OUTER HOUSE, COURT OF SESSION

[2018] CSOH 111

PD1572/15

OPINION OF LORD WOOLMAN

in the cause

MARC KERSHAW AND OTHERS

Pursuer

against

(1) CONNEL COMMUNITY COUNCIL & (2) AGGREGATE INDUSTRIES LTD

Defenders

Pursuer: H H Campbell QC, MacMillan; Thompsons
First Defender: Shand QC; Clyde & Co (Scotland) LLP
Second Defender: Galbraith; Weightmans (Scotland) LLP

5 December 2018

Introduction

[1] Can a community council be sued for damages for personal injuries? The question is one of taxonomy. Is such a body correctly classified as one without a separate legal persona that cannot be sued? Or is it properly classified as one that can be sued?

Background

[2] I assume the following facts to be true in determining this issue. Connel Community Council ("Connel CC") has rights and responsibilities over an area of Argyll that includes

the Falls of Lora, a local beauty spot ("the site"). In 2012 Connel CC discussed improving the visitor facilities at the site, but it did not have the funds, resources or expertise to carry out any works itself.

[3] Aggregate Industries Ltd ("Aggregate") owns and operates a quarry in Argyll. In 2012 it encouraged its employees to provide their services free for certain community and charitable purposes. It placed a notice in a local newspaper advertising the scheme. Mr Les Stewart (secretary) and Mr Sandy Dunlop (chairman) were office-bearers of Connel CC at the time. They saw the advertisement and arranged to meet Mr Calum Carnie of Aggregate. At the meeting, he offered to provide the services of four labourers for one day at the site. There was a general discussion about the improvement works. Mention was made of laying paths, placing new picnic tables, and carrying out works to a flight of steps linking the picnic area to the adjacent car park ("the steps"). But nothing specific was agreed.

[4] The workmen arrived at the site in August 2012. Mr Stewart and Mr Dunlop instructed them to work on the steps and provided general supervision. There was a certain 'Heath Robinson' aspect to the enterprise, as no one had any expertise in laying or improving steps. The labourers used surplus slabs from a patio at Mr Stewart's house. They also brought up rocks from the nearby shore. Aggregate supplied cement and a watering can to mix it.

[5] The site was formally opened on 1 May 2013. Subsequently, an Aggregate shift manager noticed something amiss with the steps. A slab had cracked and come loose. Mr Stewart also detected a problem. He intended to find out whether individuals on community payback orders could undertake the repairs to the steps. Neither man reported matters, or took any action to place any barriers or warning signs at the steps.

[6] One evening in July 2013, Alan Kershaw went fishing near the site. On returning to the car park, he fell when descending the steps. An air ambulance took him to the Southern General Hospital in Glasgow. Scans showed that he had sustained a neck fracture. The medical team initially placed him in a 'halo' frame to keep his head and neck immobile. Several weeks later they replaced it with a cervical collar. Unfortunately, the fracture did not unite, leaving Mr Kershaw with significant pain and discomfort. His physical and mental health deteriorated. He died in 2016 aged 57.

[7] There are other matters to add to these essential facts. The ownership of the picnic area and the steps is uncertain. Argyll and Bute Council (a) owns the car park at the site, (b) approved the proposal to undertake the works, and (c) stated after the accident that it had arranged public liability insurance for Connel CC, which had responsibility for the steps.

The Present Action

[8] Before his death, Mr Kershaw raised this action for damages for personal injury against Connel CC and Aggregate . He claimed that they (a) were jointly responsible for the poor condition of the steps, and (b) had each breached the duty of care that they owed to him at common law and under the Occupiers Liability (Scotland) Act 1960. After his death, Mr Kershaw's long-term partner and other members of his family have continued the action.

[9] In convening Connel CC, Mr Kershaw acted in accordance with established authority relating to community councils. This court has allowed them to pursue and defend actions in their own name. Examples include *Kirkcaldy District Council* v *Burntisland Community Council* 1993 SLT 753 and *Hillhead Community Council* v *City of Glasgow Council* 2015 SLT 239. In another action, Lord Osborne expressly held that a community council had title and

interest to raise proceedings: *Cockenzie & Port Seton Community Council* v *Lothian District Council* 1997 SLT 81, 87H-88A.

[10] Miss Shand acts on behalf of Connel CC or, more precisely, its insurers. She advances a short point. She contends that Connel CC is an unincorporated association with no legal persona. It therefore cannot be sued in its own name alone for delictual damages. The action against Connel CC should therefore be dismissed as irrelevant.

[11] Counsel for the other parties invite me to fix a proof before answer. They differ, however, in their analysis. Miss Galbraith on behalf of Aggregate submits that community councils fall into a special category of unincorporated associations that can be sued. She contends that the court should hear the facts before coming to its final view.

[12] By contrast Mr Campbell for the pursuers maintains that a community council is a body *sui generis*. He rejects the idea of a binary choice between an incorporated and an unincorporated body.

Unincorporated Associations

The General Rule

[13] Unincorporated associations can only be convened as parties to legal proceedings if certain individuals (usually the office bearers) are named in the instance. Any decree is only directly enforceable against them. They in turn have a claim for relief against the association's funds: *Harrison* v *West of Scotland Kart Club* 2004 SC 615.

Misgivings

[14] Jurists expressed concern about the law's approach:

> "The fiction is not that the Royal Bank of Scotland has corporate identity, but that the National Union of Bank Employees lacks it. Indeed, clubs, trade unions and other unincorporated associations often have … much more reality than some such legally incorporated bodies as the one-man company in the celebrated case of *Salomon* v *Salomon and Co Ltd*."
>
> Professor Sir Neil MacCormick, *Institutions of Law* (2007) page 84

Proposed Reform

[15] As a result of such concerns, the Scottish Law Commission (SLC) decided to consult on the matter. In 2008 it invited interested parties to comment on the suggestion that unincorporated associations which met certain conditions should be accorded separate legal personality: *Discussion Paper on Unincorporated Associations* No 140. The suggestion received a positive response. Accordingly in 2009 the SLC proposed reform of this area of the law: *Report on Unincorporated Associations* No 217. It recommended the creation of the Scottish Association with Legal Personality ('SALP'). The name alone delineates the status of the new body. No legislation has as yet followed. If it had, the present issue would not arise. As a SALP, a community council could unequivocally sue and be sued in its own name.

[16] In Report No 217, the SLC justified its approach as follows:

> "1.4 Put shortly, the current law does not recognise the existence of such organisations as separate legal entities. In the case of associations of sufficient size to wish to enter into contracts, own property, engage employees and so forth, this absence of legal personality has given rise to a variety of problems, highlighted in a substantial body of case law over many years, only some of which have been pragmatically resolved.
>
> 1.5 Yet the full picture is not so clear-cut. Much statutory regulation proceeds upon the (strictly false) assumption that an unincorporated association has some form of existence in law. A wide variety of statutory criminal offences may be committed by associations as well as by their officers. Associations are liable to various taxes in much the same way as corporate bodies. Statutes in the employment and pensions law field refer to individuals as being the employees of unincorporated associations. An unincorporated association may be sequestrated. The non-existence of such associations as a matter of law is often quietly ignored."

[17] In its fuller discussion, the SLC highlighted two particular issues of uncertainty that are relevant to the present case. First, some bodies have been treated as "quasi-corporations": *Discussion Paper* No 140 at paras 2.25 – 2.27. Most of the jurisprudence relates to trade unions. The SLC itself may be another example of such a hybrid body. There is no clear and consistent thread identifying their characteristics. Commonly, Parliament has created them and accorded them certain rights and privileges, or ascribed to them certain duties.

[18] Secondly, there is "no clear authority on the extent of liability of an association and its members to a third party in delict." *Report* No 217 para 2.8. That ambiguity appears to have been erased in English law, where a voluntary association can be liable: *Various Claimants* v *Catholic Child Welfare Society & Ors* [2012] UKSC 56.

Community Councils

History

[19] I begin by considering the genesis of community councils. In the late 1960s Lord Wheatley chaired a Royal Commission to investigate local government arrangements in Scotland. After carrying out an extensive review, it recommended a new system of regional, islands area, and district councils: 1969 Cmnd 4150. It also recommended the introduction of community councils, which were intended to provide a "neighbourhood voice" (para 847).

1973 Act

[20] The Local Government (Scotland) Act 1973 largely implemented the Royal Commission's recommendations. Section 2 expressly stated that each regional, islands area,

and district council would be a body corporate. But no such provision was made in respect of community councils. They are therefore not incorporated bodies. But in my view it is going too far too fast to conclude that all the incidents of their juridical status are defined by that negative inference. The issue requires a wider inquiry.

Ambit of a Community Council's Role

[21] Section 51(2) of the 1973 Act states that the purpose of community councils:

> "shall be to ascertain, co-ordinate and express to the local authorities for its area, and to public authorities, the views of the community which it represents, in relation to matters for which those authorities are responsible, and to take such action in the interests of that community as appears to it to be expedient and practicable."

[22] Their remit therefore goes beyond that of being mere debating forums and neighbourhood voices. Parliament has enjoined them to act. Inevitably acts have consequences, which may include causing harm to third parties.

Insurance

[23] Whenever one thinks of the risk of harm, one thinks of insurance. The 1973 Act is silent on that question. To my mind it is not surprising that Parliament chose not to legislate in respect of that issue. It recognised that different areas of the country might wish to adopt different detailed arrangements for their community councils. It required every regional council to submit a scheme to the Secretary of State for Scotland: section 51(1) of the 1973 Act. Community councils could only be established in that area after approval was given to such scheme.

[24] In 2013 the Argyll and Bute Council scheme provided that:

> *"12.1 Liability of Community Council Members*

> Argyll and Bute Council will meet the costs of public liability insurance in respect of the reasonable and proper activities of community councils."

Part 8 of the scheme handbook buttressed that position:

> "*Insurance for Community Councils* As a public body, each Community Council is responsible for ensuring that an appropriate level of insurance covers its activities. To assist in this public liability cover has been arranged for community councils who require this by Argyll & Bute Council. The premiums for this are paid directly to the insurers."

[25] As mentioned above, after the accident Argyll and Bute Council wrote to the pursuers' solicitors confirming that it had arranged insurance cover for Connel CC at the material time. It is reasonable to suppose that, before this challenge was taken, both the pursuers and the members of the council assumed that this was an insurance question and that any successful claim would be paid out under the policy.

[26] There are obvious practical advantages in allowing any action to be brought against a community council itself, rather than its members. Pursuers do not have to take steps to find out the names of the office bearers. Members do not have to worry about the threat of personal liability. Public spirited citizens might well be deterred from seeking election to community councils if they thought that there was a chance, even a remote one, that their own assets could be put at risk.

[27] No doubt these factors may have influenced the decisions in the Outer House cases to which I refer in para 9 of this Opinion. I recognise that they are not binding upon me, and that none related to delictual claims. In my view, however, it would be odd for the designation of a community council to depend on the nature of the proceedings.

[28] Having regard to all these factors, and in particular that Parliament created community councils as distinct bodies with rights and duties to act in the public interest, I conclude that they are hybrid bodies that can be sued in their own name.

[29] That conclusion appears to accord with the view of the Royal Commission:

> "If, in order to fulfil its true function, a community council cannot be merely a voluntary body, neither should its status be too rigid and official. To create something approximating to a third tier of local government would defeat the whole object we have in view. Above all, the community council must not be forced into existence. Equally, however, its emergence ought to be encouraged and in some way regularised." (Report para 849)

Relevancy and Specification of the pleadings

General

[30] Miss Shand also challenges the relevancy and specification of parts of the pleadings. I shall anticipate my decision by saying that I do not accept these submissions. This is a personal injury case brought under RCS chapter 43. It therefore does not require elaborate pleadings. I'm satisfied that the summons meets the test of fair notice: *Melville Dow* v *Amec Group* [2017] CSIH 75 per Lord Glennie at paras 179, 180.

Liability

[31] The key questions on the merits are whether, in all the circumstances, (a) there is a sufficient relationship of proximity, and (b) it is fair, just and reasonable to impose a duty: *Caparo Industries plc* v *Dickman* [1990] 2 AC 605; *Mitchell* v *City of Glasgow Council* 2009 SC (HL) 21. These matters should be decided after the court has heard evidence.

Occupier's Liability

[32] Miss Shand argued that the occupier's liability case is irrelevant. The pursuers do not aver that every member of Connel CC had a right of control over the steps, or that there was any right to prevent members of the public from coming on the site: Walker *Delict* p581. In my view this is a fact-sensitive issue. The test is whether someone "has a sufficient

degree of control over premises that he ought to realise that any failure on his part to use care may result in injury to a person coming lawfully there": *Wheat* v *Lacon* [1966] AC 552, 557-8, 581 per Lord Denning. Entire or exclusive physical control is not required: *Furmedge* v *Chester-le-Street DC* [2011] EWHC 1226 (QB) at para 142.

Vicarious liability

[33] I agree with Miss Shand that there is no basis for the case of vicarious liability: *MCE* v *De La Salle Brothers* 2007 SC 556. The other members of Connel CC cannot be held liable for the acts of the two office-bearers. But this branch of the case flies off, given my decision on the main point that Connel CC can be sued in its own name.

Loss

[34] Before the accident, Mr Kershaw worked as a delivery driver. The pursuers concede that he drank more than the recommended levels of alcohol, but say that it did not prevent him from leading a full and active life. They claim that the accident had a profound effect on his lifestyle. In particular, he significantly increased his alcohol consumption with the result that his life was shortened.

[35] Miss Shand contends that the pursuers have failed to specify (a) the date when Mr Kershaw changed his drinking habits, and (b) whether he developed a psychiatric illness as a result of the accident. These points can be ascertained from his medical records, which are lodged in process. There is no need for a primary victim to establish psychiatric illness: *Page* v *Smith* [1996] AC 155. In *Carling* v *Bruce* Ltd 2007 SLT 743, Lord Macphail rejected a contention that smoking and heavy drinking are lifestyle choices that negative a causal connection, as heavy drinking may reasonably be expected to accompany PTSD.

Conclusion

[36] I am satisfied that all these matters should be determined once the evidence has been led. I shall therefore allow a proof before answer. I reserve all questions of expenses.