SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH
IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2023] SC EDIN 30

PIC-PN2284/21

NOTE BY SHERIFF K J CAMPBELL KC

in the cause

BEVERLY GILCHRIST

Pursuer

against

CHIEF CONSTABLE POLICE SERVICE OF SCOTLAND

Defender

Pursuer: Hofford KC; Thompsons
Defender: Hastie, advocate; Solicitor to the Scottish Police Authority

Edinburgh, 7 February 2023

Introductory

[1] This action concerns an incident which occurred on 3 August 2019 while the pursuer was working in the course of her employment as a clinical support worker in the Emergency Department at the Edinburgh Royal Infirmary. The pursuer was attempting to treat a disruptive patient, who had been brought to hospital by constables of Police Scotland. The police officers required to restrain the patient. It is common ground that the pursuer was injured, but there was a dispute about the nature of her injuries and the causal mechanism. Following proof, in my judgment dated 12 October 2022 ([2022] SC EDIN 2), I assoilzied the defender. I appointed a hearing on expenses, and heard parties on 19 December 2022.

[2] Both parties lodged written submissions on which they elaborated in argument. It is helpful to start with the defender's motion, set out in the written submission, as that shaped the discussion which followed.

> "The defender seeks an award of expenses against the pursuer in terms of [OCR] rule 31A.2 on the ground that, having regard to the Sheriff's decision, the pursuer (or her agents) did not conduct proceedings in an appropriate manner in that she/they either: (a) made a fraudulent representation in connection with the claim or the proceedings; or (b) behaved in a manner which was manifestly unreasonable in connection with the claim or the proceedings.
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> Additionally, the defender also seeks an order under rule 31A.4 OCR whereby the pursuer/her agents are ordained to lodge any document which sets out or records any agreement between the pursuer and/or her agents and/or any third party funder as to the pursuer's personal liability for expenses in the case, in the event of an award being made against her."

[3] The motion came against the background of the recently introduced regime of Qualified One-way Cost Shifting ("QOCS"), and shortly before the hearing, Sheriff Fife's decision in *Lennox* v *Iceland Foods Ltd* [2022] SC EDIN 42 was issued. I arranged for my clerk to bring that decision to the attention of parties.

Preliminary point – intimation

[4] As a preliminary, Mr Hofford KC for the pursuer called attention to OCR 31A.4(1)(a), which requires an application under the QOCS provisions of OCR 31A, to be in the form of a written motion intimated in terms of the usual procedure under OCR 15 or OCR 15A. He was not insisting on the point because the defender had intimated and lodged a detailed written submission a week prior to the hearing and he had been instructed accordingly, but thought the point ought to be noted. Mr Hastie accepted the point was well-taken.

[5] In my view, senior counsel was quite right to raise the point about intimation, albeit he did not insist on it. OCR 31A.4(1)(a) is in my view unambiguous in its terms. In future, the court will expect all applications under OCR 31A to be in the form of written motions duly intimated and lodged in accordance with the usual requirements of OCR 15 or OCR 15A.

QOCS issue - defender's submission

[6] The claim was first intimated under the Personal Injuries Pre-Action Protocol on 7 May 2020. In the claim form the pursuer alleged that two police officers who accompanied the patient JH to hospital:

> "decided to restrain him. One of the officers asked [the pursuer] to assist by taking the leg restraints from his belt and tying his legs. As she did so she was kicked twice. It was asserted the defender was vicariously liable for the officers' acts and omissions and that they ought not to have asked a clinical support worker to tie the legs of a violent and aggressive individual."

Liability was denied by the defender, and proceedings were thereafter served on 7 October 2021. By the time the action was raised, the pursuer had Dr Rodger's report dated 12 July 2021, which dealt with her psychiatric condition.

[7] The pursuer's case on Record was that the police officers:

> "asked the pursuer to take police leg restraints from the officer's belt. They asked her to straps JH's legs with the restraints…. and further that ….as the pursuer attempted to restrain JH's legs he kicked her in the wrist.…. Her left hand and wrist were caught in the restraint straps."

It was later averred that the police officers:

> "ought not to have asked the pursuer to apply police restraints to JH…in inviting [her] to participate in the restraint they made a hazardous situation more dangerous."

[8] Counsel submitted it was obvious from these pleadings that the central plank (in fact the only plank insisted in at proof – the other ground about the officers calling for help was not advanced) was that the pursuer was asked by the police officers to apply the restraint straps to the patient JH in circumstances in which she should not have been asked, and that she had been injured whilst doing so.

[9] Counsel referred to my summary of the pursuer's evidence at paragraphs [6]-[13] of my judgment, and my analysis of that evidence at paragraphs [56]-[59]. He noted that I had preferred the police officers' account of the critical events, and at paragraph [59] I had observed:

> "I do not accept that injury happened as she was applying the restraint straps to JH's legs. I do not accept the pursuer's evidence that she was doing so. Nor do I accept that she was instructed, or even merely invited to apply the straps to JH by the defender's officers."

Counsel submitted that having regard to these findings, the only logical inference is that, although I did not say so in terms, I found the pursuer to be incredible in relation to her allegations as to how she was injured. These allegations formed the central plank to the pursuer's case, and it is inconceivable that my findings on the pursuer's evidence could be a matter of reliability only. These were specific allegations of specific requests by the police officers and, in consequence, specific action by the pursuer, which she alleged led to her injury. In not accepting the evidence of the pursuer in relation to the "restraint/injury factual narrative", as narrated in paragraph [59], counsel submitted the logical conclusion is that the pursuer was not telling the truth when she gave her evidence. It is reasonable to argue that, having regard to my findings in relation to that evidence, the pursuer made up the "restraint/injury factual narrative" on which her claim was based.

Fraudulent representation

[10] Counsel noted that section 8(4)(a) of the Civil Litigation (Expenses and Group Proceedings)(Scotland) Act 2018 ("the 2018 Act") was not dealt with in *Lennox*. Nor is "fraudulent representation" or "otherwise acts fraudulently" further defined in the 2018 Act. However the concept of fraudulent misrepresentation was not a new one in Scots law. Counsel referred to a number of institutional authorities.

> Justinian characterised fraud thus: "Every kind of cunning, trickery or contrivance in order to cheat, trick or deceive another" (Dig 4.3.1.2)
>
> Erskine (*Inst* III, I, 16) and Bell (*Princ* §13) suggested it was "A machination or contrivance to deceive".

Both references are found in Professor McBryde's book on *Contract*, (3rd Edition), para 14-02. At 14-10, Professor McBryde himself suggests "the simplest form of fraud is a straight lie."

[11] Counsel submitted that if the argument about the logical conclusion of my findings about not accepting the pursuer's evidence on the main plank of her case – the "restraint/injury factual narrative" – was correct, namely that the pursuer did not tell the truth about that, then, the pursuer must have lied. And, having regard to the discussion in McBryde, the pursuer's evidence about the restraint would amount to a fraudulent representation sufficient to allow the court conclude her conduct of the action was not in an appropriate manner, and so trigger the exception to section 8(2).

[12] Counsel did not go so far as to say that in every case where a pursuer was found incredible would the court find his or her conduct to be a fraudulent representation. It was enough that in this case the pursuer had, in counsel's submission, been found incredible on the central plank of her case.

Manifestly unreasonable conduct

[13] Counsel accepted this was a high threshold. The background to this part of section 8 had been discussed in *Lennox*, at paragraphs [57]-[60]. Counsel submitted the pursuer's conduct in this case crossed that threshold. If the court was not satisfied that the pursuer's evidence on the central issue engaged section 8(4)(a), it was submitted that it was manifestly unreasonable conduct. It was difficult to see how putting forward a factual basis for one's claim which was not accepted could be other than manifestly unreasonable behaviour.

[14] There was a separate point in relation to this head, canvassed at paragraph 31 of the written submission. The action was raised three months after Dr Rodger's report was provided. Counsel submitted the pursuer's agents ought to have considered the import of the pursuer making no reference in the history given to Dr Rodger of the mechanism of the accident she later relied out. Further questioning might have elicited a clear position.

[15] In all of these circumstances, the defender was entitled to the expenses. Further, an order for disclosure ought to be made. Counsel accepted the Taylor review had envisaged a slightly different funding model, but the order sought was reasonable.

QOCS issue – pursuer's submission

[16] Senior counsel invited me to refuse the defender's motion. The defender's position was the action had not been conducted in an appropriate manner, and these were not minor matters. In terms of section 8(4)(a), the allegation was of fraudulent representation by the pursuer or her agents; that was akin to criminal deception. The alternative argument was their conduct was clearly unreasonable or even irrational. There were two versions of events offered in evidence. The pursuer's position was that the two police constables restraining the patient asked her to assist with the restraint, and she was injured. The

defender's position, which the court had accepted, was that the police constables applied the restraints and asked the pursuer to get the straps out. This was a heated incident, and, senior counsel submitted, one could understand why recollections might vary. The pursuer was not out on a limb. Dr Garrett had noted the same account as the pursuer gave in court. PC Downie said he had no difficulty asking for assistance. PC Grant said NHS staff had been involved and his notebook recorded the assistance of six NHS staff. Ultimately, it was a matter of fact for the court.

[17] Senior counsel noted that at paragraphs [57] and [58] of my judgment, I had accepted the police evidence, and pointed to what was not said by the pursuer to Dr Birrell and Dr Rodger. There were other issues where the judgment referred to the pursuer being unreliable. However, nowhere did I suggest there had been fraudulent misrepresentation by the pursuer or her agents. Nor did I say that the pursuer was incredible. Senior counsel understood it had not been put to the pursuer at the proof in terms that she was lying. The court was faced with two versions, and had preferred one for the reasons given. It would not be a fair inference to draw that the court found the pursuer to have lied. One would expect the court to have said that the pursuer's account was not accepted because it was untrue or because she was incredible. It was in the nature of litigation that there competing accounts of events, because memories might differ. Just because one version was preferred to another did not give rise to a fraudulent misrepresentation, or even manifestly unreasonable behaviour.

[18] The effect of section 8 of the 2018 Act is that the court must not make an award of expenses unless certain things are established. Senior counsel submitted that formulation was not designed to deal with competing versions of events such as the present case. Senior counsel referred to *Lennox*, at paragraph 31, where the section of Sheriff Principal Taylor's

report dealing with manifestly unreasonable behaviour was set out in the submissions before the court. It was clear that was a high test, and that Sheriff Principal Taylor's view was that it would be unusual for a pursuer to lose the benefit of QOCS. Senior counsel agreed with the defender's characterisation of the test for fraudulent representation. What was required was bad faith, deliberately and clearly intended. That was the law going back to *Derry* v *Peek* (1889) LR 14 App Cas 337, if not further. Could it be said the pursuer's account in this case was given recklessly, and without belief in the truth? Senior counsel submitted it could not. The court would require to have made a finding that a person had intentionally or deliberately misled the court. It would have to be close to being a finding that person had lied. In this case, one did not get near to that.

[19] On the alternative argument that the pursuer's behaviour was manifestly unreasonable, senior counsel submitted there was nothing approaching the level required here. Again, the issue was that there were two versions of events, and the court preferred one over another. The pursuer submitted that as a general proposition, QOCS protection could not be disapplied simply because the court preferred one account over another. In *Lennox*, the court observed that the defender had not appreciated how high the threshold for section 8(4)(b) was; senior counsel submitted the same applied here. In relation to the point directed to the pursuer's agents under section 8(4)(b), again such a finding was not to be lightly countenanced. There was no basis for it in the argument advanced by the defender. In the whole circumstances, the motion should be refused. Expenses should follow success in the motion. The pursuer sought sanction for senior counsel in relation to the motion.

Defender's reply

[20] In a brief reply, Mr Hastie accepted that it had not been put to the pursuer in terms at proof that she was not telling the truth. However, it was put to her that the police officers did not ask her to apply the restraint straps, and it was put to her that she did not apply the straps. The defender concurred that expenses should follow success in relation to the motion. In relation to sanction for counsel, it was accepted there were novel issues and that this case raises slightly different issues from *Lennox*. The defender agreed that sanction for counsel was appropriate, but the threshold for senior counsel was not met.

Analysis and decision

[21] The starting point for this motion is section 8 of the Civil Litigation (Expenses and Group Proceedings (Scotland) Act 2018, which provides:

> "**8 Restriction on pursuer's liability for expenses in personal injury claims**
>
> (1) This section applies in civil proceedings where—
>
> (a) the person bringing the proceedings makes a claim for damages for—
>
> (i) personal injuries, or
> (ii) the death of a person from personal injuries, and
>
> (b) the person conducts the proceedings in an appropriate manner.
>
> (2) The court must not make an award of expenses against the person in respect of any expenses which relate to—
>
> (a) the claim, or
>
> (b) any appeal in respect of the claim.
>
> (3) Subsection (2) does not prevent the court from making an award in respect of expenses which relate to any other type of claim in the proceedings.

(4) For the purposes of subsection (1)(b), a person conducts civil proceedings in an appropriate manner unless the person or the person's legal representative—

(a) makes a fraudulent representation or otherwise acts fraudulently in connection with the claim or proceedings,

(b) behaves in a manner which is manifestly unreasonable in connection with the claim or proceedings, or

(c) otherwise, conducts the proceedings in a manner that the court considers amounts to an abuse of process.

(5) For the purpose of subsection (4)(a), the standard of proof is the balance of probabilities.

(6) Subsection (2) is subject to any exceptions that may be specified in an act of sederunt under section 103(1) or 104(1) of the Courts Reform (Scotland) Act 2014.

(7) In subsection (1)(a), 'personal injuries' include any disease and any impairment of a person's physical or mental condition."

[22] Section 8(4), and in particular subsections 8(4)(b) and (c) was recently considered in *Lennox* v *Iceland Foods Ltd* [2022] SC EDIN 42. I gratefully adopt the account of the legislative history set out there. Section 8(4)(a) did not arise in *Lennox*.

Fraudulent representation – section 8(4)(a)

[23] As counsel observed, the formulation in section 8(4)(a) "makes a fraudulent misrepresentation or otherwise acts fraudulently" is not further defined or characterised. However, these are not new legal concepts, and in my view it therefore follows that Parliament intended the established definition of those concepts to apply. In this context, it should be borne in mind the court is dealing with a civil matter, rather than the crime of fraud. As counsel for the defender submitted, there is discussion of the notion of fraudulent representation going back to the earliest sources in our law. Those older sources are

conveniently gathered in Professor McBryde's discussion of fraudulent representations in the context of the law of contract, see W McBryde *Contract* (3rd ed), Ch14, particularly paragraphs 14-02 and 4-03. Professor McBryde analyses the law in this way:

> "The simplest form of fraud is the straight lie. Examples are the production, prior to contract, of a false statement of affairs which enlarges assets and diminishes liabilities, or lying about a rate of foreign exchange or pretending to be an heir or misrepresenting the circumstances surrounding an agreement on splitting an inheritance, or misrepresenting the nature of a sub-lease, or the acreage of a farm, or the number of sheep a farm would maintain … (para 14-10).
>
> The law has not had much difficulty with the distinction between the straight lie, knowing that the statement is false, and a false statement made with the honest belief that the statement is true. The latter is not fraud; it may be innocent or negligent misrepresentation …" (para 14-12).

[24] I did not understand either party to dispute this as an accurate statement of the law. In my opinion, it is clear from the range of instances cited, that this formulation describes the notion of fraudulent representation or misrepresentation across the body of civil law, and not only in relation to the law of contract. It is therefore a helpful source of reference in approaching section 8(4)(a). In the practical application of section 8(4)(a), that will require the court to consider the whole facts and circumstances of the litigation. However, it is clear from these authorities that the threshold for fraudulent representation is a high one. In my opinion, senior counsel for the pursuer was correct that in order for a case to fall within section 8(4)(a), the court would require to make a finding that a pursuer or his or her legal representative had acted intentionally to mislead the court.

[25] Turning to the circumstances of this case. As I narrated in my judgment of 12 October 2022, there were competing accounts of the events in this case. I preferred the account given by the two police officers, PC Downie and PC Grant, for the reasons set out in my judgment. Those are my reasons, and I do not consider it appropriate to engage in a meta-analysis of them. Not least because that would tend to undermine the important

principle of finality in judicial decision making. However, the key points for the purposes of deciding the QOCS question are that I did not make a finding that the pursuer was either incredible or that her evidence was deliberately untrue. No other argument was advanced under this strand of the motion. Accordingly, I consider that the defender has not met the high threshold for section 8(4)(a).

Manifestly unreasonable behaviour – section 8(4)(b)

[26] In relation to the construction and application of section 8(4)(b), I respectfully agree with the approach set out by Sheriff Fife in *Lennox*, at paragraphs [57]-[62]. In my view, in a situation where a pursuer is found to be incredible on the core issue in an action, the issue of whether that is manifestly unreasonable behaviour may arise when the question of expenses is considered. However, for the reasons given in *Lennox*, I consider that it does not invariably arise in that situation. Each case will turn on its own facts and circumstances, and for this purpose, that will involve consideration of the history of the litigation.

[27] In this case, I have not made a finding that the pursuer was incredible. As discussed above in relation to section 8(4)(a), I preferred the account given by the police witnesses, for the reasons in my judgment. Those reasons do not meet the threshold for manifestly unreasonable conduct.

[28] Finally, there is the alternative argument, directed against the pursuer's agents, that their conduct was manifestly unreasonable in putting forward the position on record that the pursuer ultimately took to proof, in the face of the history noted in Dr Rodger's report. I consider that argument to be misconceived. I do so because it conflates the omission of information, with a report containing a contrary or inconsistent position from that advanced by a pursuer on record and at proof. Persisting with the latter might in some circumstances

be sufficient to cross the threshold in section 8(4)(b). However the position of a report which contains an account which is silent is, in my opinion, different, at least in the absence of further circumstances pointing to manifestly unreasonable behaviour. There are no such circumstances here. Given the conclusion I have reached on the first limb of the defender's motion, there is no need for me to deal with the second limb, seeking an order ordaining the pursuer or her agents to disclose information about funding.

Conclusion

[29] I will therefore refuse the defender's motion. Parties were agreed expenses should follow success in relation to the motion. I will therefore find the pursuer entitled to the expenses of the motion. This is the first occasion on which the court has had to deal with section 8(4)(a), which is an important matter for practice, and only the second occasion when it has had to deal with section 8(4)(b). I am satisfied that it was reasonable for parties to instruct counsel. Given the nature of the issue raised by section 8(4)(a), I am satisfied that it was reasonable to instruct senior counsel.