

FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2017] CSIH 30

A243/04

Lord President
Lord Drummond Young
Lord Malcolm

OPINION OF THE COURT

delivered by LORD MALCOLM

in the Reclaiming Motion

CD

Pursuer and Respondent

against

LANARKSHIRE ACUTE HOSPITALS NHS TRUST

Defenders and Reclaimers

Pursuer and Respondent: Creally QC, Henderson QC; Drummond Miller LLP
Defenders and Reclaimers: G Mitchell QC, N Mackenzie; NHS Scotland Central Legal Office

17 March 2017

Introduction

[1] In 1999 CD gave birth to a son (C) at the William Smellie Maternity Unit at Law Hospital, Lanarkshire. During his birth C sustained a severe brachial plexus injury which has resulted in a permanent disability, principally concerning the use of his right arm. (At the base of the neck, five spinal nerves merge and form the brachial plexus – flexion of the neck puts the nerves at risk of root avulsion.) It is alleged that the injury was caused by negligence on the part of Sister Murphy, the midwife who ultimately delivered C. Proceedings have been raised by CD on behalf of her son for damages payable by the midwife’s employers, Lanarkshire Acute Hospitals NHS Trust. In 2015 the Lord Ordinary (Lady Rae) heard a proof and thereafter found that CD’s claim is well-founded. (It was agreed by the parties that in that event damages should be awarded in the sum of £725,000 plus interest.) The Trust now reclaims (appeals) against that decision.

[2] The Lord Ordinary issued a comprehensive and clear opinion (2015 CSOH 142) in which she reviewed the evidence in detail and explained her reasoning. She noted that the case turned on whether CD had proved her version of events on the day. There was a sharp dispute on the facts, but not on the applicable law. CD’s case is that the birth was delayed as a result of shoulder dystocia (basically stuck shoulders) and that the injury was caused by excessive force being used by Sister Murphy to overcome the problem and deliver C. The Trust and Sister Murphy’s position is that C was delivered without excessive force, indeed without any force. It is accepted that there

was an initial difficulty when only the baby's head emerged. At this point the cord was cut resulting in a need to deliver C within a relatively short period. However, when Sister Murphy took over from a student midwife, after she made one unsuccessful attempt, she was thereafter able to achieve delivery simply by probing the vagina with two fingers and touching the baby's shoulder, at which point it rotated and "slipped under the pubic arch". The rest of the baby emerged "very easily".

[3] On the other hand both CD and her husband, who was present at the birth, spoke to C being delivered only as a result of Sister Murphy effectively "yanking" him out after his shoulders appeared to be stuck. The baby was immediately "whisked" out of the room. There was no dispute that, if accurate, this account could explain the mechanism by which the injury occurred. For the reasons given in her opinion (to be summarised later), the Lord Ordinary accepted the pursuer's account and rejected that put forward by Sister Murphy.

[4] A good deal of expert evidence was led, but we agree with the Lord Ordinary that the case turns on the facts. Reflecting this, the appeal is based on the proposition that the Lord Ordinary erred in accepting the account given by C's parents, rather than that of Sister Murphy. It was submitted that the Lord Ordinary failed to take proper advantage of having seen and heard the witnesses. She reached a decision which was "plainly wrong". She misunderstood the evidence on material issues and reached conclusions for which there was no evidence. At the end of the appeal hearing, the court refused the reclaiming motion. We now set out our reasons.

The grounds of appeal (so far as maintained at the appeal hearing)

[5] The grounds of appeal are variations on a theme, namely that the evidence of Sister Murphy should have been accepted. A number of propositions are asserted which, in general, can be described as arguments on the merits of the case. For example it is said that the Lord Ordinary failed to test Sister Murphy's evidence against other evidence, and that the parents' evidence was implausible. Reliance is placed on the evidence of the other midwife present, midwife Sutcliffe. Criticisms are made of certain expressions used in the Lord Ordinary's opinion, for example "a shoulder dystocia situation". It is claimed that she misunderstood the Trust's case and various parts of the evidence. It is a central pillar of the appeal that the Lord Ordinary proceeded upon the basis that Sister Murphy's account was anatomically impossible. In addition it is said that the statistical and epidemiological evidence has no bearing on issues concerning ordinary competence.

The grounds of appeal as elaborated upon at the hearing

[6] Senior counsel for the Trust stated that the crucial issue is whether excessive traction was used when C's right (anterior) shoulder was impacted on the symphysis pubis. The Lord Ordinary had no proper basis for stating that Sister Murphy lied on that matter. Her reasons for preferring the parents' evidence are not satisfactory. It follows that Sister Murphy told the truth. The expert evidence indicated that her account is consistent with ordinary competence on her part. The key proposition was that, if Sister Murphy was able to touch the baby's shoulder, that implied that there was no bony impaction at that point, so there was no need to use force. If there was no need for force, none would be used.

“The Lord Ordinary’s conclusion is that no (such) manoeuvres were undertaken and further that Sister Murphy lied about this. Our submission is that there was no evidence to warrant that finding. The reasons given were unsatisfactory, contained a misunderstanding of the evidence, and were arrived at only after a failure to analyse properly the other evidence in the case.”

[7] Various reasons were given for the assertion that Sister Murphy’s account should have been accepted; for example, the explanation she gave for the differences between her contemporaneous note and her evidence in court, and that to attempt to locate the fetal back was good practice. Passages in the Lord Ordinary’s opinion were subjected to a textual analysis, usually aimed at undermining her view that Sister Murphy had lied about what happened; a conclusion which was described as an error of law on her part. It was emphasised that the evidence demonstrated that Sister Murphy’s account was anatomically possible, whereas the Lord Ordinary was under the impression that it was impossible. It was submitted that the reasons given by the Lord Ordinary for rejecting the midwife’s account were not sufficient to warrant the view that a professional person would lie and fabricate medical records. Various points were made designed to rebut the Lord Ordinary’s view that Sister Murphy was an unimpressive witness; for example, that there is nothing untoward in a witness, having reflected on an earlier answer, changing her mind.

[8] Counsel’s “simple and straightforward submission” was that, when Sister Murphy delivered the baby, the shoulder was not impacted on the symphysis pubis. Reference was made to certain passages in the expert evidence, including the absence of chin recession and “turtling” (the baby’s head retreating into the mother); the apparent ease with which the cord was cut; and Sister Murphy’s evidence that the shoulder rotated on her touch. The Lord Ordinary “failed to reflect properly on this evidence”. This amounted to a failure to consider relevant evidence. In preferring the evidence of one expert to the effect that shoulder dystocia can be overcome by the use of excessive traction, the Lord Ordinary expressly rejected the evidence of certain witnesses, but failed to mention that of another witness, which was to the same effect as the rejected witnesses.

[9] Counsel submitted that while the Lord Ordinary based her decision on the evidence of the parents, an examination of their evidence cannot reasonably explain the conclusion that excessive force was used. The parents’ evidence “goes beyond exaggeration”. Examples of the specific points made on behalf of the Trust are that the mother had been awake for 24 hours and had received strong medication, and that the Lord Ordinary did not properly weigh the parents’ evidence with other evidence in the case, including that of midwife Sutcliffe. Again it was asserted that, since Sister Murphy had carried out the internal manoeuvre described earlier, there was no reason to use force. She had touched the baby’s shoulder, something she would not have been able to do if there was true bony impaction. It follows that this was a case of a snug or tight fit, not shoulder dystocia, and that excessive force was not required to deliver C.

[10] In our view this last point is a good example of a general comment which can be made concerning the Trust’s overall approach, namely that much of the case in support of the appeal rested upon the assumption that Sister Murphy’s evidence as to what happened is accurate. However, that cannot be an *a priori* assumption. It is the key issue in the case, and must be justified

by the Trust, all in terms of the now well-established jurisprudence concerning appeals against decisions made on matters of fact by the judge who heard and saw the witnesses.

[11] In conclusion on this chapter of the submissions, we note that on more than one occasion counsel accepted that there are issues as to the reliability of Sister Murphy's evidence (given the account of her evidence provided by the Lord Ordinary, he could hardly do otherwise), but it was submitted that there is no justification for the finding that she had lied about certain crucial matters. Our comment is that the key issue is not whether Sister Murphy told deliberate untruths (no doubt over such a long period since the birth a witness can persuade herself that various things happened, or become confused with another incident); but rather whether the Lord Ordinary was bound to accept her account as accurate.

[12] Finally, it was observed that the Lord Ordinary had reached a decision on liability without having regard to the causation evidence. We understand this to be a reference to expert evidence to the general effect that there is an association between excessive traction and permanent injuries of the kind which C sustained. The purpose of this chapter of the submissions was to dissuade this court from using this evidence to supplement any perceived deficiencies in the reasoning of the Lord Ordinary. In the event it is not necessary for us to dwell on this part of the submissions. We accept that on its own the statistical evidence would not allow a conclusion that excessive force was used to deliver C, however it does provide some support for the parents' account.

The reasons given by the Lord Ordinary

[13] The interested reader will find a full account of the evidence led (plus a discussion of the undisputed facts, the nature and mechanism of C's injury, relevant medical procedures and protocols, and shoulder dystocia) at paragraphs [6]-[97] of the Lord Ordinary's opinion [2015] CSOH 142. None of this was the subject of challenge, and it is not necessary to rehearse it. The challenge was to the Lord Ordinary's reasons for her decision (paragraphs [98]-[113]), which can be summarised as follows.

[14] The Lord Ordinary took into account the difficulties caused by witnesses attempting to remember events which occurred more than 15 years previously. She noted the poor standard of the contemporaneous record in the patient's medical notes. Sister Murphy had made a partial retrospective note, though she now claims that it is wrong in various respects. The absence of a full account in the medical records made it difficult for the experts to know what happened on the day.

[15] The Lord Ordinary was satisfied that the parents were both credible and reliable in the essentials of their evidence (which was to the general effect that significant force was used by Sister Murphy to achieve C's delivery). It was an important event in their lives, not least since C suffered a significant injury. The Lord Ordinary gained no impression of untruthful witnesses. They lodged a complaint within two months. The Lord Ordinary dealt with certain criticisms of their evidence and other issues at paragraph [100]. Their evidence was supportive of the absence of any internal manoeuvres on the part of Sister Murphy (which were likely to be painful and thus noticeable to CD), and also that CD was not put into a particular position on the bed designed to facilitate delivery (the McRoberts position), something which was standard procedure once shoulder dystocia was recognised. The Lord Ordinary was satisfied that midwife Sutcliffe was doing her best to tell the truth, however the passage of time had affected her memory. She was

clear that there were no manoeuvres of the kind required once shoulder dystocia is suspected. This supported the evidence of the parents on this point (but not that of Sister Murphy).

[16] For the Lord Ordinary, Sister Murphy was not an impressive witness. There were a number of serious reservations as to her evidence. Her memory of events appeared to improve significantly as the questioning progressed. She was prepared to change her evidence. At the outset she had no recollection of the detail of C's birth, preferring to rely on a statement she prepared in September 1999. Ultimately she claimed to have a clear recollection. She had recorded shoulder dystocia in the notes at the time, and also in a retrospective note, but by the end of cross-examination she was of the view that it was not a case of shoulder dystocia, but of "a snug fit". This was not offered by Sister Murphy in examination-in-chief, but emerged in response to a suggestion made by the Trust's counsel in Sister Murphy's cross-examination. Various other inconsistencies in her accounts over time and in her evidence are noted by the Lord Ordinary at paragraph [102], for example that previously Sister Murphy had spoken of "manual rotation of the shoulders", whereas in evidence she said that she had merely touched the baby's shoulder.

[17] Sister Murphy's evidence varied as to whether there was or was not an obstetric emergency requiring a call for assistance. She insisted that she had put CD into the McRoberts position (basically flat on her back with her knees at or near her ears), but the Lord Ordinary did not accept that this occurred. (It was contradicted by the parents and midwife Sutcliffe.) Sister Murphy did not summon assistance, but rather attempted an unsuccessful delivery, and then an invasive procedure, which she accepted would be painful or uncomfortable to CD. Thereafter C was born "easily" and Sister Murphy was "dumbfounded" to discover that he had been injured.

[18] At the end of re-examination Sister Murphy was reminded of the terms of her original statement made in September 1999. She said that "today" she would have written a completely different statement. The Lord Ordinary states that she has recorded only some of the inconsistencies revealed in Sister Murphy's evidence. She was an unreliable and incredible witness. Only Sister Murphy spoke to CD being put in the McRoberts position and to the execution of internal manoeuvres. The Lord Ordinary was satisfied that neither of these occurred.

[19] The Lord Ordinary considered that, at the time, Sister Murphy came to believe, or strongly suspect, shoulder dystocia. She made a retrospective note shortly after the birth to that effect. The medical notes thereafter reflect that diagnosis. Sister Murphy failed to implement any of the recommended measures to deal with shoulder dystocia, which included summoning assistance and putting the patient into a particular position (McRoberts) which often resolves the problem of stuck shoulders. By the time Sister Murphy took over, it must have been obvious that there was a problem. (It can be recalled that the cord had been cut, which meant that there was a short period, perhaps up to five minutes, for the birth to be achieved.) The student midwife had made two unsuccessful attempts to deliver C. By then, or at least after Sister Murphy's first unsuccessful attempt, the obstetric emergency drill for shoulder dystocia ought to have been implemented. It should have been clear that there was an emergency. The evidence indicated a sense of anxiety in the room. On Sister Murphy's second attempt, C was delivered with a severe brachial plexus injury. The Lord Ordinary considered that it was reasonable to infer that Sister Murphy, realising her mistake in not following protocol, lied about the use of manual rotation and the McRoberts position.

[20] The Lord Ordinary preferred the evidence of the parents as to the use of excessive traction by Sister Murphy. She did not believe Sister Murphy's evidence on this. She reviewed midwife Sutcliffe's evidence on this point (paragraph [104]) which she regarded as not reliable. The Lord Ordinary was satisfied that "a shoulder dystocia situation" existed. (Counsel criticised this phrase, but it is tolerably clear what was meant, namely, that "prior to delivery of the body of C, his anterior shoulder had become impacted on his mother's symphysis pubis" (paragraph [105]).) Sister Murphy was an experienced midwife and was best placed to make an assessment. Her contemporary diagnosis was shoulder dystocia. She included it in the medical notes. After delivery of the head, it took four attempts to deliver the baby, indicating a difficulty with the shoulders. In the absence of any of the recommended obstetric procedures for the resolution of shoulder dystocia, the baby was delivered by the use of excessive traction. Professor Draycott's evidence that shoulder dystocia can be overcome in such a manner was accepted by the Lord Ordinary. Having rejected Sister Murphy's evidence to the effect that the shoulders were lower in the pelvic area than behind the symphysis pubis, the most probable explanation for the problem was impaction.

[21] The Lord Ordinary notes that all the experts agreed that to use excessive traction in a case of shoulder dystocia would fall below the standard of an ordinarily competent midwife. On behalf of the Trust it was conceded that, if that was the proven factual situation, there was no other probable cause for C's injury.

[22] It followed from the above that the expert evidence as to causation was not directly relevant; however the Lord Ordinary discussed it briefly. The alternative explanation, which was supported by Dr Sanders and Professor Mires, was that there was no bony impaction. C was a large baby who was "a tight fit" in the pelvis, and the injury was caused by the natural propulsive forces of birth, uninfluenced by any external agency. The Lord Ordinary noted that those opinions were predicated on the accuracy of Sister Murphy's account. If she touched C's shoulder with her fingers, that indicated that the shoulder was lower than the symphysis pubis, otherwise it would have been out of reach. Given the rejection of Sister Murphy's account, this evidence is of no direct relevance. (The Lord Ordinary's reference to the anatomical impossibility of Sister Murphy touching the baby's shoulders (paragraph [53]) is predicated upon them being impacted against the symphysis pubis higher up in the pelvic area.) The preponderance of the evidence was that the second stage of labour was not "precipitous" (unduly fast). The evidence of Professor Draycott and Professor Carlstedt provided general support for the parents' position, in that a permanent brachial plexus injury, especially one involving the anterior shoulder, suggests the use of excessive force in a context of shoulder dystocia. Their extensive experience and knowledge in this area was supported by reference to research papers. As to Dr Sanders, the Lord Ordinary considered that she attempted to manipulate or alter the evidence to fit in with her opinion. Professor Mires has no particular expertise in shoulder dystocia. In the light of the Lord Ordinary's conclusions on the facts, the expert evidence faded into the background, however it is clear that she was more favourably disposed to that led on behalf of the claimant.

The applicable law in an appeal of this nature

[23] There is a well-established jurisprudence concerning the limited jurisdiction of an appeal court when it is asked to overturn the decision of a judge on the facts of a case. The reasons for this

are obvious. The appeal court does not enjoy the advantage of having seen and heard the witnesses, for example in terms of judging their credibility and reliability. Therefore, before interfering “it is absolutely necessary that the court of appeal should be clear that (the judge) has drawn a wrong conclusion from the evidence” (Lord Atkinson in *Clarke v Edinburgh and District Tramways Company* 1919 SC (HL) 35 at 36). More recently, in *McGraddie v McGraddie* 2014 SC (UKSC) 12, the UK Supreme Court has re-emphasised that a judge’s conclusions on matters of primary fact should be overturned only in those rare cases where it is plain that a mistake has been made. Deference to the trier of fact is the rule, not the exception. It will always be possible to criticise the manner in which reasons are expressed, however an appeal court should resist any temptation to justify an exercise of its own discretion by way of a narrow textual analysis of the judgment under challenge.

[24] In *Henderson v Foxworth Investments Ltd* 2014 SC (UKSC) 203, Lord Reed stated: “What matters is whether the decision under appeal is one that no reasonable judge could have reached” (paragraph [62]). He quoted a passage in the speech of Viscount Simon in *Thomas v Thomas*:

“If there is no evidence to support a particular conclusion (and this is really a question of law), the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight.”

At paragraph [67] of *Henderson* Lord Reed said:

“... in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified.”

Decision

[25] Having regard to the evidence led at the proof, plus the terms of the Lord Ordinary’s judgment and the parties’ submissions, we are wholly unpersuaded that the Lord Ordinary reached a wrong or unreasonable result. On the contrary, in our view she was more than entitled to conclude that bony impaction was overcome by the use of excessive force in order to achieve C’s delivery. No persuasive criticism has been made of the decision to accept the parents’ evidence as credible and reliable. That was a classic issue for the Lord Ordinary’s assessment, she having had the benefit of seeing and hearing them. A similar remark can be made in respect of the rejection of Sister Murphy’s evidence on the key issues. The relevant expert evidence led by the Trust depended upon the accuracy of her account. There are obvious reasons for finding Sister Murphy’s evidence to be unsatisfactory. For example, it contradicted her own medical notes made more or less at the time. It was unsupported by the evidence of the parents and of midwife

Sutcliffe in important respects, for example as to whether the mother was put into the McRoberts position. Midwife Sutcliffe said that if a mother was put into that position, she would remember it. It would be “very frightening” (356).

[26] While the Lord Ordinary considered that midwife Sutcliffe’s memory of events had been affected by the passage of time, nonetheless a consideration of her evidence is instructive. She said that there was “an urgency” to deliver the baby, the nuchal cord having been cut. It was a very stressful, life-threatening situation. No obstetric manoeuvres were performed. It was difficult to dispute that it was shoulder dystocia, albeit at the time there was no express diagnosis. Sister Murphy had told her that if the baby did not come out with the next pull, she was to press the emergency buzzer; however “the baby came out with that pull.” She was pressed on the amount of force used – see pages 533/39 of the transcript of evidence. That passage is more redolent of the parents’ evidence than that of Sister Murphy. Her colleague was pulling harder than the student midwife. She would have to pull more powerfully to expedite the birth. She would have “to put a bit of force into it.”

[27] Sister Murphy began her evidence by stating that the medical notes and her statement of September 1999 were her best recollection of events. After the birth she needed to see if the nursing team was alright, since they had dealt with a stressful obstetric emergency such as shoulder dystocia (page 652). She realised it was an obstetric emergency which had to be dealt with quickly. The buzzer should have been pressed, but there would be no point if no medical staff were in the vicinity (695/6). There was shoulder dystocia “to a moderate degree” which was not resolved by the use of the McRoberts position. Without that position, the baby could not have been delivered (706). It would have needed a lot more strength than she had (711). She was about to apply suprapubic pressure, but “as I touched the anterior shoulder, the shoulder actually rotated forward and slipped under the pubic arch” (713/4). “I remember this part of the delivery very clearly in my mind” (730). She did not have to pull, just guide the baby out (740).

[28] In cross-examination (804) counsel for the Trust put it to Sister Murphy that the baby could have passed beyond the symphysis pubis and simply have been snug within the cavity of the pelvis? Sister Murphy replied – Yes, if it is a big baby it can be stuck or snug, “a snug fit”. If the shoulder was well impacted behind the symphysis pubis “no amount of traction would deliver the baby”. Later in her evidence she stated that she had seen this being done, but it would require a lot more traction that she would use (892). Her ultimate position was expressed as follows at 872/3 – as we put her into the McRoberts position the shoulder began to dislodge under the pubic arch as happens 60/70% of the time. “That is my theory” – there was shoulder dystocia because we needed McRoberts to free the shoulder. Sister Murphy asked – “Did you want me just to leave the baby there?” (889).

[29] As to this last remark, it is difficult not to have sympathy for the position in which Sister Murphy found herself. The clock was ticking and everyone was concerned to deliver, as midwife Sutcliffe put it, a neurologically active child. That objective was achieved, but sadly, not without a cost. The difficulty with the theory spoken to by Sister Murphy is that, not only is there no other factual evidence to support it, it is directly contradicted by the others in the room able to give evidence as to what happened (the student midwife was unable to provide useful evidence one way or the other). The court has no difficulty in understanding how and why the Lord Ordinary rejected Sister Murphy’s account. Her reasons were summarised earlier. We reject the

submission that they are unsatisfactory. On the contrary they are cogent and compelling. We can identify no errors of the kind mentioned by Lord Reed in *Henderson* at paragraph [67] (quoted earlier). The Lord Ordinary's decision to uphold the claim is not plainly wrong. Going further, we have found no reason to disagree with it. There may be room for doubt as to whether this court would have decided to categorise Sister Murphy as a liar in relation to certain key matters, but this was supplementary to and strictly unnecessary for the Lord Ordinary's decision. That said, again ultimately this was a matter within the ambit of her reasonable discretion.

[30] There was ample evidence to support the Lord Ordinary's conclusions on the key issues. There is no warrant for the proposition that she failed to analyse and weigh relevant evidence in a proper fashion. She did not misunderstand either the evidence or the Trust's case. Many of the submissions ignored the injunction against undue textual analysis of the judge's reasoning, or amounted to little more than an invitation to this court to review the evidence and reach its own decision on the issues in dispute. An appeal of the present kind is not the equivalent of a hearing on evidence.

[31] In essence the appeal is based upon the alleged accuracy of Sister Murphy's account, but nothing has been said which persuades us that this court should proceed upon that basis. Furthermore, all of the above proceeds without regard to the independent support for the claim provided by the statistical evidence led on behalf of CD. While not sufficient on its own, there is no question but that it is wholly consistent with the injury having been caused by the use of excessive force to overcome shoulder dystocia.

[32] For these reasons the court refused the reclaiming motion and upheld the Lord Ordinary's interlocutor.