OUTER HOUSE, COURT OF SESSION

[2022] CSOH 39

A63/17

OPINION OF LORD CLARK

In the cause

ARLENE CHISHOLM (AP)

Pursuer

against

GRAMPIAN HEALTH BOARD

Defender

Pursuer: Party litigant
Defender: Khurana QC, Dundas; Central Legal Office

18 May 2022

Introduction

[1] The pursuer seeks damages for loss alleged to have been caused by clinical negligence. The defender contends that the case should be dismissed, primarily because no expert report dealing with causation has been lodged on behalf of the pursuer. The defender also argues that there are no relevant averments of causation. The case called for a diet of debate on 5 April 2022.

Background

The pursuer's case

[2] The pursuer attended Aberdeen Maternity Hospital on 21 February 2014. She was to have a caesarean section under spinal anaesthesia. This involved a needle being inserted in her spinal area. She claims that the insertion was performed negligently and that as a result she had pain, initially in her leg and back. The back pain is said to be ongoing and debilitating. Dr Moore, the specialist anaesthetic registrar who administered the spinal anaesthesia, is averred to have negligently positioned the needle, attempted to position it too many times (on around seven occasions) and failed to seek assistance from a consultant at an appropriate stage. The pursuer also avers that Dr Moore failed to obtain informed consent by not informing the pursuer of the risk of nerve damage at the time the spinal anaesthetic was administered. The pursuer also claims that Dr Lamont, a consultant anaesthetist, failed to properly supervise Dr Moore.

The defender's position

[3] The defender denies the allegations of negligence. The defender avers that the pursuer's informed consent was duly obtained in advance of the procedure and that Dr Moore attempted to insert the needle on an appropriate number of occasions prior to seeking assistance from her senior colleague, all in accordance with ordinarily competent practice. It is also averred by the defender that, in any event, the administration of spinal anaesthesia had not in any way caused or otherwise contributed to the continuing pain in respect of which the pursuer now sues.

Procedural history

[4] Given its central importance to the matter before the court, it is necessary to set out the procedural history of this case in sufficient detail. The summons was served on the defender on 17 February 2017. On several occasions thereafter, on unopposed motions by the pursuer, the cause was sisted pending the outcome of the pursuer's legal aid application. Each sist lasted for three months and the overall period ended in June 2018. On 20 June 2018, on the unopposed motion of the pursuer, the cause was sisted for a further period of three months until 20 September 2018 to allow medical reports to be considered by an independent neurosurgeon. On 20 September 2018, a further period of sist of three months was allowed on the grounds that the pursuer had obtained reports from a consultant neuroradiologist and neurologist, which required to be considered, and a further application for legal aid on the basis of the opinion obtained would have to be made. On 20 March 2019 a further sist of four months was allowed on the motion of the pursuer for further investigations to be carried out. The submissions in support of this motion stated that investigations were ongoing in respect of the causation of the pursuer's current symptoms. On 22 July 2019 there was a further three month sist granted because a consultant neurosurgeon had confirmed that causation is complex and the opinion of a chronic pain specialist was required, as a final line of enquiry. A further application for legal aid was to be made. On 23 October 2019 there was a further sist of three months, granted on the motion of the pursuer, to await the outcome of an application in respect of legal aid.

[5] Defences were lodged on 16 January 2020. The adjustment period was continued until 4 November 2020. Statements of proposals were exchanged by parties and lodged in advance of a by order hearing, fixed for 9 December 2020. The pursuer's statement of proposals named, as a witness, a consultant neurosurgeon, Mr Mathieson, who "will speak

to the connection between the allegedly negligent attempts at siting the spinal anaesthetic needle and the pursuer's symptoms". The statement of proposals for the defender mentioned issues of relevancy and specification but, I assume, proceeded upon the basis indicated in the pursuer's statement that an expert report on causation would be exchanged and lodged. At the hearing on 9 December 2020, a proof was fixed for 23 November 2021 and the seven following days, with three case management hearings also fixed. The Lord Ordinary appointed witness lists and productions, which would include all expert reports, to be lodged by 23 July 2021.

[6] On 17 February 2021, the pursuer's agents withdrew from acting. The case was continued to 28 April 2021 to allow the pursuer time to appoint and instruct new representation. At the continued hearing, there was no appearance by the pursuer and there was an email in advance from her daughter explaining that the pursuer was unwell. The hearing was continued to 11 May 2021. On that date the matter was continued for six weeks to allow the pursuer to make progress in instructing agents and to advise the court. At a hearing on 23 June 2021, the pursuer appeared personally. The court timetable was varied and the pursuer was ordained to lodge in process a report or reports in relation to liability and causation from a suitable medical expert no later than close of business on 25 July 2021. No expert report on causation was lodged. The pursuer had instructed Dr Seckin as an expert witness on causation in April 2021.

[7] On 17 August 2021, the defender enrolled a motion seeking dismissal of the cause on the ground that the pursuer had failed to obtemper the court's order made on 23 June 2021. At a hearing on 26 August 2021 the court was told that an electromyography (EMG) test was to be conducted and that Dr Seckin's report would be issued as soon as possible after the test result was available. The motion by the defender for dismissal was refused. The timetable

was extended and the pursuer was ordained to disclose the existing expert reports. At a hearing on 22 September 2021 the court noted that the pursuer expected to have her expert report on causation by the beginning of November and the case was continued to 3 November for that purpose. On 3 November 2021, no expert report on causation having been lodged, the diet of proof was discharged but the case was set down to call for a by order hearing on 23 November for consideration of further procedure. The Minute of Proceedings noted:

> "Mrs Chisholm confirmed to the court that she had an EMG test scheduled for 9 November 2021 and it is anticipated that the report will be available one week after. The court appointed the cause to a by order on 23 November to enable consideration to be given as to whether or not the case should proceed at that stage. This will depend on the report which will be lodged in due course by the pursuer and the defender's response to the report."

[8] An EMG test was conducted in early November and the result was made known to Dr Seckin. No report from Dr Seckin was lodged. At a hearing on 23 November 2021, the court was told by the pursuer that the EMG results were normal. That test was carried out only for the purpose of ruling out certain matters, which it did rule out. Dealing with the defenders' motion to dismiss the action, the court understood from Ms Chisholm's submissions that Dr Seckin's report should be received by the end of November 2021. The motion hearing was continued to 9 December 2021 to allow the pursuer to lodge the report and intimate it to the defender. No report was lodged or intimated by that date. In advance of that hearing, the pursuer indicated she was unwell and unable to attend. The court requested a medical certificate to confirm that position. The hearing was continued until 22 December 2021. At that hearing, an email from the pursuer's GP practice was referred to, but it did not amount to a medical certificate. The court was advised by Ms Chisholm that Dr Seckin had been on holiday and that the report would be produced in January. The court

advised the pursuer to contact him, advise him of the continuation and that the report should be lodged and intimated before the next hearing on 28 January 2022. At that hearing, Ms Chisholm advised the court that she had spoken to Dr Seckin by telephone. He had been on holiday for about one month and was extremely busy, partly as a result of issues arising from the pandemic. He told her that it would take at least another month to produce a report. Ms Chisholm was unable to advise the court of a date when the report would be obtained.

[9] Ms Chisholm accepted that she had been aware for quite some time that if no expert report supporting causation is lodged her case is bound to fail. This is a case to which the previous version of Chapter 42A of the Rules of Court applies. In terms of rule 42A.6 of those previous rules, the Lord Ordinary may make such orders as are thought to be necessary to secure the efficient determination of the action. There is support for the view that this rule would have allowed the consequences of there being no expert report on causation to be determined at a by order hearing: *JD* v *Lothian Health Board* 2018 SCLR 1, Lady Clark at [53], Lord Glennie at [73]. However, the defender's position, as expressed in written and oral submissions, was that there were also issues of relevancy. The fixing of the proof before answer in November 2021 must have proceeded on the basis that supportive expert reports would be exchanged and lodged. I concluded that in light of rule 42A.6 and the fact that the absence of the expert report on causation had arisen, along with issues of relevancy, it was necessary for the court to determine further procedure, of new. Fixing a further proof before answer, in the absence of an expert report on causation, was not appropriate. At a debate, the court does not normally look beyond the pleadings, but where the absence of an expert report is raised, there is no difficulty in the court dealing with the point: *JD* v *Lothian Health Board,* Lady Clark at [57]. Accordingly, at the hearing on

28 January 2022, the defender's motion for dismissal was refused as I considered it appropriate that a diet of debate be fixed. The debate was fixed for 5 April 2022, at which any matters of relevancy, and the issue of whether there is support in expert evidence for the pursuer's case, could be addressed. Ms Chisholm was advised that it remained open to her to lodge an expert report prior to the diet of debate. In the event, when the debate called on 5 April 2022, no report had been lodged.

[10] The interlocutor fixing the diet of debate ordained the defender to lodge its Note of Argument by 11 February 2022 and the pursuer to lodge her Note of Argument by 11 March 2022. That was complied with. A joint list of authorities was lodged. On 30 March 2022, the pursuer contacted the general department of the court asking for the debate to be discharged. The defender indicated to the general department that it wished the matter to proceed. No motion to discharge the debate was lodged. When the case called for debate on 5 April 2022, by a WebEx hearing, the pursuer appeared personally. She stated that she had a chest infection and was on antibiotics. No motion was made to discharge the diet of debate. No medical certificate or other communications from a GP were offered. When she had felt unwell on a prior occasion and considered that she was unable to appear at the hearing, she did not appear. She did not suggest that she was unable to take part in the debate hearing. Ms Chisholm's ability to address the court was not in any way hindered or differed at all from how she had dealt with matters in her earlier appearances. She was fully able to articulate her position and at no point indicated that she had any difficulty in that regard.

[11] Each party had set out its position in a Note of Argument. As well as having four weeks to consider the defender's Note, the pursuer had for a considerable period of time before then been well aware of the points which the defender would be making. The

defender had referred to the issue of causation in its statement of proposals for further procedure, prepared in December 2020. Also, a Note of Argument in support of the motion made previously, seeking dismissal on the same grounds as those to be advanced at the debate, was lodged several months prior to the debate. The motion had been made on more than one occasion, when the pursuer was present, under reference to the Note of Argument. The central point was the absence of an expert report on causation. In the whole circumstances, I concluded that there was no good reason for delaying matters further and not dealing with the issues.

[12] Senior counsel for the defender relied heavily on the Note of Argument and made very brief oral submissions based on the Note. The pursuer responded to those submissions, in equally brief terms, and relied upon her Note of Argument. Following her submissions, senior counsel responded on one point. Out of caution and as she was a party litigant, I allowed her to comment further and she did so in brief terms. The hearing lasted for a short period, part of which was taken up by parties clarifying points in answer to questions raised by the court. Senior counsel for the defender did not make any submissions that materially altered or added to the position adopted in the Note of Argument previously lodged in support of the motions to dismiss and repeated in the Note of Argument for the debate.

Submissions

Submissions for the defender

[13] This action had been characterised by repeated delay at the instance of the pursuer. Despite these delays the pursuer has still failed to produce any expert evidence to support her averments on causation. The pursuer had thereby also failed to provide fair notice of

her case. The pursuer's pleadings were both fundamentally lacking in specification and irrelevant.

[14] A case should be concluded within a reasonable time *Clark* v *Greater Glasgow Health Board* [2017] CSIH 17, Lord President (Carloway), at [44]); MacPhail, *Sheriff Court Practice* at 14.02. All litigants, whether represented or party, ought to be treated equally: *AW, Applicant* 2018 Fam LR 60, Lady Paton at [14]; *HN & Anr* v *Barnet Enfield & Haringey Mental Health NHS Trust* [2019] EWHC 2473 (QB), Martin Spencer J at [39] to [46]; *Gell* v *32 St John's Road (Eastbourne) Management Co Ltd* [2021] L & TR 26, Lord Justice Edis at [69] and [70]. The defender is entitled to fair notice of the case against it: *Morrison* v *Rendall* 1986 SC 69, Lord Robertson, at 78. That remained essential in actions for clinical negligence (where the subject matter is often legally and clinically complex), even where the pursuer is a party litigant: *JD* v *Lothian Health Board* 2018 SCLR. 1, Lady Clark of Carlton at [54] and [55]; *Spark* v *Western Isles National Health Service* [2019] SC EDIN 70 at [47]-[48], Sheriff Weir (as he then was)).

[15] Further procedure should not be afforded to the litigant who has failed to produce the requisite evidence: *JD* v *Lothian Health Board*, Lady Clark of Carlton at [53], [54] and [58]; *Tods Murray WS* v *Arakin Ltd*, Lord Woolman at [92] and [116]. Where the court is satisfied that a pursuer's pleadings are not properly founded upon expert evidence, the court has the power to dismiss the action: *JD* v *Lothian Health Board*, Lord Glennie at [73]. If it is contended by a pursuer that she was not offered a reasonable alternative to the proposed course of treatment, she must also offer to prove, had that alternative been offered, that she would have taken it and thereby avoided the injury giving rise to the claim: *AH* v *Greater Glasgow Health Board* 2018 S.L.T. 535, Lord Boyd at [33], [43], [46], [49] and [50]).

[16] The pursuer's pleadings contained wholly generic and unfocused averments on causation. No further specification was given by the pursuer to explain the causal link between the administration of spinal anaesthesia and neurological back and leg pain. That is inconsistent with the duty to provide fair notice of one's case. The lack of notice in the pleadings was not altogether surprising, in the absence of an expert report. The pursuer had been afforded every opportunity by the court to produce evidence which supports the averments in relation to causation. Despite the latitude afforded to her, the pursuer has repeatedly failed to do so. These repeated failures have caused the defenders to incur significant expense, all at a cost to the public purse.

Submissions by the pursuer

[17] The pursuer was an experienced registered nurse, having started her career in 1988. There had been no issues in two previous births. She had no history of leg or back pain prior to the events in February 2014. Throughout her nursing career she had spent time at the maternity hospital and was well aware of the procedure in theatre and the like. She was also aware of what falls below standards and had mentored many staff over the years. The experience during the birth of her daughter in February 2014 was distressing and as a result had caused a major lifestyle change in that she had to move house, change her vehicle, obtain help with her baby and had one of her daughters as a carer.

[18] She lived with constant pain and her mental state has been greatly affected. She was awarded ill health retirement in May 2016 (at the lower tier) after her daughter's birth. This had recently been increased to the upper tier level, meaning she will be unable to work indefinitely. Her retirement was supported by NHS Grampian. She believed that her claim for damages was reasonable as she would still have a considerable amount of years of work

in her career if she had been fit and healthy. The pain and suffering she still has is long term.

[19] During the birth of her daughter, Dr Moore was unsupervised and struggled with the spinal insertion. There was evidence that the attempts to inject took too long, just under one hour. Dr Moore had to be directed by senior nursing staff on several occasions. When senior help was eventually asked for, it was nursing staff who asked for it and not Dr Moore. Dr Moore failed to document another serious issue that happened in theatre with the venflon not being *in situ* correctly. This led to an emergency situation as the pursuer had a postural drop, where IV medication is required to stabilise the person, but a mini-crisis occurred. Professionals must keep accurate and clear records but this was not even documented. It was clear that the procedure was difficult as this was documented in the medical theatre notes and that the spinal attempts were numerous. Her MRI scan showed nerve root issues where the attempts were made. She had supportive evidence that Dr Moore was negligent. Any delays in court had been outwith her control and that was evidenced to the court at the appropriate times. Despite requests, she had not been given the defender's evidence.

[20] There was an expert report, from Dr Norman, supporting negligence. Among other things, it made reference to the timescale of the attempts to inject, which was some 50 minutes or so. There must have been more attempts than three. Dr Moore should have sought senior help a lot earlier than she did. Dr Moore was very rough and frustrated, acting with force, when it should have been slow and precise. Matters were evidenced by the nursing staff. The pursuer's personal view was that after two failed attempts to inject Dr Moore should have sought help from a senior colleague. The pursuer advised the court that her partner had been seriously unwell in recent months. As a result of her situation, she

had not had a lot of communication with Dr Seckin, including because she was not aware whether her partner would pull through from his illness. Dr Seckin still supported causation and had requested sight of the defender's expert reports. However, it was not suggested that Dr Seckin was preparing an expert report or when he would do so.

Decision and reasons

[21] This action was raised over five years before the diet of debate took place. As noted above, sists were granted. This included a period of well over a year for the pursuer's medical experts to investigate matters, including on causation. The lengthy periods of sist came to an end some two years and three months before the debate. The case has been live for that period but the pursuer has not lodged any expert report which provides support on the essential issue of causation. Even though in December 2020 a diet of proof was fixed for November 2021 with expert reports to be lodged by July 2021, no such report was obtained and the diet came to be discharged. The court has been advised by the pursuer that an expert, Dr Seckin, was instructed in April 2021. The pursuer has also told the court that Dr Seckin "supports causation". However, no correspondence from Dr Seckin and no other form of evidence from him to that effect has ever been shown to the court. More fundamentally, the pursuer's failure to obtain, let alone lodge, an expert report on causation has persisted despite much more than an ample time period having been allowed for that to be done.

[22] The pursuer is clearly aggrieved at what she views as the consequences of the alleged negligence. She has support, in expert reports, for the allegations of breach of duty, although those are contested by the defender. However, for several years she had legal representation. The pleadings were drafted by her representatives. It must have been

known from the outset that an expert report on causation was required. Indeed, as noted above, the pursuer herself appears to know that as well. A lengthy period (June 2018 until October 2019) was allowed for her medical experts to investigate matters further, including on causation. In due course, her representatives withdrew from acting. Although she has legal aid, her attempts to engage other solicitors have failed.

[23] The legal principles about court actions fall to be applied to any person who decides to bring litigation, whether that person is represented or is a party litigant. In *Barton* v *Wright Hassall* [2018] UKSC 12, Lord Sumption, as part of the majority decision by the Supreme Court, observed (at [18]) that the rules of court provide a framework within which to balance the interest of both sides, that balance being inevitably disturbed if an unrepresented litigant is entitled to greater indulgence in complying with them than the represented opponent. Such an advantage enjoyed by a party litigant imposes a corresponding disadvantage on the other side. That approach was applied by Lady Paton in *AW, Applicant* (at [14]).

[24] Depending upon the circumstances, it may be appropriate in the course of case management to provide a degree of latitude to a party litigant. That has been done on numerous occasions in this case. In part, this took into account that the pursuer's solicitors had withdrawn from acting and that as a party litigant she was seeking further representation as well as an expert report on causation. But, in my opinion, the stage has now been reached where gross disadvantage has been suffered by the defender in being exposed to this unfounded claim for a lengthy period of time. In a clinical negligence case of this kind, expert evidence must be provided to support causation: *JD* v *Lothian Health Board*, Lady Clark of Carlton at [53], [54], [57] and [58], Lord Glennie at [73]. The same approach was taken in *Spark* v *Western Isles National Health Service*, by Sheriff Weir (as he then was) at

[47]-[48]. It has also been taken in England: *HN & Anr* v *Barnet, Enfield & Haringey Mental Health NHS Trust*, Martin Spencer J at [42]. Lord Woolman reached a similar view, albeit in relation to breach of duty in professional negligence, in *Tods Murray WS* v *Arakin Ltd*, at [92] and [116]. The absence of such a report results in this case requiring to be dismissed.

[25] It is not surprising that, without such expert support, the pleadings for the pursuer on causation are merely assertive and inspecific. The defender's position, that fair notice of the pursuer's case remains essential even where the pursuer is a party litigant, is undoubtedly correct: *JD* v *Lothian Health Board*, Lady Clark at [54]-[55]. For the reasons given in the defender's Note of Argument, there are no averments which give fair notice of why the alleged negligence is said to have caused the leg and back pain. The pursuer's pleaded case is therefore irrelevant.

Disposal

[26] I shall sustain the defender's first plea-in-law and dismiss the action, reserving in the meantime all questions of expenses.