SHERIFFDOM OF LOTHIAN AND BORDERS

IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2020] EDIN 37

EDI-PN3021-19

NOTE BY SHERIFF KENNETH J McGOWAN

in the cause

LILIYA TSETVANOVA

Pursuer

against

CHRISTOPHER WALDEN

Defender

Pursuer: Nicol, Advocate; Thorley Stephenson
Defender: Murray, Advocate; Anderson Strathern

Edinburgh, 21 October 2020

Introduction

[1] This case came before me on the defender's motion for an order that the pursuer should be required to find caution.

The pursuer's case as pled

[2] To put the matter in context, I begin by quoting the relevant part of the pursuer's pleadings. The pursuer offers to prove the following facts:

4. On 18 December 2016 at 8/6 Chalmers Buildings, Edinburgh, the Defender attempted to enter the pursuer's property. The pursuer was in fear of her life. As a result she exited her property through a window and attempted climb down a drainpipe. In doing so she fell and sustained serious and significant injuries. ***With reference to the defender's averments in answer not known and not admitted that on 18 December 2016 the defender had attended a University of Edinburgh reunion event with his wife. Not known and not admitted the defender had consumed alcohol at this event. Not known and not admitted after the event that, the defender became separated from his wife. Not known and not admitted the defender believes that somebody may have attempted to mug him. Not known and not admitted the defender was in a state of terror. Not known and not admitted he entered the stairwell of the pursuer's building in terror. Quoad ultra denied. Explained and averred that the defender was prosecuted under Section 38 of the Criminal Justice and Licensing Act (Scotland) Act 2010. It is understood that he pled guilty to that office. The defender was ordered to pay the pursuer compensation of £2,000. When the defender attended at her property the pursuer was in fear of her life. The pursuer reasonably believed that the defender was attempting to break into her property to cause harm to her. There was no other exit from her property aside from a window on the second floor of the building with a drainpipe in order to make good her escape. The defender is called upon to confirm whether he provided the explanation that he has on Record to the Police. His failure to answer this call will be founded upon. The defender is called upon to confirm whether he pled guilty to the offence. His failure to answer this call will be founded upon.***

[3] The pursuer's case is law is articulated thus:

7. The claim is based on a breach of common law. ***The defender was under a duty not to bang on the pursuer's door as he did. He was under a duty not to use an implement or otherwise. He was under a duty not to terrify the pursuer. He was under a duty not to attempt to enter the pursuer's property. But for these failures in duty the pursuer would not have sought to escape from the window of her property down a drainpipe.***

[4] It was accepted by Mr Murray for the defender that at this stage, it was appropriate for me to proceed on the hypothesis that the pursuer's factual case would be proved.

[5] Insofar as relevant to the present case, the applicable principles may be summarised as follows[1]:

a. Whether a party to an action should or should not find caution or security for the expenses that may be awarded against him is a matter entirely within the discretion of the court.

b. The court will not make such an order unless the interests of justice appear to require it.

c. The court may in its discretion ordain either the pursuer or the defender to find caution, but in practice an order is made only in cases where the party against whom it is asked is an undischarged bankrupt or is a nominal pursuer, or where special circumstances exist.

d. Poverty alone is not a sufficient ground for ordering caution for expenses, since such an order "would be nothing short of shutting the doors of the court upon" the poor litigant.

e. Apart from the case of an undischarged bankrupt, the court will order caution only in exceptional circumstances.

f. On the other hand, if the litigant does not have a stateable case and is unable to meet an award of expenses, it would be unfair to oblige an opponent to continue the litigation without any prospect of recovering expenses in the event of success.

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[1] *Sheriff Court Practice*, MacPhail, 3rd edition, W. Green & Sons Ltd, Edinburgh, 2006, paras 11.52 - 11.60.

g. As to the amount of the caution, that too is a matter for the discretion of the court, taking account of the probable amount of costs taking into account the chance of the case collapsing. It must be just as between the parties.

h. Since the court has a discretion whether or not to order caution for expenses to be given, there may be circumstances in which the court may not require caution although the case falls within one of the foregoing categories, and other circumstances in which the court may require caution although the case does not fall within any of these categories.

i. The court may require caution upon a consideration of the cumulative effect of a number of factors none of which of itself might be sufficient to justify an order.

Submissions for defender

[6] The defender moves the court in terms of OCR rule 27.2 to ordain the Pursuer to find caution or give security in the sum of £19.000, or such other sum as the Court deems fit, within a period of 14 days.

[7] The pursuer sues for personal injuries in respect of a fall from a drainpipe outside her flat on 18 December 2016. She avers that the defender attempted to enter her flat, that she was in fear of her life and that she left her property by climbing out of a second-floor window.

[8] The pursuer's case is that the defender was in breach of common law duties of care which he owed her, namely: not to bang on her door, not to use an implement, not to terrify the pursuer and not to attempt to enter her property. The pursuer's case is brought in negligence, not intentional delict.

[9] The matter was one for the discretion of the court: *Stevenson* v *Midlothian DC* 1983 SC (HL) 50).

[10] Although impecuniosity alone was not sufficient, a wide variety of factors could be taken into account in determining a motion for caution. The overriding principle is that the defender is entitled to be protected against the necessity of incurring heavy expenses where the nature of the litigation is such that the interests of justice require such protection: *McTear's Exrx* v *Imperial Tobacco Ltd* 1996 SLT 514.

[11] In *Rush* v *Fife R.C.* 1985 SLT 451 it was said:

> "Ordering caution on a man who is manifestly not in a financial position to provide any sum of substance may appear to be a draconian order, but justice has to be even handed, and on the other side of the coin it would be grossly unfair to oblige the defenders to carry on defending an obviously irrelevant action without any hope of recovering any expenses if successful."

[12] The pursuer's case appears to proceed on the basis that the defender was convicted of a contravention of section 38 of the Criminal Justice and Licensing (Scotland) Act 2010. The material part of that section provides:

> "3**8. Threatening or abusive behaviour**
>
> (1) A person ("A") commits an offence if—
>
> (a) A behaves in a threatening or abusive manner,
>
> (b) the behaviour would be likely to cause a reasonable person to suffer fear or alarm, and
>
> (c) A intends by the behaviour to cause fear or alarm or is reckless as to whether the behaviour would cause fear or alarm."

[13] It is not necessary to sustain a conviction for the defender either to have placed a particular person in a state of fear and alarm, nor to have been reckless as to whether the behaviour complained of would place a particular person in a state of fear and alarm

[14] The pursuer's case is that the defender is liable at common law for unintentional harm caused negligently. Her claim is actionable only if the unintentional harm was done in breach of a legal duty:

a. that in the circumstances a recognised legal duty of care existed;

b. that the ambit of the duty extended to protect the pursuer;

c. that the legal duty owed by the defender to the pursuer was broken;

d. that the breach of duty caused the harm to the pursuer;

e. that at least part of the losses sustained by the pursuer was not too remotely connected to the breach of duty: *Gilmour* v *Simpson* 1958 SC 477, per Lord Wheatley at 479.

[15] There is no recognised general duty of care to take reasonable care to avoid placing persons in a state of fear or alarm. Primary victims may claim damages for psychiatric injury which results directly from a particular breach of duty, for example by employers. Claims by secondary victims are limited to relatives injured in particular factual circumstances. The pursuer's claim as a primary victim is neither for personal injury inflicted by the defender, nor psychiatric injury inflicted by the defender.

[16] Moreover, if such a duty does exist, any breach of that duty by the defender did not cause the pursuer physical or psychiatric injury. It was not reasonably foreseeable that as a result of the defender's actions the pursuer would sustain physical injury, in particular by taking the extraordinary step of climbing out of the window. The pursuer's actions of climbing out of a window were not the reasonably foreseeable consequence of the defender's actions. They were voluntary, informed and unreasonable, such as to constitute a *novus actus interveniens*: *Clay* v *TUI UK Ltd* [2018] EWCA Civ 1177; *Beaumont* v *Ferrer* [2016] RTR 25.

[17] The defender has no insurance which will respond to the pursuer's claim against him. He is privately funding his defence of these proceedings. The pursuer applied for civil legal aid in order to bring these proceedings. The financial eligibility criteria for an application for legal aid are such that it can be reasonably inferred that she could not meet an award of expenses made against her. The pursuer is therefore not in a position to pay for the consequences of a failure to successfully prosecute the action.

[18] The factual circumstances on which the pursuer's case is based are unusual, as is the formulation of her grounds of fault. It is submitted that there is no general duty not to cause fear or alarm to others which results in liability for damages in the absence of personal or psychiatric injury arising directly from placing a person in fear or alarm. Even if there is such a duty, the pursuer's extraordinary step of climbing out of a second-floor window clearly constitutes a *novus actus interveniens*.

[19] The defender should not bear the financial consequences of the pursuer's failure to successfully prosecute her case. It is submitted it would be appropriate for the motion to be granted.

Submissions for pursuer

[20] The motion should be refused.

[21] The pursuer's cases was based on the conviction. The factual position put in issue was that the defender had accepted by his guilty plea that he intended and did cause fear and alarm to the pursuer. The averments were about the events taking place at the pursuer's home.

[22] The adjustment period was still running. The pursuer's case was a stateable one.

[23] The test was well known. The position in *Stevenson* was the reverse of the present case.

[24] The defender could not say that the pursuer did not have a stateable case.

[25] It was open to the defender to argue *novus actus interveniens*, but such issues were fact specific: *Clay*, para. 50. There was an issue to try. It would be wrong for the court to bar the pursuer from access to court by making the order sought. Legal Aid had been refused but the pursuer was funding the litigation herself.

[26] If the court was to make an order for caution, there was no warrant for the sum mentioned. The expenses of the action, even if it proceeded to proof would be substantially less.

Grounds of decision

Pleadings not yet finalised

[27] Mr Murray proceeded on the assumption that the pursuer's averments would be proved and he made a root and branch attack on (i) the primary legal basis (duty) and the (ii) causation (*novus actus interveniens*). Mr Nicol did not suggest that there was other material not yet pled which he wished to or could place reliance on. Accordingly, this factor appears to me to be of little significance.

Existence and scope of duty

[28] If a claim is brought on the basis of what is said to be a negligent act but it turns out that but it turns out that the act complained of was deliberate, then it appears to me that the action could still succeed, whereas the opposite would not necessarily be true. But the conviction is specifically referred to in the pleadings (though not formally adopted) and it is

a self-proving document. Put another way, the pursuer has perhaps underpled the case here, but the basis of the case is clear. As to the whether the pursuer was the 'victim' of the defender's actions, the pursuer offers to prove that he was ordered to pay compensation to her. That suggests that the court was made aware of some kind of loss or injury or damage accruing to the pursuer (though not necessarily personal injury) as a result of the defender's actions.

[29] I do not suggest that the foregoing means that the pursuer will necessarily prove that breaches of duty desiderated, because an exploration of the precise sequence of events may be required before the court is able to reach a concluded view, but if proved it appears to me that it cannot be said that the pursuer does not have a stateable case in relation to the first three elements described by Lord Wheatley in *Stevenson*, namely: that in the circumstances a recognised legal duty of care existed; that the ambit of the duty extended to protect the pursuer; and that the legal duty owed by the defender to the pursuer was broken.

Causation

[30] Mr Murray made reference to the case of *Clay* (I did not see the relevance of *Beaumont* which appears to focus on *ex turpi causa*). In that case, the plaintiff had been on holiday in Tenerife with his wife, their two children and his parents. He and his wife and children were in one room and his parents were next door. Both rooms were two stories up and each had its own balcony, accessible from the room via a door. One evening, the plaintiff, his wife and parents were on his parents' balcony. The plaintiff went to use the toilet, and on returning to the balcony, closed the door which locked, trapping the family on the balcony. They tried to attract attention for about 30 minutes unsuccessfully and then the plaintiff decided to step across from his parents' balcony to the balcony of his room. In doing so, he stood on the ledge of a balcony which gave way and he fell and fractured his skull. He

brought a claim against the respondent relying on the Package Travel, Package Holidays and Package Tours Regulations 1992.

[31] After trial, the judge found that the lock on the sliding door was defective and that that was a breach for which the respondent was liable, but concluded that the plaintiff's actions were so unexpected and/or foolhardy as to be a *novus actus interveniens*. The judge observed that at the relevant time, the group were in no direct danger.

[32] The appeal was dismissed, the court holding that determining whether there had been a *novus actus interveniens* required a judgment to be made as to whether the sole effective cause of the injury suffered was the *novus actus interveniens* rather than the prior breach of duty, in order to determine whether the latter had been eclipsed so as not to be an effective or contributory cause in law. Where the line was to be drawn was not capable of precise definition. The judge had contrasted the absence of danger, emergency or threat from being trapped on the balcony with the obvious risk of life threatening injury involved standing on the ledge of the balcony, weighing the degree of inconvenience to which the plaintiff had been subjected with the risks taken in order to try and do something about it; and had had appropriate regard to the degree of unreasonableness required for the plaintiff's conduct to amount to a *novus actus interveniens*.

[33] In my opinion, the foregoing highlights that this type of question is fact-sensitive and one that may often only be capable of answer after the precise facts and circumstances are established after proof (as happened in *Clay*). Furthermore, the facts in Clay were much less favourable for the plaintiff than they appear to be for the pursuer here, who offers to prove that she was placed in a state of fear and alarm. While there may be some cases where it may be possible to say that the admitted conduct in question of a pursuer would plainly amount to *novus actus interveniens*, this is not one of them.

Impecuniosity

[34] I do not agree that I should infer that the pursuer is impecunious. I was told that the pursuer was funding this litigation herself. It appears that she is in work and occupies a flat either as proprietor or tenant. In any event, impecuniosity alone is not sufficient grounds for ordering caution: *Rush.*

Disposal

[35] I am not satisfied that the interests of justice require that the pursuer find caution. The defender's motion is refused. All questions of expenses are reserved meantime.