

OUTER HOUSE, COURT OF SESSION

[2016] CSOH 120

PD233/16
PD234/16
PD235/16
PD236/16

OPINION OF LORD BOYD of DUNCANSBY

In the actions of
AB
v
(First) NHS Ayrshire & Arran; and (Second) Johnson & Johnson
AS
v
(First) Greater Glasgow and Clyde (NHS Trust); and (Second) Johnson & Johnson
CK
v
(First) Greater Glasgow Health Board; and (Second) Johnson & Johnson
SH
v
(First) RH; (Second) BMI Healthcare and (Third) Johnson & Johnson

Pursuer: Sutherland; Anderson Strathern (PD233/16)
First defenders: Reid; NHS Scotland Central Legal Office
Second defenders: Batchelor, Solicitor Advocate; Clyde & Co (for Johnson & Johnson)

Pursuer: Sutherland; Anderson Strathern (PD234/16)
First defenders: Cominsky; Plexus Law
Second defenders: Cominsky; MDDUS
Third defender: Batchelor, Solicitor Advocate; Clyde & Co (for Johnson & Johnson)

Pursuer: Sutherland; Anderson Strathern (PD235/16)
First defenders: Reid; NHS Scotland Central Legal Office
Second defenders: Batchelor, Solicitor Advocate; Clyde & Co (for Johnson & Johnson)

Pursuer: Sutherland; Anderson Strathern (PD236/16)
First defenders: Reid; NHS Scotland Central Legal Office
Second defenders: Batchelor, Solicitor Advocate; Clyde & Co (for Johnson & Johnson)

12 August 2016

Introduction

[1] On 16 June 2016 Sheriff Katherine Mackie sitting in Edinburgh Sheriff Court pronounced interlocutors in four cases requesting the Court of Session to allow the cases to be remitted to this court in terms of section 92(4) of the Court Reform (Scotland) Act 2014 ("the 2014 Act"). On 8 July 2016 the cases came before me by order in terms of Rule of Court 32.2B and I made orders in respect of all four under section 92(5) of the 2014 Act allowing the proceedings to be remitted.

Background

[2] These four actions in each case arise out of the insertion of vaginal tape and mesh products for the treatment of urinary incontinence or prolapse. The sums sought range from £50,000 to £80,000. The defenders are not all the same. Johnson & Johnson Medical Ltd are defenders common to all four actions. It is averred that they are the manufacturers of the products concerned. The cases against them are founded on their alleged breach of their statutory duty in terms of the Consumer Protection Act 1987. In three of the cases the defenders include the local health board. In the fourth case the defender is a private health care company together with a medical practitioner employed by them. The cases against the health boards, private health company and practitioner aver breach of the duty to give warnings about the use of pelvic mesh products founding on *Montgomery* v *Lanarkshire Health Board* 2015 SC (UKSC) 63.

Remit to the Court of Session

[3] The Sheriff Court has exclusive jurisdiction in actions where the total value of the orders sought does not exceed £100,000; section 39(1)(b)(ii) and (2). Section 92 of the Act provides for remits from the Sheriff Court to the Court of Session. Where it is within the exclusive jurisdiction of the Sheriff Court, is not subject to simple procedure but the Court of Session would, but for the provisions of section 39(2) also have competence and jurisdiction the Sheriff Court may request the Court of Session to allow the proceedings to be remitted to that court. The sheriff may make such a request if she considers that the importance or difficulty of the proceedings make it appropriate to do so; section 92(3) and (4). Where the sheriff makes such a request she must append a note of her reasons to the interlocutor; Ordinary Cause Rule 26.2A(2).

[4] The Court of Session may, on cause shown allow the proceedings to be remitted to the Court; section 92(5). Such requests are dealt with under RC 32.2A.

[5] It is for the sheriff to determine whether the importance or difficulty of the proceedings makes it appropriate to request the Court of Session to allow the remit. The words "importance or difficulty" echoes the words of section 37(1)(b) of the Sheriff Courts (Scotland) Act 1971 which gave the sheriff power to remit cases to the Court of Session. The difference now is that the power of the Sheriff Court is only to request the Court of Session to accept a remit. The sheriff was referred to the 5 judge case of *Mullan* v *Anderson* 1993 SLT 835, which considered the test under section 37(1) of the 1971 Act. It was submitted to her that there was a two stage approach. First there required to be a determination of whether the proceedings were important or difficult and secondly the court required to exercise its discretion in considering whether it was appropriate to request the Court of Session to allow the proceedings to be remitted.

[6] These matters are however for the sheriff. This court's function under section 92(5) is to consider whether or not cause has been shown to allow the proceedings to be remitted. In

considering whether cause has been shown this court does not have to consider the issue in the same way as the sheriff is obliged to approach the issue. Obviously however if the court considered that cause had not been shown it would be obliged to refuse to allow the proceedings to proceed.

[7] The provisions for remit in the 2014 Act arise out of the report of the Scottish Civil Courts Review (the Gill Review). It considered that the power of remit should be exercised in exceptional cases (Volume 1, chapter 4, paragraph 134). It seems to be both logical and appropriate that the remit provisions should only be used exceptionally. Parliament has determined the exclusive jurisdiction of the Sheriff Court and that would be undermined if remits became common place.

Reasons for the decision

[8] The sheriff has provided a detailed and helpful note setting out her reasons for making the request. I was also addressed by counsel and Mr Batchelor for the parties. All are agreed that the case should be remitted to this court.

[9] There are presently around 350 cases in the Court of Session arising out of the use of pelvic mesh products. I was informed by counsel for the health boards that the NHS in Scotland has received intimation of 409 claims. There is one case in Glasgow Sheriff Court which is presently sisted. All the others, apart from these four, have been raised in the Court of Session.

[10] On 2 September 2015 Lord Carloway, then the Lord Justice Clerk exercising the powers of the Lord President, issued a direction under Rule of Court 2.2(2) directing that proceedings arising from the use of vaginal tape and female pelvic mesh to treat stress urinary incontinence and pelvic organ prolapse should be dealt with in accordance with the direction (Direction No.2 of 2015). In order to make such a direction the Lord President requires to be satisfied that the procedure which would otherwise apply is unsuitable for the disposal of such proceedings.

[11] There is significant public interest in the outcome of these cases. I am informed that the issues surrounding these cases have been raised in the Petitions Committee of the Scottish Parliament. There are numerous actions pending in other jurisdictions including England and Wales and the United States. There is a considerable volume of material to consider and a multiplicity of legal issues which I have outlined above. I am told that resolution of some of the cases may require development in areas of the law for which there is no authority. While defences have not yet been lodged in these cases one aspect of the defence on behalf of medical practitioners may be their reliance on the fact that the products were licensed for use in the UK. That may in turn raise issues of public confidence in the licensing system itself.

[12] The sheriff found considerable force in an argument that a risk of conflicting decisions would be undesirable in litigation of such importance. Of itself I do not think that risk is persuasive, particularly since the creation of the Sheriff Appeal Court which should remove the possibility of different outcomes in different sheriffdoms. Of more significance is the wider point that there does not appear to be a power equivalent to RC2.2 to direct that an aspect of procedure should apply to proceedings of a particular description and to direct that another form of procedure apply. Accordingly the Sheriff Court could not deal with such cases in the way in which the Court of Session is dealing with them under the Practice Direction. That would lead to a greater number of hearings and more expense and possibly delay.

[13] In summary these four cases are clearly part of a much wider cohort of cases which have been raised in Scotland. Their conduct in this court is subject to a Practice Direction which is designed to ensure that the cases are dealt with in a consistent and efficient manner. There is considerable public interest in the wider issues which these cases raise. I am satisfied that cause has been shown for remit of these proceedings to this Court.