OUTER HOUSE, COURT OF SESSION

[2022] CSOH 83

A142/19

OPINION OF LORD CLARK

In the cause

JAMES McGRAW

Pursuer

against

GREATER GLASGOW HEALTH BOARD

Defender

Pursuer: Mackay KC; Lloyd; Friends Legal
Defender: Doherty KC; Drysdale; NHS Scotland Central Legal Office

23 November 2022

Introduction

[1] The pursuer seeks damages, alleging negligence on the part of a pathologist, a surgeon and a radiologist. The case called for a diet of debate, at which the defenders challenged the relevancy and specification of the pursuer's pleadings in the claim against the radiologist.

Background

[2] In November 2012, the pursuer had a lesion on his right cheek. He went to see his GP and was referred for further examination. In 2013, a biopsy found that it was a form of

skin cancer, known as basic cell carcinoma (BCC). A further lesion had in the meantime appeared on his left temple and this was considered to be another area where BCC was present. In 2014, surgery took place to excise the BCC in each area. After the surgery the pursuer was advised that it appeared that the BCC had been completely excised.

[3] However, following further symptoms he was given scans and biopsies and the view was reached that in fact the cancer had spread further into his left temple. He was given surgery again in November 2015. Post-operative CT and MRI scans were carried out and reports on them were prepared by a consultant radiologist. Matters were then considered by a multi-disciplinary team. Further surgery was recommended. Another MRI scan was done and reported upon by a radiologist. The further surgery then took place in late December 2015, carried out by a consultant surgeon (Mr Wales). Part of the surgery involved the pursuer's left eye being removed.

[4] The pursuer makes three claims of negligence against medical practitioners. The first allegation is that a pathologist who prepared a report in 2014, after the initial surgery to remove the BCCs, failed to recognise the existence of an aggressive basosquamous tumour on the pursuer's left temple. If it had been recognised, the pursuer claims that there would have been re-excision at that time, avoiding the need for the more extensive surgery later which caused the loss of his left eye. The second allegation is that Mr Wales failed in certain respects, including not discussing the range of options open to the pursuer and not taking steps which, had they been taken, would have shown there was no need to remove the left eye. The third allegation is that, to the extent that Mr Wales relied upon particular CT and MRI scan reports by the radiologist, these were wrong and the radiologist was negligent in preparing them.

[5] At the debate, the defenders argued that the pursuer's case against the radiologist (the third allegation above) was irrelevant *et separatim* lacking in specification, on both breach of duty and causation, and that as a consequence a number of averments should be excluded from probation. The pursuer's averments in respect of the first and second allegations were not challenged and it was accepted that they are suitable for a proof before answer. On behalf of the pursuer, it was argued that the pleadings on breach of duty and causation relating to the radiologist were relevant and gave sufficient specification.

Averments on fault and negligence

[6] The Closed Record is lengthy and the pursuer makes a number of averments referring to the radiologist, but there are two short passages of particular importance for present purposes:

> "Explained and averred that the MRI scan did not show tumour extension into the lateral wall of the orbit or suspicion of malignant dural involvement. The scans were reported to a standard below that to be expected of an ordinarily competent Consultant Radiologist exercising ordinary reasonable care." (Article 8)
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> …
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> "Further, to the extent that Mr Wales relied upon the reports of the radiology, the pursuer suffered the loss of his eye as a result of the fault and negligence of the reporting radiologist." (Article 15)

Submissions

Submissions for the defenders

Breach of duty

[7] The test for establishing negligence in diagnosis or treatment is whether the doctor has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of, if acting with ordinary care (*Hunter* v *Hanley* 1955 SC 200, Lord President Clyde at 204-5).

The pursuer makes certain averments as to what the scans on 1 December 2015 did and did not show. It is a separate question whether or not the reporting radiologist was negligent. The *Hunter* v *Hanley* test applies to that question (*Penney* v *East Kent Health Authority* [2000] PNLR 323, Lord Woolf MR at 329C-330G). Other than the general allegation (in the first of the passages of averments quoted above), no indication is given of the manner in which the radiologist was negligent. The pursuer has not averred that (1) there was a normal and usual practice in December 2015, (2) that the radiologist did not adopt that practice, or (3) that the course that the radiologist adopted was one which no consultant radiologist of ordinary skill would have taken had they been acting with ordinary care. The pursuer made further averments that the report following the MRI scan performed on 18 December 2015 was inaccurate. Again, the pursuer made certain averments as to what the scan did and did not show but had not averred any of the points (1), (2) and (3) mentioned above. The second passage of averments quoted above was also irrelevant as no averments are made setting out the legal or factual basis for the assertion of fault and negligence by the radiologist.

[8] The pursuer required to have averments about the following four questions. Firstly, what was to be seen on each scan. Secondly, why no radiologist of ordinary skill would have failed to see it. Thirdly, how a radiologist with ordinary skill should have reported it. Fair notice required the pursuer to explain what the radiologist should have done, thus specifying what the fault is or how it can be inferred (see *Argyll & Clyde Health Board* v *Strathclyde Regional Council* 1988 SLT 381). Lastly, whether no radiologist of ordinary skill would have reported as the radiologists did here. While there were some limited averments on the first point, there were no averments on the other matters. The suggestion by the pursuer in his Note of Argument that the averment in the last sentence in the first passage quoted above was simply a way of expressing this test or standard was not correct. There

had to be an averment that no radiologist would act in this manner. In passing, while not a pleadings point, there was nothing in the pursuer's expert report addressing this test. Moreover, in relation to averments about one of the scan reports (the MRI scan on 18 December 2015), the pursuer did not specify who wrote the scan report and whether it was a junior doctor or a consultant, a matter relevant to the standard required to be met. In relation to Mr Wales, there was no averment that he relied upon the radiologist's report and the allegation was not founded upon "*esto*" he had done so.

Causation

[9] The averments in relation to the radiologist were irrelevant because the pursuer must aver a causal link between allegedly negligent reporting and the loss of the eye. No chain of events was set out and no causal link was stated. The pursuer avers that the decision to proceed to surgery was a multi-team decision. The pursuer makes no averments about what decisions about treatment would have resulted if something different was said in the reports nor does the pursuer say that Mr Wales did not review the MRI scan. There were no averments of what would have happened had the reporting been non-negligent. Nowhere does the pursuer aver that with non-negligent reporting there would have been no surgery at all or it would have been performed differently. It was unfair to leave it to the defenders to deduce what the reports should have said. The pursuer should spell that out.

Submissions for the pursuer

Breach of duty

[10] The sum total of the pursuer's case was that he had his eye removed for no reason at all. Following upon the radiology imaging there was further imaging and then a

multi-disciplined meeting, at the end of which it was determined there should be an operation. The pursuer accepted that the test set out in *Hunter* v *Hanley* is the touchstone but as Lord Clyde noted every case must depend on its own particular circumstances. The case of *Penney* v *East Kent Health Authority* was to some extent analogous to the present case. The first question to be answered was what was to be seen in the imaging. In the present case the pursuer avers what was seen and that it was not what was reported by the radiologist. As stated in *Penney*, the judge deals with matters of fact as to what the slides show. The pursuer avers here that a reasonably competent radiologist should have seen, if exercising reasonable care, what was shown in the scan images. The judge has to consider the expert evidence but make his or her own findings on the issues of fact, including on negligence. It was accepted that the specific form of wording used in *Hunter* v *Hanley* was not stated in the averments. However, the pursuer offered to prove that the conduct fell below the standard, and that standard was that no competent radiologist would have reported what was in fact reported.

Causation

[11] The pursuer avers that according to the report by the radiologist on the CT scan on 1 December 2015 the cancer had not been excised in the first operation, but had only been partially excised and had spread to the bony orbit. It is also averred that in fact the image showed that the soft tissue mass noted pre-operatively had been excised. There was excision of tumour and not bone destruction by the tumour. The pursuer therefore averred what the scan did not show and in fact what it did show. In relation to the report on the MRI scan of 1 December 2015, there are averments as to why it is incorrect. The pursuer also sets out the reasons for the MRI scan on 18 December 2015, which was the extent of the

tumour spread. This presupposed the existence of a tumour as identified in the previous CT scan on 1 December 2015, according to the radiologist's report on that scan. What the report said is set out and it is averred that the report is inaccurate. In essence, it is averred that the images identified in the report as apparently showing cancer being present in fact showed just the consequences of the earlier operation, including post-operative scarring. The references in the pleadings to the reports being inaccurate about the cancer having spread plainly implied that what should have been said in the report was that there was no such cancer spread. Fair notice was given.

[12] There was no way for the pursuer to know what influenced the decision by Mr Wales of what surgery should take place. All the pursuer has is the medical records, so his advisors cannot discover the extent of the influence of the imaging evidence. Questions had been asked of Mr Wales, but they remained unanswered. To the extent that Mr Wales relied upon the radiologist's reports, the pursuer suffered loss of his eye. The pursuer could make no averments that he did so rely, because they had no evidence to that effect, but it was likely that the imaging was critical to his decision and the imaging was negligently reported upon. There were sufficient averments on causation.

Decision and reasons

[13] The principles for determining questions of relevancy and specification are set out in widely-known and regularly cited authorities. In view of their common application, the relevant *dicta* need not be rehearsed in full here, but these are four key points:

- "The true proposition is that an action will not be dismissed as irrelevant unless it must necessarily fail even if all the pursuer's averments are proved. The onus is on the defender who moves to have the action dismissed, and there is no onus on the pursuer to show that if he proves his averments he is bound to succeed." *Jamieson* v *Jamieson* 1952 SC (HL) 44, Lord Normand at 50.

- "…it is undesirable, except in a very clear case, to dismiss an action on the ground that the pursuer's averments are irrelevant and insufficient in law." *Miller* v *South of Scotland Electricity Board* 1958 SC (HL) 20, Viscount Simonds, at 32.

- "In claims of damages for alleged negligence it can only be in rare and exceptional cases that an action can be disposed of on relevancy…It is hardly necessary to say in a Scottish case that the law of negligence in Scotland proceeds on principles of *culpa*, breach of the duty to take that care which the circumstances demand from a reasonable man. These circumstances in any particular case will normally have to be ascertained by evidence. They vary infinitely. The facets and detail of a case on which an assessment of the law must depend cannot be conveyed to the mind by mere averments of the bare bones of the case, and the weighing of the facts for or against negligence may often present a delicate task to the tribunal charged with applying the law." *Ibid*, Lord Keith of Avonholm, at 33.

- "Despite the general caution that lies behind the decision in *Miller*, it remains the law that the pursuer must aver facts and circumstances from which fault can be inferred; the pursuer must give notice either of the precise fault founded upon or of facts and circumstances which, in the absence of a better explanation, infer some fault on the part of the defender." *Argyll & Clyde Health Board* v *Strathclyde Regional Council* 1988 SLT 381, Lord McCluskey, at 383J-K.

Breach of duty

[14] As noted above, senior counsel for the pursuer entirely accepted that the test which falls to be applied is that stated in *Hunter* v *Hanley*: that "no ordinarily competent" skilled person of the kind in question, exercising ordinary care, would have done the act. The central issue is whether the pursuer's averments on breach of duty require to follow the precise wording articulated as the legal test in that case and, if not, whether the wording as expressed by the pursuer equiparates sufficiently with that test. It is no doubt undesirable, and indeed risky, to deviate from the wording in that key authority. Indeed, when dealing with the alleged negligence by the surgeon Mr Wales the pursuer avers that "No ordinarily competent Surgeon exercising ordinary reasonable care would have failed…to do so", and hence closely follows the wording. However, there is no absolute requirement for the

pleadings to mirror that wording exactly and the fundamental point is whether the pursuer's version in relation to the radiologist properly corresponds with the test.

[15] The court was not taken to any authorities which might show examples of usages of language similar to the pursuer's use. But, on a brief perusal of the case law, it can be seen that alternative versions of wording have been used to express the test, referring to the standard of the ordinarily competent skilled person. In *Whitehouse* v *Jordan* [1981] 1 WLR 246, at 257G-258D, Lord Edmund-Davies said:

> "The principal questions calling for decision are: (a) in what manner did Mr. Jordan use the forceps, and (b) was that manner consistent with the degree of skill which a member of his profession is required by law to exercise? …
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> But doctors and surgeons fall into no special legal category, and, to avoid any future disputation of a similar kind, I would have it accepted that the true doctrine was enunciated — and by no means for the first time — by McNair J. in *Bolam* v. *Friern Hospital Management Committee* [1957] 1 W.L.R. 582, 586 in the following words, which were applied by the Privy Council in *Chin Keow* v. *Government of Malaysia* [1967] 1 W.L.R. 813:
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> > '… where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill.'"

Lord Fraser of Tullybelton, at 263D-F, put it this way:

> "My Lords, this is an action of damages for professional negligence against a senior registrar at Birmingham Maternity Hospital. After a long trial, the learned judge held negligence established against the registrar, but the Court of Appeal by majority (Lord Denning M.R. and Lawton L.J., with Donaldson L.J. dissenting) reversed his decision. They did so not because they considered that the learned trial judge had misstated the relevant law. Clearly he did not; he said, rightly in my opinion, that negligence for the purposes of this case meant
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> > 'a failure … to exercise the standard of skill expected from the ordinary competent specialist having regard to the experience and expertise that specialist holds himself out as possessing.'
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> …The true position is that an error of judgment may, or may not, be negligent; it depends on the nature of the error. If it is one that would not have been made by

> a reasonably competent professional man professing to have the standard and type of skill that the defendant held himself out as having, and acting with ordinary care, then it is negligent. If, on the other hand, it is an error that such a man, acting with ordinary care, might have made, then it is not negligent".

Lord Russell of Killowen, at 268C-D, added:

> "My Lords, I wish at the outset to emphasis one matter. Some passages in the Court of Appeal might suggest that if a doctor makes an error of judgment he cannot be found guilty of negligence. This must be wrong. An error of judgment is not per se incompatible with negligence, as Donaldson L. J. pointed out. I would accept the phrase 'a mere error of judgment' if the impact of the word 'mere' is to indicate that not all errors of judgment show a lapse from the standard of skill and care required to be exercised to avoid a charge of negligence".

[16] In *Investors in Industry Ltd* v *South Bedfordshire DC* [1986] 1 All ER 787 professional negligence was alleged against a firm of architects and Slade LJ in the judgment of the court said, at page 808:

> "Expert evidence from suitably qualified professional persons is, in our judgment, admissible to show what competent architects in the position of Hamiltons Associates could reasonably have been expected to know and do in their position at the relevant time. Indeed, in our judgment, there could be no question of the court condemning them for professional negligence on account of their failure to appreciate points (3) and (4) and to take the suitable consequential action, unless there were appropriate expert evidence to support the allegation that their conduct fell below the standard which might reasonably be expected of an ordinarily competent architect (cf. *Worboys* v. *Acme Investments Ltd* (1969) 4 B.L.R. 133 at 139 per Sachs L.J.)"

[17] In *D* v *Lanarkshire Acute Hospitals NHS Trust* [2017] CSIH 30 (First Division) Lord Malcom said:

> "21. The Lord Ordinary notes that all the experts agreed that to use excessive traction in a case of shoulder dystocia would fall below the standard of an ordinarily competent midwife. On behalf of the Trust it was conceded that, if that was the proven factual situation, there was no other probable cause for C's injury.
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> 25. Having regard to the evidence led at the proof, plus the terms of the Lord Ordinary's judgment and the parties' submissions, we are wholly unpersuaded that the Lord Ordinary reached a wrong or unreasonable result."

[18] In *Campbell* v *Borders Health Board* [2012] CSIH 49 (Second Division) at para [5], the Lord Ordinary was quoted as saying:

> "…midwife Davidson's actions would properly be found to be below the standard to be expected of the ordinarily competent midwife exercising ordinary skill and care, and a proof before answer on causation would be required. I am satisfied that the pursuer has succeeded in establishing this first ground of negligence."

The court agreed with the Lord Ordinary's decision.

[19] The words used in *Hunter* v *Hanley* ("no ordinarily competent") make it clear that if *any* ordinarily competent (in this case) consultant radiologist of ordinary skill exercising ordinary care would have done what was in fact done, the test is not met. The use of the word "no" is taken to set a high bar. A test which is lower will not do. But it is possible to express the test as a standard and make it clear that falling below that standard will be a breach of duty, without the need to use the word "no". The language used by the pursuer in the first passage of averments quoted above sufficiently reflects the test that requires to be met. The word "reasonable" is superfluous, but the reference to the reports being of "a standard below that to be expected of an ordinarily competent Consultant Radiologist exercising ordinary…care" comes close to the language used in the cases noted above. The reference to "that" must be taken to be a reference to the standard to be met. That standard is what is referred to in *Hunter* v *Hanley*; it is what *all* ordinarily competent consultant radiologists exercising ordinary care require to meet. There is no suggestion in the pursuer's pleadings that any such consultant would not be negligent if his reporting fell below that standard. The pursuer is therefore not averring that some lower standard than that stated in *Hunter* v *Hanley* is to be applied.

[20] Of course, to make such an allegation, expert evidence will require to support that position. It must support (however it is ultimately expressed) the proposition that no

ordinarily competent consultant radiologist of ordinary skill exercising ordinary care would act in that manner. Senior counsel for the defenders referred to the pursuer's expert report and submitted that it did not address the relevant test. This was, however, only an incidental part of the argument in relation to relevancy and there was no separate motion to dismiss the pursuer's case on the basis that it was unsupported by expert evidence. I was not taken to the report in detail. There is some force in the point made by senior counsel for the defenders that the pursuer does not specify who wrote the report in respect of the MRI scan on 18 December 2015 and whether it was a junior doctor or a consultant. However, parties will be, or will become, aware of who was the author and the pursuer's averment refers to the standard of a consultant. Whether the pursuer does or does not have sufficient support in the expert evidence remains to be seen.

[21] Deviating from the language used in *Hunter* v *Hanley*, whether in the pleadings or in the expert report, runs the serious risk of not corresponding with its meaning. In this case, however, the relevant test has been expressed in an alternative fashion.

Causation

[22] The next question is the relevancy and specification of the averments in respect of causation. The alleged breaches of duty by the consultant radiologist must have caused, or at least materially contributed to, the alleged loss. In this case, where it is said that the overly extensive surgery by Mr Wales resulted in the loss of the pursuer's left eye, any negligence by the radiologist can only have contributed if Mr Wales relied upon the terms of the radiology reports.

[23] Senior counsel for the defenders referred to the causal chain and how that should flow in a case such as this. It is true, and indeed undisputed, that while the pursuer makes

averments about what the reports stated, there are no express averments about what the reports should have said. But it is the pursuer's averred position that the reports are inaccurate. The nature of the alleged inaccuracies are made reasonably clear. It is sufficient for the pursuer to identify the inaccuracies and the resulting inference, to be obviously drawn, is that these should not have been present in the reports. Precisely how the reports should have been expressed does not need to be averred, when the things that should not have been said (the spread of cancer) are clearly identified and the implication is that the reports should have said there was no such spread.

[24] It is also correct that the pursuer does not expressly aver what would have happened had the reporting been non-negligent and in particular whether there would have been no surgery at all or it would have been performed differently. However, it can readily be inferred from the pleadings that if the points complained about had not been stated in the reports, there would have been no causal link between the loss and the radiology reports. It is a case predicated "to the extent Mr Wales relied upon" the allegedly incorrect radiology reports. That is the averred causal link. It is plainly implicit in this branch of the case that the presence of the inaccuracies caused the loss and that if the inaccuracies were not present the loss would not have occurred. If that is not proved, because the loss of the eye would have occurred even if the reports had been accurately prepared, the case against the radiologist will fail on causation. That will of course be a matter to be determined on the evidence.

[25] Senior counsel for the defenders made the point that the decision on surgery had been reached by the multi-disciplinary team. It will again be a matter for determination by the court on the factual evidence as to precisely what their decision was and how, if at all, it

affected the decisions made by Mr Wales. On the averments made, the decision by the team does not exclude the case against the radiologist.

[26] In short, this is not a case where it could be concluded at this stage that even without the alleged negligence by the radiologist the same loss would have arisen and hence that there can be no causal link. Read fully and in context the point being made is that the reports were inaccurate and that *esto* Mr Wales relied upon those inaccuracies in the reports, the loss of the eye was caused thereby.

[27] It is of course also correct that the pursuer has not adopted the standard approach of presenting this part of the case on an *esto* basis. Instead, the expression "to the extent" is used. While far from being a helpful approach, when read in context it falls to be viewed as indeed an *esto* case. Such a case can be presented as a possibility of what occurred and that is the position here, because the pursuer does not know whether or not, or the extent to which, Mr Wales relied upon the radiology reports. The court was advised that questions have been put to Mr Wales on this issue and it may be that the answers could have some impact upon the pleaded position, but that remains to be seen.

Conclusion

[28] The parts of the pursuer's pleadings that are the subject of challenge are not expressed in the standard or normal fashion. However, I am not able to conclude that this is a very clear case showing a lack of relevancy or specification. The position adopted in the pleadings does not bring it within the rare and exceptional criteria noted in the authorities. From the averred facts and circumstances, relevant and specific allegations of fault and a causal link can reasonably be seen or, at least, inferred.

Disposal

[29] The defenders' motion to exclude certain averments from probation is refused and their plea-in-law on that point is repelled. The case will proceed to a proof before answer on the parties' whole averments. All questions of expenses are reserved.