SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 34
A448/16

Lord Justice Clerk
Lord Turnbull
Lady Wise

OPINION OF THE COURT

delivered by LORD TURNBULL

in the reclaiming motion

by

CAR

Pursuer

against

(1) MUFTAH SALEM ELJAMEL

First Defender and Reclaimer

and

(2) NHS TAYSIDE

Second Defenders and Respondents

First Defender and Reclaimer: Primrose QC, Watts; MDDUS
Second Defenders and Respondents: MacNeill QC, Dundas; NHS Scotland Central Legal Office

12 August 2022

Introduction

[1] This reclaiming motion (appeal) arises out of an action for medical negligence brought against Muftah Salem Eljamel (the first defender), a Consultant Neurosurgeon, and NHS Tayside (the second defenders). Mr Eljamel was employed by the second defenders at

Ninewells Hospital Dundee and also had practising privileges at the BMI Fernbrae Hospital, Dundee, which provided private medical care.

[2] The action was settled by joint minute in which the first and second defenders agreed that they were jointly and severally liable to make reparation to the pursuer in the sum of £2,810,118, subject to any apportionment as between them as determined by the court. By interlocutor dated 21 December 2021 the Lord Ordinary's decision on the application of section 3(1) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 was that a just apportionment of damages was 100% contribution by the first defender and 0% contribution by the second defenders. The first defender seeks to challenge that decision on apportionment in this appeal. The pursuer plays no part in this appeal, which is between the two defenders.

The agreed facts

[3] The relevant facts upon which the Lord Ordinary was invited to exercise his power under the 1940 Act were agreed by joint minute. They can be summarised quite shortly. On 4 February 2013 the pursuer attended at the Accident and Emergency department of Ninewells Hospital with complaints which suggested nerve root compression, or other neurological condition. She was reviewed by a neurosurgery advanced nurse practitioner who considered that she required to be admitted to the neurosurgery department. Having discussed matters with the first defender, who was the relevant consultant, the nurse was instructed not to admit the pursuer. Instead, it was arranged for the pursuer to undergo an outpatient MRI scan and she was discharged to the care of her GP.

[4] An MRI scan was undertaken at Ninewells Hospital on 20 February 2013 which showed that the pursuer was suffering from a left paracentral disc protrusion between

lumbar discs 3 and 4 and facet joint hypertrophy which resulted in severe central canal and left lateral stenosis. In addition, between lumbar discs 4 and 5, the scan disclosed the presence of a very large central disc prolapse compressing the thecal sack causing severe central canal stenosis. The radiographer performing the scan noted that it appeared the pursuer had clinical cauda equina syndrome ("CES"). No further action was taken on this report.

[5] On 1 March the pursuer's GP became aware of the scan results and, at the pursuer's request, referred her for private medical treatment at the BMI Fernbrae Hospital where she came under the care of the first defender. On 16 April 2013 the pursuer underwent a lumbar microdiscectomy operation performed by the first defender. That operation was performed negligently and, as a result, the pursuer suffered nerve root damage, all to the extent specified in the joint minute.

[6] Post-operatively the pursuer's condition deteriorated and the first defender negligently failed to organise an emergency MRI scan and emergency revision surgery. On 19 April 2013 the pursuer was discharged from the BMI Fernbrae Hospital by the first defender and told to attend at Ninewells Hospital in order to have an MRI scan performed. A number of conclusions associated with these facts were agreed:

- In light of the pursuer's presentation at Ninewells Hospital on 4 February 2013 an MRI scan ought to have been arranged as a matter of urgency and undertaken within 48 hours.
- Had this occurred the pursuer would have undergone spinal decompression surgery at Ninewells Hospital no later than 7 February 2013.
- An MRI scan undertaken within 24 hours of her presentation would have shown the same results as those shown on the scan taken on 20 February 2013.

- The pursuer's neurological condition remained stable between 4 February 2013 and 16 April 2013.
- Had revision surgery taken place on 16 April 2013 any immediate damage exhibited after surgery would not have improved but the pursuer would now have less bladder and bowel dysfunction than currently although it would not be completely normal.
- By 19 April 2013 when she presented at Ninewells Hospital in order to undergo an MRI scan the pursuer's condition was irreversible.
- Had spinal decompression surgery been undertaken by a neurosurgeon of ordinary competence, exercising reasonable skill and care, either by 7 February 2013 or on 16 April 2013, the outcome would have been the same. As a result of competent surgical intervention on either date the pursuer's radicular pain would have improved; bladder and bowel function would have been normal; there would have been some impairment of perianal sensation in the long term with reduced sexual sensation; motor power would have been normal; there would be no lower limb cramp; there would be normal balance; and there would have been long-term reduced sensation in the S1 dermatomes and the right S2 dermatome, albeit of no functional significance. The pursuer would not have suffered complete CES.
- As a result of the negligently performed operation on 16 April 2013 post-operatively the pursuer developed complete CES and all of her new neurological deficits occurred during and after that operation.

The Lord Ordinary's decision

[7] The Lord Ordinary heard competing submissions during the course of which

reference was made to authorities including: *Wright* v *Cambridge Medical Group* [2013] QB 312, *Widdowson's Executrix* v *Liberty Insurance Ltd* 2021 SLT 539, *Downs* v *Chappell* [1997] 1 WLR 426, *Jackson* v *Murray* [2015] UKSC 5, *Bolitho* v *City & Hackney Health Authority* [1998] AC 232, *Brian Warwicker Partnership Plc* v *HOK International Ltd* [2005] EWCA Civ 962, *McEwan* v *Lothian Buses Plc* 2006 SCLR 592 and *Re-Source America International Ltd* v *Platt Site Services Ltd* [2003] EWHC 1142 (TCC) and [2004] EWCA Civ 665. He then set out his reasoning and decision at paragraphs [41] to [46] of his opinion.

[8] The Lord Ordinary concluded that the moral blameworthiness and causative potency of the negligence for which the second defenders were responsible was vastly outweighed by that of which the first defender was responsible. In arriving at this view he rejected the first defender's submission that there was a similarity between the circumstances of the present case and those in the case of *Widdowson*. He accepted the submission for the second defenders that the negligence for which they were responsible did not cause any significant harm to the pursuer and did not cause her any neurological deterioration. At most it might have resulted in her experiencing pain for an additional two weeks and it did not contribute to the damage for which reparation was sought, CES having developed only after the operation negligently performed by the first defender. Accordingly, he accepted the submission that the causative potency of the negligence of which the second defenders were responsible was nil.

Submissions for the first defender and reclaimer

[9] Senior counsel for the first defender sought to challenge the Lord Ordinary's decision on the basis of six propositions.

Error in interpreting the joint minute

[10] It was submitted that the Lord Ordinary was wrong in concluding that CES developed only after and as a result of the first defender's negligence and not as a direct consequence of the failure to arrange an urgent MRI scan. In reaching this conclusion he had failed to take account of the implication that the pursuer was already suffering from CES by 4 February 2013 which, it was said, was confirmed by the scan which was performed on 20 February 2013. The Lord Ordinary failed to give adequate weight to the fact that there was an earlier opportunity to perform an operation which, as was agreed, would have led to a significant improvement in the pursuer's condition.

Widdowson's Executrix* v *Liberty Insurance Ltd

[11] It was contended that the Lord Ordinary erred in rejecting the submission that the circumstances of the case of *Widdowson* were comparable with the present case and went to support the first defender's contention as to the appropriate level of apportionment. Each of the two health boards in the case of *Widdowson* had an opportunity to interrupt the fatal consequences for the pursuer of the serious abdominal and bowel injuries which he sustained in a road traffic accident. Through their negligent treatment each failed to do so and each was held liable to a 15% apportionment of the damages awarded.

[12] In his analysis the Lord Ordinary ignored the fact that but for the negligence of the second defenders in the present case the negligently carried out operation would never have happened. By comparison with *Widdowson*, the second defenders in the present case were presented with an opportunity to identify and treat the condition which the pursuer was suffering from and had they done so her condition would have been alleviated. It was therefore wrong to say that the second defenders' negligence was of insubstantial causal significance.

Causative potency

[13] It was contended that the Lord Ordinary erred in concluding that the causative potency of the negligence of which the second defenders were responsible was nil. Because of the second defenders' negligence the pursuer underwent the subsequent operation. The second defenders should bear some responsibility for what happened. Support was sought for this proposition from the cases of *Rahman* v *Arearose Ltd* [2001] QB 351, *Webb* v *Barclays Bank & Portsmouth Hospitals NHS Trust* [2001] EWCA Civ 1141 and *Wright* v *Cambridge Medical Group*.

Moral responsibility

[14] It was contended that the Lord Ordinary provided no reasoning to explain why he thought the moral blameworthiness of the first defender was so much worse than that of the second defenders. When the pursuer presented at Ninewells Hospital on 4 February 2013 it was recognised that her condition merited discussion with the neurosurgery department. The experienced advanced nurse practitioner in that department carried out a full examination and wished to admit the pursuer. Without performing an examination, the first defender concluded that the pursuer did not have CES and that she was not a case for urgent admission. An urgent scan was not arranged nor any follow-up organised.

[15] These constituted significant acts of moral blameworthiness, including on the part of the first defender for whose conduct at that stage the second defenders were responsible. There was a lack of care and a failure to examine despite the concerns of a senior member of staff. In these circumstances there had not been an adequate exercise of weighing up the conduct for which the two defenders were responsible, nor any explanation of the conclusion reached.

The period between 7 February and 16 April 2013

[16] As was agreed, but for the second defenders' negligence the pursuer would have had an operation by 7 February 2013. Her condition between that date and 16 April 2013 was attributable to the actings of the second defenders and was not something which the first defender could be held liable for. The Lord Ordinary should have at least made an award to reflect the extent to which the pursuer continued to suffer pain and discomfort throughout that period.

Apportionment

[17] The correct level of apportionment which should have been arrived at by the Lord Ordinary was 50% as between each defender.

Submissions for the second defenders and respondents

[18] Senior counsel for the second defenders submitted that the challenge to the Lord Ordinary's decision was based on a fundamental mistake. This proposition became clear when the first paragraph of the note of argument lodged on behalf of the first defenders was considered. The question there framed was whether the Lord Ordinary was correct to treat the negligence of the second defenders as "of no causal importance and the second defenders as not blameworthy". Here lay the mistake in the analysis for the first defender. The issue for the Lord Ordinary was not causal connection; that had been admitted. What the Lord Ordinary was required to undertake was a comparative exercise comparing the blameworthiness and the causal potency of the respective defenders. It was an incorrect reflection of his decision to say that he treated the negligence of the second defenders as of no causal importance or blameworthiness. He correctly compared the two and came to a decision that he was entitled to reach.

[19] The Lord Ordinary had not misunderstood the joint minute. The pursuer presented on 4 February 2013 with a condition which required treatment and which was described (after the 20 February 2013 scan) as having the appearance of CES. The second defenders were not responsible for her condition at the date of presentation and it was agreed in the joint minute that she developed complete CES after the operation performed by the first defender.

[20] Counsel submitted that the authorities relied upon by the first defender were of no assistance as they were concerned with issues of causation rather than apportionment, or were otherwise distinguishable. In the present case the second defenders took appropriate action in arranging for an MRI scan. Their negligence was in failing to prioritise that. This negligence did not make the pursuer any more vulnerable to the subsequent negligently performed operation. Her condition remained stable until the time of the operation. In these circumstances the task for the Lord Ordinary was to compare the respective negligence of the two defenders. In this exercise causative responsibility, or causative potency, was likely to be carry more weight than moral blameworthiness – *Brian Warwicker Partnership Plc* v *HOK International Ltd* per Arden LJ at para 42.

[21] The comparative negligence was, on the one hand, a failure to prioritise the carrying out of a scan and, on the other hand, the negligent infliction of harm during the course of an operation followed up by a failure to carry out further investigations and revision surgery. Viewed from this perspective, counsel submitted, it was plain that the Lord Ordinary had been correct to conclude that the moral blameworthiness and causative potency of the negligence for which the second defenders were responsible was vastly outweighed by that for which the first defender was responsible. He was also correct to decline to apportion a level of damages to reflect the period between 7 February and 20 February 2013 since an

award of damages for ongoing pain and discomfort in this period would be of such a small percentage of the agreed award of £2.8 million as to be inappropriate. That was the correct period to consider as thereafter the pursuer was in the care of private health providers and no explanation had been provided for the apparent delay in operating prior to 16 April 2013.

Discussion

[22] The decision brought under challenge in this reclaiming motion was made in exercise of the discretionary power granted to the Lord Ordinary by the terms of section 3(1) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, which provides:

> "where in any action of damages in respect of loss or damage arising from any wrongful acts or negligent acts or omissions two or more persons are, in pursuance of the verdict of a jury or the judgment of a court found jointly and severally liable in damages or expenses, they shall be liable *inter se* to contribute to such damages or expenses in such proportions as the jury or the court, as the case may be, may deem just …"

[23] For the purposes of determining the appeal parties helpfully set out a number of agreed propositions in a joint minute as follows:

i In matters of apportionment, an appellate court should not undertake to alter the proportions fixed by the judge who tried the case save in exceptional circumstances. See: *Owners of the "Boy Andrew"* v *Owners of the "St Rognvald"* 1947 SC (HL) 70 at 78 per Viscount Simonds.

ii An appeal court will not readily upset the assessment of apportionment by a trial judge unless there has been some error in law or fact. The nature of the error has to be such that it can be said that the Lord Ordinary has manifestly and to a substantial degree gone wrong. See: *McCusker* v *Saveheat Cavity Wall Insulation Ltd* 1987 SLT 24 per the Lord Justice Clerk (Ross) at page 29, Lord Robertson at pages 31–32 and Lord Dunpark at page 34.

iii It is not enough that the appellate court looking at the matter anew considers that it might have come to a different decision on the evidence than that which the Lord Ordinary reached. It is only when the judge has been plainly wrong, that an appellate court is entitled to interfere with the exercise of discretion made at first instance. See: *G* v *G (Minors: Custody Appeal)* [1985] 1 WLR 647 per Lord Fraser of Tullybelton at p651–652.

iv When determining the apportionment of damages between joint wrongdoers, the court requires to consider the degree of each party's fault together with the degree to which it contributed to the damage in question. In so doing, the court requires to consider the seriousness or moral blameworthiness of the respective faults and their causative relevance or potency. See: *Downs* v *Chappell* (*supra*) at p.445H per Hobhouse LJ and *Widdowson's Executrix* v *Liberty Insurance Ltd* (*supra*) at 552 per Lady Wise.

[24] The question for this court is therefore whether the Lord Ordinary has made an error in law or in fact such that it may be said that he has manifestly and to a substantial degree gone wrong.

[25] The first issue to be addressed is whether he erred in interpreting the terms of the joint minute presented to him. At paragraph [42] of his opinion the Lord Ordinary stated:

> "… The negligence of which they (the second defenders) were responsible was part of the sequence of events leading up to the serious negligence of the first defender which caused the nerve root injury. All new neurological deficits appeared after the operation carried out by the first defender on 16 April 2013: there was no major neurological deterioration before then. …"

[26] In so holding he correctly reflected the terms of that joint minute. He went on at paragraph [45] of his opinion to note that the pursuer's CES only developed after and as a result of the first defender's negligence, not as a direct consequence of the failure to arrange

an urgent MRI scan. In this passage of his opinion it is clear that the Lord Ordinary had in mind the terms of the joint minute which set out that the complainer suffered complete CES as a consequence of the manner in which surgery was undertaken. The conclusion which he sets out in this paragraph also correctly reflected the terms of the joint minute. We do not consider that he can be said to have made any error of fact or law in interpreting that document.

[27] Nor do we consider that the Lord Ordinary can be said to have erred in his analysis or interpretation of any of the various authorities to which his attention was drawn. As counsel for the second defenders correctly observed, the case of *Wright* v *Cambridge Medical Group* was concerned with causation rather than apportionment. Each of the cases of *Rahman* v *Arearose Ltd* and *Webb* v *Barclays Bank and Portsmouth Hospitals NHS Trust* concerned circumstances in which one defender was responsible for significant injuries caused to a claimant which were then compounded by subsequent negligently performed medical treatment. The crucial distinguishing points in the present case are that the second defenders were not responsible for the condition in which the pursuer presented at Ninewells Hospital on 4 February 2013 and that condition did not deteriorate between then and the date of her operation. Or to put it as counsel for the second defenders did, the negligence of the second defenders did not make the pursuer any more vulnerable to the negligence of the first defender. The damages awarded to the pursuer were all in respect of the CES that she suffered as a consequence of the negligently performed operation.

[28] The pursuer's circumstances were also quite different from those which were present in the case of *Widdowson's Executrix* v *Liberty Insurance Ltd*, where the negligent health boards were presented with opportunities to interrupt the fatal consequences of the injury

which that pursuer had already suffered in the road traffic accident and failed to do so. Had they done so the pursuer would not have died from his injuries.

[29] In the present case the correct approach for the Lord Ordinary to follow was to consider the comparative blameworthiness of the respective conduct on the part of each of the two defenders and to consider the respective causative potency of their negligence – *Downs* v *Chappell*. As Arden LJ explained in the case of *Brian Warwicker Partnership Plc* v *HOK International Ltd* at paragraph 42, when considering the question of apportionment under the relevant English statute, causative responsibility is likely to be the most important factor in the assessment of contribution. The same emphasis can be seen in the judgment of Laws LJ (with whom the other judges agreed) in the case of *Rahman* v *Arearose Ltd* where at paragraph 33 he stated:

> "So in all these cases the real question is, what is the damage for which the defendant under consideration should be held *responsible* …"

[30] This reflects the approach which the Lord Ordinary took. Whilst he may not have explained in any detail why he considered the moral blameworthiness of the negligence for which the first defender was responsible to be far greater than that of the second defenders, the reasoning is perhaps obvious. More importantly though, his analysis of the causative responsibility for the pursuer's injuries cannot be faulted. He was correct to conclude that the negligence of the second defenders did not cause any significant harm to the pursuer and that accordingly "the causative potency in relation to the neurological harm suffered was nil" (paragraph [42] of his opinion). The Lord Ordinary concluded that it would be unjust to find the second defenders liable to contribute to the damages for the CES which the pursuer suffered. In arriving at that conclusion he addressed himself correctly to the test set out in section 3(1) of the 1940 Act and arrived at a decision which is beyond criticism.

Decision

[31] For the reasons given the reclaiming motion is refused.