OUTER HOUSE, COURT OF SESSION

[2021] CSOH 68

A201/18

OPINION OF LORD BRAID

In the cause

KEVIN DUNN

Pursuer

against

GREATER GLASGOW HEALTH BOARD

Defenders

Pursuer: Party
Defenders: Fitzpatrick; NHS Central Legal Office

13 July 2021

Introduction

[1] In this action the pursuer seeks £900,000 damages in respect of an unsuccessful hip arthroscopy performed on 6 January 2015 by Mr Alastair Gray, consultant orthopaedic surgeon following an earlier review by Dr Stephanie Spence, an ST4 specialist registrar in orthopaedic surgery. In summary, the pursuer blames both Mr Gray and Dr Spence for the unsuccessful procedure. He asserts that his consent was not properly obtained; in particular, that he was not warned about a risk of the procedure making his symptoms worse and that he was not offered the option of conservative treatment, which he would

have elected for had it been offered. He further asserts that following the procedure his symptoms are worse, and he seeks to hold the defenders liable.

[2] The pursuer has averred in some detail (i) the circumstances leading to, as he has it, the failure to obtain his fully informed consent to the procedure; and (ii) the pain from which he has suffered since the procedure was carried out. The principal issue for decision at this stage is whether he has adequately averred a causal link between the procedure and his subsequent pain.

[3] I heard a discussion on the procedure roll (a debate) at the instance of the defenders on their first plea-in-law. They contend that the pursuer has made no adequate averments in respect of the causation aspect of his claim, and that this failure renders his case irrelevant and so lacking in specification as to not give the defenders fair notice of what the pursuer's case is. Separately, the defenders also contend that aspects of the pursuer's fault case are fundamentally lacking in specification and should not be remitted to probation, should a proof before answer be allowed.

[4] The pursuer, who is a party litigant, contends that he has pled a relevant case which should be allowed to go to proof. I discuss his submissions in more detail below but essentially the pursuer's position is that if only he is allowed to lead evidence at a proof, he will be able to establish that the pain from which he suffers was caused by his failed arthroscopy; and that he should not be penalised for being unable to afford to fund his action.

[5] Both parties lodged written notes of argument in advance of the debate, which were expanded upon in the course of oral argument.

[6] The debate was conducted through the medium of Webex, which if nothing else saved the pursuer having to travel from Campbeltown to Edinburgh to appear in person.

That said, he did not have a good internet connection, which made conduct of the debate challenging at times, since it was more difficult to engage him in discussion than it would have been in court, particularly on the occasions when his video failed. Nonetheless, he was able to present his argument and appeared to be able to see and hear the proceedings, and I am satisfied that ultimately I was able to have a good understanding of what the pursuer's arguments were.

Legal framework

[7] It is worth stating at the outset the framework within which the court must operate when considering the adequacy of a party's pleadings – in this case, the pursuer's – at a debate. For the purposes of the debate, the pursuer's averments must be assumed to be true: the court cannot resolve disputes of fact at this stage. That being so, the pursuer's case can be dismissed as irrelevant only if the defenders succeed in persuading the court that even if the pursuer proves all that he offers to prove, his action must necessarily fail: *Jamieson* v *Jamieson* 1952 SC (HL) 44. Second, in an action of damages for professional negligence such as this, a pursuer must make averments about each of the following: the negligent act; loss injury and damage; and the causal link between the negligent act and the loss, injury and damage, with a degree of specification of detail that gives the alleged wrongdoer fair notice of the facts which the pursuer intends to prove relating to each element: *Kyle* v *P & J Stormonth Darling WS* 1993 SC 57 at 67. In other words, for a case to be allowed to go to proof, it must not only be relevant but it must give fair notice to the defenders of what it is that the pursuer offers to prove. Third, in considering the adequacy of pleadings, the court may look only at the pleadings and not at extraneous material. In particular, it may not have regard to assertions of fact (whether contained in productions, or made at the debate

itself) which are not contained in averments in the pleadings. Fourth, the court is not directly concerned with what evidence a party might be in a position to lead at proof. However, in a case such as this, if a pursuer has chosen not to obtain, or is unable to afford, expert evidence on key matters such as what went wrong in a surgical procedure, or the link between the procedure and subsequent pain, the absence of such evidence may have the consequence that the pursuer is simply unable to plead a relevant case.

Submissions for the defenders

[8] In support of their central contention that the pursuer's averments about causation are inadequate, counsel for the defenders submitted that the pursuer's case appears to proceed on the assumption that if only he had not been offered a hip arthroscopy, he would have avoided his current chronic pain condition. Counsel drew attention to the following averments: first, in article V of condescendence:

> "If the pursuer had been advised of the option of not operating and managing his condition conservatively he would have chosen not to have surgery and he would not have sustained any loss, injury and damage";

and in article VIII*:*

> "As a result of the fault and negligence and breach of duties by Stephanie Spence and Mr Gray, the pursuer has suffered loss, injury and damage. He is in constant pain and is unable to carry out normal day-to-day activities. He is disabled. He cannot play with his children. He is unable to work. He has sustained a loss of earnings. He requires assistance from his family with showering and putting on his clothes

Counsel submitted that the pursuer has not averred any plausible causal link between the performance of his arthroscopy and his alleged current disability. Instead, he merely described his current condition, and his case was advanced on the apparent basis "*post hoc ergo propter hoc*" ("after this, therefore because of this"). In article III the pursuer avers:

> "The pursuer proceeded with the left hip arthroscopy and developed significant medical complications subsequent to the operation. He developed significant pain in left hip (*sic*) which continues to be present. He developed Bursitis as a result of surgery as depicted in the first post operative scan which was not related to the pursuer when the question about what was wrong was raised, nor was the cause or condition ever explained thereafter."

However, even if that averment were proved, that would not explain all of the pain suffered by the pursuer of which he now complains.

[9] The defenders further complained that they had tabled extensive averments in answer with which the pursuer has completely failed to engage (answer 8):

> "The pursuer was already in significant pain prior to his arthroscopy, and his ability to carry out day-to-day activities was already compromised. The pursuer's surgery did not lead to the hoped-for benefit, but nor did it cause his current pain and disability, which reflect the natural course of his underlying condition. His current condition may have been the same had he not sought surgery. The reported worsening in pain since his arthroscopy is not what would be expected from a failed arthroscopy procedure … There is no evidence that any significant complication occurred during the surgery or the post-operative rehabilitation phase. There is no evidence to suggest the articular surface within the hip joint was severely damaged or that there is any other condition that would account for the level of pain and disability currently described by the pursuer. It is likely that he is now significantly exaggerating his current level of musculoskeletal symptoms for the benefit of his claim."

The pursuer's only response to these averments was in the form of a blanket denial of the averments in answer. He did not offer to prove that anything had gone wrong with the procedure, or that his hip had been damaged during it. This reinforced the defenders' submission that the pursuer's case amounted to no more than an assertion that since his pain followed his arthroscopy it must have been caused by it, which was insufficient.

[10] In short, the defenders' submission was that the pursuer has no averments offering to prove any basis upon which his post-operative deterioration was to be taken to represent anything other than a progression of his underlying condition. Not only did the averments

not give fair notice of the pursuer's position (lack of specification) but on the pleadings there was no basis upon which the pursuer could succeed, rendering his case irrelevant.

[11] Counsel for the defenders further submitted that in certain respects the pursuer's averments about fault are lacking in specification. In article II of condescendence, the pursuer avers, in relation to Dr Spence, that:

> "[s]he did not discuss with him the possibility *or likelihood* [emphasis added] of failing to achieve an improvement of his symptoms. She did not discuss with him the possibility *or likelihood* of a worsening of his symptoms … She did not advise the pursuer that he was a higher risk candidate".

The defenders did not understand the basis for suggesting that there was a likelihood of worsened symptoms nor the suggestion that the pursuer was a higher risk candidate. They were entitled to know the explanation for these assertions and the basis if any for making them. Similarly, in the averments directed against Mr Gray, in article III of condescendence, the pursuer averred that:

> "Mr Gray did not consider or discuss the fact that the pursuer was a poor candidate for this procedure given his type of impingement. Mr Gray did not discuss the higher statistical rates of patients with FAI having a less than satisfactory outcome."

The defenders did not understand the suggestion that the pursuer was a poor candidate for the procedure, nor what he meant by "his type of impingement", nor the oblique reference to statistical outcomes. Again, they were entitled to know the explanation for these assertions and the basis for making them.

Submissions for the pursuer

[12] Much of the pursuer's written Note of Argument related to his averments of fault, namely, that he had not been fully informed of the risks inherent in the arthroscopy and thus had not properly consented. However, other than as narrated in paragraph [11] above,

the defenders do not dispute that those averments are sufficient to entitle the pursuer to a proof in relation to that aspect of the case, and so this part of the pursuer's argument does not assist the court in resolving the issue in dispute which is whether or not the pursuer has adequate averments about causation. Much of the remainder of the Note of Arguments contains material not to be found within the pursuer's averments, or refers to cases which are not pled. For example, he states in the final paragraph:

> "Harm, [d]amage and loss, from a procedure that was needed, that I stated I wouldn't have should there be moderate risk, and a procedure that according to later MRI scans, didn't even remove the impingement, but did remove good cartilage and leave hefty scar tissue along with pain and immobility."

Nowhere in the pursuer's pleadings is there a reference to any MRI scan which showed that the impingement was not removed, to good cartilage being removed or to hefty scar tissue being left. Consequently, none of those statements in the Note of Arguments can be taken into account in considering the adequacy of the pursuer's pleadings. This criticism can be levelled at much of the content of the Note of Arguments. Going through that Note paragraph by paragraph, the pursuer states in paragraph 1 that the impingement was not fully removed; in paragraph 2, that the wrong hip may have been operated on; and in paragraph 3, that he should have been seen by a consultant prior to the operation. None of those cases are advanced in his pleadings. In paragraph 4, he challenges Dr Spence's version of events. That is a dispute of fact which cannot be addressed at debate. In paragraph 5, he refers to a Freedom of Information request made by him in relation to the number of complaints against the doctors concerned. That is irrelevant to the issues in the case. In paragraph 6, he challenges the defenders' assertion that he is exaggerating his symptoms. Again, that is a dispute of fact. In paragraphs 7 and 8 he develops his assertion that he was not properly consented. In paragraph 9 he acknowledges that he is unable to

afford to instruct an expert to prepare a report or to appear as a witness at any future proof. In summary, nothing in the written Note of Arguments provides an answer to the defenders' criticisms of his pleadings.

[13] In his oral submission, as in his written Note of Arguments, the pursuer devoted much time to a matter which is not in issue at this stage – the lack of proper consent, and the failure to advise him fully on the risks inherent in the procedure. That is clearly a matter about which he feels very strongly, and into which he has conducted much research and devoted a great deal of time and energy. He also made assertions which went beyond what is contained in his pleadings about the arthroscopy, and why it might have caused the pain from which he is now suffering. Under reference to a passage in *Montgomery* v *Lanarkshire Health Board* 2015 UKSC 11 where a 10% risk of an adverse event was described as substantial (at paragraph [94]), he submitted that the failure rate of arthroscopies was up to 20% which must therefore also be substantial, and was a risk of which he should have been advised. A lateral tear was supposed to be removed in the procedure but had not been. There was a CAM impingement which had only been partially removed. He suggested that had he been offered conservative treatment, his condition may have improved. He pleaded for an opportunity to lead evidence so that he could advance these various points at proof. It would be unfair if he was denied a proof simply because he could not afford to pay for expert evidence to support his claims.

Decision

[14] As I have identified earlier, the principal issue to be decided at this stage is whether or not the pursuer has made adequate averments about the causal link between the arthroscopy procedure and the pain from which he now suffers. It should be observed that

there are two aspects to causation in this case. The first is whether the pursuer has pled a causal link between any negligence in obtaining his consent and his decision to undergo the procedure. There is no doubt about this: he has, as the first excerpt from his pleadings, quoted at paragraph [8] above, clearly demonstrates. However, it is in relation to the second aspect, which is whether the procedure caused his subsequent pain, that the pursuer's case runs into difficulties. Apart from a fleeting reference to bursitis which the pursuer avers he developed as a result of the procedure, the pursuer makes no averments whatsoever about how, or in what respect, the procedure not only did not improve his symptoms but made them worse. He does not explain what it was about the procedure that went wrong, or carried an inherent risk that his pain might be made worse. Insofar as there is an assertion about bursitis, he does not aver the mechanism by which the procedure caused his bursitis to develop, nor even that his bursitis is the root of all his current pain. I agree with the submission made by counsel for the defenders that the pursuer's case proceeds upon an assumption that because his pain is worse now than it was before, the procedure must have been the cause but that simply does not follow, either as a matter of logic, or as a matter of medical science. If at proof the pursuer succeeded in proving all that he offers to prove, namely that the defenders were at fault for not obtaining his fully informed consent, which led to his undergoing a procedure he would not otherwise have undergone, and that he now suffers from significant pain, his action would nonetheless be bound to fail because of a failure to establish a causal link between the procedure and the pain. The pursuer's position in submissions is that the operation did cause his pain, but several comments fall to be made about that. First, as *Kyle* v *P & J Stormonth Darling WS* (above) makes clear, the defenders are entitled to at least some degree of specification, as a matter of fair notice, as to how the operation caused the pain, and there is currently no specification about that whatsoever.

Second, it appears that the pursuer does hold a view as to what it was about the operation that caused his pain (impingement not fully removed; damage to his hip during the operation) but these assertions are nowhere to be found in the pleadings, and the pursuer would not be allowed to lead evidence of those assertions at any proof which might take place. Third, it would in any event be inappropriate for the pursuer to include in his pleadings any assertions or averments along these lines, since he quite candidly and properly accepts that he has no expert medical witness who is prepared to write a report or to give evidence to that effect. He did not seek leave to amend, but had he done so, I would have refused it for that reason.

[15] The pursuer did not in fact attempt to persuade me that there was no need for greater specification than the authorities suggest. As can be seen from the discussion of his Note of Arguments and oral submission, at paragraphs [12] and [13] above, the bulk of his argument was devoted to matters which are irrelevant because they relate to allegations of fault which are not pled and in any event are to a large degree speculative and, in some instances, would be irrelevant and lacking in specification even if pled.

[16] The pursuer's reliance on *Montgomery* is of no assistance to him. He placed much weight on the court's description of a 10% risk in that case as substantial, compared to his contention that the risk of failure in his case was 20%. However, as the court also pointed out in *Montgomery*, at paragraph [89], the assessment of a risk cannot be reduced to percentages: the assessment of risk is fact-sensitive. In any event, the question of materiality relates to whether a risk ought to be disclosed or not which in turn bears upon the first aspect of causation mentioned above: in other words, whether the pursuer would have elected to undergo the procedure had the risks been fully explained. As I have said, that is not what is in issue here. In *Montgomery* the specific risk which should have been warned

against, namely shoulder dystocia, did in fact materialise. There was no dispute in that case as to the fact that the shoulder dystocia then had dire consequences. That may be contrasted with the pursuer's case, where he does not aver any specific risk which materialised, causing him pain. What was said in *Montgomery* about causation was that "the issue of causation, where an undisclosed risk has materialised, is closely tied to the identification of the particular risk which ought to have been disclosed" (paragraph 98). This supports the defenders' position rather than the pursuer's: there is a complete absence in his pleadings of the particular risk (be it damage to the hip, failure to remove cartilage, or whatever) which did in fact materialise and which did in fact cause him injury.

[17] That is sufficient to dispose of the action: the pursuer's case on causation is irrelevant and is so lacking in specification that it cannot proceed to proof. However, lest I am wrong in reaching that view, I will also deal briefly with the defenders' subsidiary argument about the fault averments identified at paragraph [11] above. I consider that the defenders' points are all well made, and that the averments in question do not give them fair notice of what it is that the pursuer seeks to prove. "Likelihood", of course, may mean something less than probability, but in that event it adds nothing to the averment that there was a possibility of failure. If it is intended to convey that there was more than a possibility of failure, then the defenders are entitled to know the basis of that assertion. Likewise, they are entitled to notice of why the pursuer considers that he was a higher risk candidate, why he was a poor candidate for the procedure, what is meant by "his type of impingement" and what is meant by the reference to higher statistical rates of patients having a less than satisfactory outcome (and what is meant by that last phrase). Had I been allowing a proof, I would not have admitted any of those averments to probation.

[18] For all of the foregoing reasons, I have sustained the defenders' first plea-in-law and dismissed the action as irrelevant and lacking in specification.