, and the second pursuer having received outpatient treatment there. Accordingly, it was submitted that there was a relationship between all parties going back a number of years which established that a duty of care was owed to them both.

[19] The position of the first defenders was explained by reference to its responsibility for both the second defenders and the third defenders, in respect of whose acts and omissions the first defenders were vicariously liable.

Pursuers' submissions - negligence

[20] The pursuers submitted that both the second and third defenders (under the "aegis" of the first defenders, the Health Board) breached their duty of care to the pursuers in that they negligently failed to diagnose the first pursuer's wet gangrene despite ample opportunities to do so. Their failures extended to (i) failing to respond to the first pursuer's concerns and questions about the possibility of the spread of gangrene from one toe to the next, coupled with his known poor circulation, and (ii) over a period of nine years, failing to refer the first pursuer to a vascular surgeon according to published guidelines within three

days. Reference was made, in that connection, to what I took to be an article "*Lesson of the Week: The painful red foot – inflammation or ischaemia?"* by William Humphreys, consultant, BMJ, 3 April 1999.

[21] It was submitted that I should understand the pursuers' case to be this. Had the first pursuer been referred to a vascular surgeon at an earlier date his diagnosis would have been made at a considerably earlier date and his treatment and prognosis would have been very different. Such were the delays that wet gangrene, and sepsis, were allowed to continue unabated for up two years with potentially life threatening consequences for the first pursuer.

[22] It was further submitted that an important test for negligence was that the consequences should be reasonably foreseeable. The pursuers' position was that the defenders, by their own admission, had warned the first pursuer that he could lose his toes, feet or even legs, if he neglected them. It was, accordingly, unconscionable that his concerns and queries about the state of his foot should have been "brushed aside" by the defenders (resulting in the outcome – I infer, amputation – which their warnings had been intended to avoid). The pursuers had averred that it was reasonably foreseeable that the failure to refer to a vascular surgeon, and the delays in a correct diagnosis of the first pursuer's condition, would have resulted in the emergency evacuation to a mainland hospital, amputation there, and multiple subsequent hospital attendances which in fact occurred, as opposed to (I infer) conservative and local treatment.

[23] Turning once more to the position of the first defenders it was submitted that the pursuers' claim in negligence arose from a failure to provide an adequate podiatry and diabetic treatment team. The team it did provide failed in respect of both coordination and

management, employed inexperienced or poorly trained staff and failed in its duty to refer to specialists where necessary.

[24] Addressing the defenders' criticisms of the claim stated on behalf of the second pursuer the pursuers submitted that she was owed a "general" duty of care by all of the defenders. As I understood the position, that was because the negligent acts or omissions which caused the physical and mental injuries to the first pursuer resulted in the second pursuer suffering nervous shock and a complete mental breakdown. The fact that she had previously been treated by two GPs, including the fifth defender (who acted as a hospital doctor on 15 February 2015), who had treated her for stress prior to February 2015 was evidence that they were aware of her already delicate emotional state, and that any injury to her husband could cause further problems. Thus, in failing to diagnose the first pursuer's condition either immediately or as a result of further research, or in failing to refer him to a vascular surgeon, it was reasonably foreseeable that she would suffer emotionally from these omissions. In their note of arguments the pursuers made reference to *McLoughlin* v *O'Brian* [1983] 1 AC 410. It was relevant to the test in that case about the ambit of the duty owed by the defenders that the second pursuer was present at the failure to diagnose, and when the first pursuer was loaded onboard the emergency air ambulance. It was at that point that she suffered her nervous shock on the realisation of the severity of the first pursuer's condition, resulting in the mental disability for which she now claimed damages.

Discussion

[25] In addressing the defenders' criticisms of the pursuers' pleadings I propose to start by summarising what I understand to be the essential basis upon which their claim is

advanced. The starting point in the pleadings is in statement 4 where it is averred that since 2004 the first pursuer had been a patient at the Benbecula Medical Practice. It is averred that he had received certain treatment from the Practice as a result of suffering from diabetic foot ulcers. The pursuers then aver that the first pursuer attended the Practice in *October 2014* (my emphasis), and several times subsequently. He saw the sixth defender in October and the fifth defender in *November*. I have emphasised the timing of these consultations because it is tolerably clear from the pleadings that the pursuers maintain that the fifth and sixth defenders were negligent in their failure *at that time* to diagnose wet gangrene, or, if beyond their competence to make such a diagnosis, to "investigate further and follow the trail ", or refer the first pursuer to a specialist. The subsequent averments in statement 4 about a failure to investigate liver function tests all appear to relate to a similar period of time with the result that a "correct" diagnosis was not reached earlier than it was.

[26] The pursuers' position is developed in statement 5, in which it is averred that over the next *three months* the first pursuer's symptoms worsened – despite further consultations with his doctors – to the point where he presented at Uist and Barra Hospital, in February 2015, asking for his blackened toe to be amputated. It was at this point that the pursuers aver that the fifth defender, in his capacity as a hospital doctor, advised (wrongly) that there was infection which would require to be treated with antibiotics before any surgery was attempted. The pursuers' case on record is that the fifth defender should have referred the first pursuer immediately to a vascular surgeon. In failing to diagnose wet gangrene and making such a referral the fifth defender was negligent. (I pause at this point to note that, in statement 6, the pursuers aver that the first pursuer discussed his condition in hospital with

both the fourth defender and a locum doctor, Dr Luedders. There are, however, no averments ascribing any fault to the fourth defender in connection with those discussions).

[27] After two days of intravenous antibiotics in hospital, it is averred in statement 6 that a discussion between the first pursuer and Dr Luedders resulted in a vascular surgeon being consulted and the first pursuer's evacuation by air ambulance to Raigmore Hospital for amputation of the affected toe. In statement 7 the case against the defenders appears to be encapsulated in an averment to the effect that had the first pursuer been referred to a vascular surgeon within three days in October 2014 "the toe[s] may not have needed amputation and it is certain that the first pursuer would not have suffered the physical and mental pain and distress that resulted". The pursuers then elaborate on that position in the succeeding averment that:

> "[T]he fact that the locum doctor immediately consulted a Vascular Surgeon demonstrates that this is the course of action that would be taken by any professional doctor of ordinary skill with hospital experience and further that the first and third defenders should have ensured that the Hospital was staffed by doctors of that level of experience."

[28] Those averments I have just described provide the context for the second pursuer's claim in statement 8. The pursuers assert the existence of a duty of care on the part of the defenders (collectively) not to cause the second pursuer undue anxiety and distress which appears predicated, at least in part, on the second pursuer having been a patient of the Benbecula Medical Practice, and consulted the Practice on matters relating to her emotional state. The precipitating event for what is described as a complete mental collapse was the first pursuer's removal by air ambulance to the mainland. Critically, however, there is no averment of any formal diagnosis of a recognised psychiatric condition.

[29] I will now address each of the submissions advanced by the defenders in the order in which they were presented.

Duty of care

[30] The arguments under this heading focussed on the claim by the second pursuer. I consider that the defenders were correct to characterise the claimed duty of care as a novel one. In that situation the approach of the court must be to consider the closest analogies in the existing law and to weigh up the reasons for and against imposing liability in order to decide whether the existence of a duty of care would be just and reasonable (*Robinson* v *West Yorkshire Chief Constable, supra.,* per Lord Reed at paragraph [29]). I was not referred to any authority in which a duty, to an individual in the position of the second pursuer, had been held to exist in anything like the circumstances averred by the pursuers in this case. Indeed, although recognising the limitations on the authority he cited, Mr Pugh pointed out that the contrary was indicated in the passage in *Jones: Medical Negligence, supra.,* paragraph 2-082, in which it is stated that, as a general rule, a doctor will not owe a duty of care to a third party arising out of the treatment of a patient. Counsel had otherwise been unable to trace any authority in which a doctor had been held to owe a direct duty to the spouse of a patient.

[31] I agree with the defenders' submission that, in the situation just described, the pleadings fail to disclose any cogent basis for holding that a duty of care was owed to the second pursuer as spouse of the first pursuer. Indeed, foreshadowing the territory addressed in the next chapter in the defenders' submissions, I consider that the authorities which deal with the status of a secondary victim, and the circumstances in which such a claimant can recover damages, point away from there being any such duty, and that there

are probably sound policy reasons for them to do so (cf *Liverpool Women's Hospital Foundation Trust* v *Ronayne, supra.*, per Tomlinson LJ at paragraph 10). In the instant case all that is pled in favour of the existence of a direct duty of care is that the second pursuer was the spouse of the first pursuer and was present at certain specific events. In as much as the pursuers' pleadings invoke, by way of analogy, the case of *McLoughlin* v *O'Brien, supra.*, I consider that it is readily distinguishable from the circumstances of the present case as one in which the plaintiff had in effect been so closely linked to the accident giving rise to her family's injuries that she could properly be described as having been a direct witness to it. Even in that situation Lord Wilberforce observed (at p 419) that her claim was "upon the margin" of what may be permitted. Viewed in that context, and without requiring to doubt that the second pursuer has suffered anxiety and distress as a result of her husband's deteriorating condition, I do not consider that the averments in statement 8 are sufficient to establish the existence of the direct duty of care contended for.

Second pursuer as secondary victim

[32] Absent any direct duty of care, I am equally persuaded that the defenders are correct in submitting that no relevant basis has been pled for the recovery by the second pursuer of damages as a secondary victim. From the terms of statement 8, the pursuers appear to recognise that, in order for her to recover damages, the second pursuer requires to be able to aver and prove that her illness must have been induced by her presence at certain specific events. The defenders' submissions founded primarily on the requirement for any illness to have been caused by "a sudden shocking event" (*Liverpool Women's Hospital NHS Trust* v *Ronayne, supra*, at paragraph 10), that being one of the four requirements for recovery of

damages established by existing authority. (A separate question arose during argument about whether English law recognised a fifth requirement – for there to be a "frank psychiatric illness or injury" – which I find it unnecessary to resolve since the defenders advanced a distinct argument under reference to *Rorison* v *West Lothian College, supra.* and *JD* v *Lothian Health Board, supra.*, to which I will return).

[33] There have been cases involving secondary victims claiming damages in the context of clinical negligence (see e.g. *Shorter* v *Surrey and Sussex HC NHS Trust* [2015] EWHC (QB); *Ward* v *The Leeds Teaching Hospital NHS Trust* [2004] EWHC 2106 (QB); *North Glamorgan NHS Trust* v *Walters* [2003] PIQR P16). Such cases, however, do not appear to dilute the requirement, which the defenders submitted was missing from the circumstances averred in the instant case, for the claimant to have been exposed to a shocking or horrifying event, judged objectively. On the contrary, my reading of the cases cited to me points to there being a requirement, or control mechanism, if you will, for the trigger event to be exceptional in character and suddenly appreciated by the victim. The pleadings do not, in my view, come close to attaining the description of an event of that character.

[34] It follows that, on this limb of the defenders' argument too, no relevant basis has been pled for the recovery of damages by the second pursuer, and it must necessarily be dismissed.

[35] That being so, it is not strictly necessary to resolve that part of the discussion which touched on whether there is further requirement, for the recovery of damages by a person other than the party injured, such that the claimant must have suffered a recognised kind of psychiatric illness or injury (cf *Liverpool Women's Hospital NHS Trust* v *Ronayne, supra.*, at paragraph [7]). I confine myself, therefore, to observing that the present position in Scotland

appears to be tolerably clear. It is that a claim for emotional loss, in the absence of recognised psychiatric injury, is insufficient to found a claim for damages (*Rorison* v *West Lothian College supra,* at paragraphs 16-08 to 16-11). *Rorison* is a case well known to those practising in that area of the law which involves the development of stress-related conditions arising from the conditions of an individual's employment. But it was not suggested by any party that the requirement to aver and prove a recognised psychiatric condition was peculiar to those sorts of cases. What seems to me to be important is that, in the case of the second pursuer, there is no suggestion of her having suffered any physical injury, and it is that feature of this case which brings about the requirement for averment and proof of such a condition (cf *JD* v *Lothian Health Board, supra.,* at paragraph [69]). Properly construed, the pleadings do not, in my view, give notice of an intention to prove that the second pursuer suffered, and continues to suffer, from a recognised psychiatric illness. A claim on her behalf based on negligence cannot, therefore, succeed.

Standard of care

[36] I turn now to address the defenders' criticisms of the pursuers' pleadings relative to the standard of care which should have been adopted on the part of the doctors treating the first pursuer. I preface the discussion on this point with an acknowledgment, under reference to *JD* v *Lothian Health Board, supra,* paragraph [68], that the court should obviously be slow to dismiss an action on relevancy alone. Lord Glennie's observations, in what was a dissenting opinion in that case, lean much upon the point that it is dangerous to speculate, in the absence of evidence, as to how the matter will ultimately fall to be resolved and that, where issues of credibility and reliability may be critical, they should be resolved at proof.

In spite of what is said about the absence, in the Rules of the Court of Session, of a process of "reverse summary decree", however, I do not understand those observations to preclude the dismissal of an action at debate in appropriate cases.

[37] In the present case the pursuers criticise the fifth and sixth defenders (as GPs) for failing in their duty to "follow the trail of worsening wet gangrene and infection (sepsis)", and failing also to follow up kidney function tests which could be a sign of severe infection. Had they done so, or referred the first pursuer to a specialist, "it would have assisted in a correct diagnosis much earlier than was the case" (statement 4). However, the pleadings only actually identify, as the critical points in time when various of the defenders are said to have been negligent, (i) October 2014, when the first pursuer was seen by the sixth defender; (ii) November 2014, when he was seen by the fifth defender, and (iii) February 2015, at a point in time two days prior to the intervention by the locum, Dr Luedders, when he was seen by the fifth defender (on this occasion, apparently, in his capacity as a hospital doctor) and a podiatrist employed by the first defenders (the Health Board). In relation to the first two of those points in time, the pleadings are entirely silent on what action should have been taken by the GPs most nearly concerned if adopting the ordinary and usual practice of such a doctor of ordinary skill, acting with ordinary care. All that I can discern from the pleadings, in relation to the standard of care provided by the fifth and sixth defenders, is the reference, in statement 7, to the "Advice to General Practitioners and Podiatrists" to the effect that patients presenting (I infer) like the first pursuer should be referred within three days to a vascular surgeon. That will not do. There is no averment that such would have been the course adopted by the ordinarily competent GP. In fact, the only attempt in the pleadings to engage with the test in *Hunter* v *Hanley* is the averment in statement 7 that the

fact that the locum (hospital) doctor immediately consulted a vascular surgeon "demonstrates that this is the course of action that would be taken by any professional doctor of ordinary skill with hospital experience…" (and that, notwithstanding the pursuers' own averment, in statement 6, that Dr Luedders had himself previously discussed his condition with the first pursuer). I do not, however, read that averment as advising anything about the situation when, in October and November 2014, the first pursuer was consulting with his GPs. In that respect, I agree with the defenders' criticisms of the pleadings which focus on the lack of any averments as to what would have constituted the ordinary and usual practice of the GPs who saw the first pursuer at that time (cf *Honisz* v *Lothian Health Board, supra.*, at paragraph [36]).

[38] The absence of such averments means that there is no basis upon which evidence could be led as to what constituted such practice. That would be fatal to any case of this kind after proof. Accordingly, this is simply not a situation in which, to employ Lord Glennie's words in *JD* v *Lothian Health Board, supra.*, it would be dangerous to speculate, in the absence of evidence, as to how the matter will ultimately fall to be resolved. Rather, in the absence of such critical averments, no speculation is necessary.

[39] The situation relative to the fifth defender, when he is averred to have treated the first pursuer in hospital in February 2015, is more nuanced. That is because it might be thought, at least superficially, to make a difference that the pursuers make the averment, in statement 7, about immediate referral to a vascular surgeon under reference to what was said to have been done by Dr Luedders. Taking as sympathetic a view as I can of the pursuers' pleadings it is not, strictly speaking, correct to say that there are no averments as to what course of action the hospital doctor of ordinary competence should have adopted in

the circumstances presented to the fifth defender. However, foreshadowing the arguments advanced by both Mr Pugh and Ms Comiskey on causation, the difficulty which the pursuers' pleadings immediately create is that the fifth defender only saw the first pursuer in hospital some two days prior to his evacuation to the mainland when surgery, involving amputation of the affected toe, was performed. As will become apparent from what follows, I do not consider that the averment about Dr Luedders' actions can provide a lifeline, where the case against the fifth defender is concerned, in the absence of any averment that an emergency evacuation some 48 hours earlier would have made any difference to the outcome.

[40] Finally, in so far as a cloak of criticism appears to be trailed over the conduct of a podiatrist in February 2015 (statement 5), I content myself with observing that there are no averments as to what an ordinarily competent practitioner in the situation of the podiatrist referred to would have advised (if anything, standing the averred advice of the fifth defender at the material time), and with what consequences. That is sufficient to dispose of matters where the podiatrist is concerned.

Causation

[41] Given the problems already identified in the pursuers' pleadings it is perhaps unsurprising that those problems extend to issue of causation. The short point is that there has to be a causal link between the alleged breach of duty and the damage sustained (*Jones: Medical Negligence, supra.*, paragraphs [5-005] – [5-007].

[42] Closer inspection of the pleadings reveals that the only attempt to engage with the issue of causation is in statement 7. But, as Ms Thompson and Ms Comiskey submitted, the

averments do not offer to prove causation to the civil standard of proof on the balance of probabilities. Rather the language used is what *may* have been the result of a referral to a vascular surgeon timeously in October 2014. It does not seem to me to assist the pursuers when they plead that "it is certain that the first pursuer would not have suffered the physical and mental pain and distress that resulted, including financial losses, or the second pursuer her mental breakdown and consequent loss of earnings and pension". That is because that averment is tied to the circumstance of the amputation of the first pursuer's toe. The pursuers do not offer to prove that, absent any breach of duty on the part of the GPs, emergency surgical intervention would probably have been avoided.

[43] Ms Comiskey made the additional point in oral submissions that the averments about causation in statement 7 were also anchored to a date in October 2014 (when he was seen by the sixth defender), whereas the critical consultation involving the fifth defender is averred to have been in November 2014. She submitted that there were no averments about causation at all where a consultation at that time was concerned. I am not convinced that that engages the weaker alternative rule which Ms Comiskey invoked in testing the relevancy of the case against the fifth defender as a GP (cf *Hope* v *Hope's Trustees* (1898) 1 F (HL) 1). The fifth defender would be properly convened in the action, as a partner in the Benbecula Medical Practice, if a relevant case had otherwise been pled in relation to the sixth defender (or, indeed, the fourth defender). However, the question whether the rule applies or not is sterile because (i) I agree that there are no averments about causation in relation to any consultation in November 2014, and (ii) I have found that no relevant case has been made out against the second defenders and the GPs who worked there.

[44] Finally, the same criticism of a want of any pleadings on causation applies to the position of the fifth defender (and, in so far as their position depends on the case made against him, the first and third defenders). The pursuers' case is that the first pursuer presented at Uist and Barra Hospital asking for a toe to be amputated because he was in so much pain (statement 5). Amputation is the consequence for which, ultimately, the pursuers claim damages. There is nothing to suggest that a referral to a vascular surgeon by the fifth defender in February 2015, if that is what the pursuers contend should have happened, would have affected the outcome. That is a fatal omission from the pleadings.

[45] For completeness I do not consider that the references, in statement 5, to cellulitis and the use of Metronidazole, assist in relation to any of the pleading difficulties to which I have made reference. There is indeed no explanation as to how the first pursuer's condition was affected either by his receiving treatment for cellulitis or being given Metronidazole.

Expert report

[46] Finally, I wish to deal with the submissions which were concerned with the absence of an expert report. It was submitted on behalf of the defenders that allegations of professional negligence require a proper foundation. Without such underpinning, the court was not in a position to make a finding in favour of the pursuers, and allegations must always be buttressed by a report from an appropriate witness which states that the course taken was one that no doctor exercising ordinary skill and care would have taken (*Tods Murray WS* v *Arakin Ltd* [2010] CSOH 90 at paragraph [92]).

[47] It is clear from the Opinion of Lord Woolman in *Tods Murray* v *Arakin Ltd, supra* that the defenders in that case, in seeking to advance a counterclaim, had never had the benefit of

an expert report to provide the kind of underpinning which the Court had in mind. In those circumstances, it is perhaps unsurprising that the counterclaim was not only held to be irrelevant and lacking in specification but an abuse of process: see paragraphs [116], [124]-[125], and [143]. In the instant case the first pursuer, in his reply to the defenders' submissions, disputed that the pursuers did not have the benefit of an expert report. He referred specifically to a report by Mr Siddiqui, who was the vascular consultant responsible for the first pursuer's treatment at Raigmore Hospital. That plainly does not address the absence of any report in relation to the conduct of the GPs under attack. Nor does it address the absence of a report by an independent expert. Ultimately, I understood the first pursuer to accept that the pursuers do not hold an independent report on either liability or causation. He made mention of the difficulty in instructing such evidence in circumstances where, in the islands, GPs performed the function of hospital doctors. He also made the point that the presentation of his symptoms at the material time was really too basic to have been overlooked. He had understood, from a Significant Events Report prepared by the second defenders (which is mentioned in statement 4, but not elaborated upon in the pleadings) that the only issue between the parties was one of quantum. In any event, the first pursuer disputed the characterisation of the action as an abuse of process. Not only did the pursuers have information from Mr Siddiqui. They referred in the pleadings to guidance in the British Medical Journal which I understood to concern circumstances in which a referral should be made to a vascular surgeon. In other words, the defenders had notice of where the pursuers' allegations of negligence came from.

[48] I am quite prepared to proceed on the basis that the pursuers have pursued their claim in good faith. Having heard the first pursuer in response to the criticism of a lack of

any expert report I am satisfied that this is not a case in which the pursuers' conduct can be described as vexatious. Nor do I consider this to be a situation in which the pursuers have deliberately gone about wastefully occupying the time and the resources of the court with a claim that is obviously without merit (cf *Clarke* v *Fennoscandia Ltd (No 3)* 2005 SLT 511). I believe that the pursuers do conceive that their claims have merit. In these circumstances, I am reluctant to characterise the action as an abuse of process. However, there is no getting away from the absence of any independent support for the allegations which have been put forward, or their consequences. The first pursuer, in addressing this argument, offered up no prospect of such independent evidence becoming available. In this unfortunate situation, there is force in the point made by Ms Comiskey that the absence of a report from a vascular surgeon (or, I might add, a GP) has contributed to the pursuers' inability to make relevant averments about both standard of care and causation. Without such reports the relevancy and specification of the pleadings cannot be improved upon. Accordingly, the proper course is to dismiss the action.

Postscript on prescription

[49] The defenders each tendered pleas of limitation. By way of response the pursuers tendered to the court, in advance of the debate, a timeline of events said to address the critical passage of time. In what became a position common to all defenders Mr Pugh advised me that he was content for the court, if it were otherwise unpersuaded by the defenders' submissions, to afford the pursuers the opportunity to amend their pleadings to reflect that timeline of events. That was an expedient course to take. However, in the view I

have taken of matters, it is unnecessary for me to do or say more on the matter of prescription.

Decision

[50] In the result, I have acceded to the motion made on behalf of each of the defenders and dismissed the action. In doing so I recognise that the nature and complexity of the arguments which I heard, while presented with complete fairness by Mr Pugh, Ms Thomson and Ms Comiskey, would have presented challenges for anyone called upon to defend the pursuers' pleadings. The pursuers made their submissions to the court with both courage and courtesy. Ultimately, however, I have reached the conclusion that the action in its present form is indeed irrelevant and so lacking in specification that decree of dismissal is unavoidable. Since I did not hear parties specifically on their disposal, I have reserved meantime the question of the expenses of the debate. If it is necessary for any matter of expenses to call before the court I would ask that parties liaise with the sheriff clerk in order that a suitable date can be identified.