EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2014] CSIH 41
A548/08

OPINION OF THE COURT

delivered by LORD BRACADALE

in the cause

by

ELIZABETH HENDERSON

pursuer and reclaimer;

against

GREATER GLASGOW HEALTH BOARD

defenders and respondents:

_____

Lord Bracadale

Lord Drummond Young

Lord Wheatley

Act: Di Rollo QC, Mackenzie; Balfour + Manson LLP

Alt: Dunlop QC, McConnell; National Health Services Scotland, Central Legal Office

4 February 2014

Introduction

[1] The pursuer raised an action against the defenders for damages for professional negligence by a doctor employed by the defenders who treated the pursuer at Glasgow Royal Infirmary. The pursuer reclaimed against the refusal by the Lord Ordinary on 19 June 2013 to allow a minute of amendment to be received. On 4 February 2014 we refused the reclaiming motion and indicated that we would give written reasons which we now do.

The pursuer's case

[2] The pursuer avers that on 11 July 2005 she suffered an injury when she fell down a flight of steps at the front door of her house. On 14 July she attended her general practitioner who referred her to the accident and emergency department of Glasgow Royal Infirmary. She was examined by Dr Jamieson in the Department of Orthopaedics and discharged without further treatment or investigation. She was readmitted to Glasgow Royal Infirmary on 20 July and on 23 July an MRI scan revealed a large disk fragment within her spinal canal. This was surgically removed at the Southern General Hospital. The pursuer avers that Dr Jamieson's failure to arrange for a MRI scan of the pursuer's lumbar spine on 14 July was negligent and had he done so, the large disk fragment within her spinal canal would have been identified and removed earlier with good prospect of recovery or less severe symptoms than she ultimately required to endure.

History of the case

[3] In order to understand the Lord Ordinary's reasons for refusing the motion to allow the minute of amendment to be received it is necessary to note the history of the action. The summons was signetted on 10 July 2008 and the cause was withdrawn from the chapter 43 procedure. It called on 14 August 2008 and was thereafter sisted until 4 August 2010, a period of almost two years. Adjustment commenced on 2 February 2011 and continued until 21 December 2011. On 22 December 2011 a proof before answer was allowed. On 1 June 2012, following upon amendment procedure at the instance of the pursuer, the record was closed and on 12 June 2012 the case came before the Lord Ordinary for a proof restricted to the question of the liability.

The first minute of amendment

[4] In the course of her evidence at the proof the pursuer gave an account of her visit to the general practitioner. She said that the general practitioner told her that it would be necessary for her to go to hospital to be examined and prepared a covering letter which she was to take with her to the hospital. When her counsel sought to ask a further question about the letter, counsel for the defenders took objection on the basis that there was no reference to the letter anywhere in the pleadings, the contents of the letter were not the subject of averment, and the letter itself had not been produced. Accordingly, the defenders had no fair notice that the letter and its contents were to be founded upon by the pursuer. Counsel for the defenders accepted that reference to the existence of the letter was made in certain documents, including expert reports. The letter had apparently gone missing and had never been found. In response, counsel for the pursuer submitted to the Lord Ordinary that there was no requirement for there to be any averments on record in order to lead evidence about the letter and its contents. The letter was not a substantive material matter of which notice required to be given. Counsel said that the letter had come to his attention in the course of the week before the proof. It was not a ground of fault that Dr Jamieson had failed to act upon the terms of the letter. In any event, there was no prejudice to the defenders because they had been aware of the letter for some time. Counsel for the pursuer explained that the general practitioner could not remember precisely what was said in the letter but would give evidence as to what she believed she would have said and this would contain reference to symptoms reported by the pursuer to the general practitioner.

[5] The Lord Ordinary sustained the objection. He considered that the terms of the letter were of some materiality. The information that was available to Dr Jamieson at the relevant time was important and appeared to go to the heart of the case. If the pursuer intended to rely on what was set out in the letter about her symptoms then in order to give fair notice she should have placed on record the existence of the letter; the contents of the letter insofar as it could be reconstructed by the general practitioner; and that Dr Jamieson was given the letter and was thus aware of its terms at the relevant time.

[6] After an adjournment counsel for the pursuer tendered a minute of amendment and moved that it be received and the record amended in terms thereof. The minute of amendment was in the following terms:

"In Article 2 of Condescendence, at page 7 of the Closed Record:

(i) between letters A and B, insert the following after the sentence ending "exclusively by their employees", namely:

"Dr Andersen wrote out a letter which she gave to the Pursuer to hand in to GRI. The letter has subsequently gone missing and has not been recovered. It is believed and averred that the General Practitioner would have mentioned in the letter that the Pursuer was unable to feel herself pass urine, and that she had numbness of her left labia and perineum, numbness of her heel and some toes."

(ii) between the letters B and C, insert the following after the sentence ending "his employment the defenders are responsible", namely:

"Dr Jamieson read the letter from Dr Anderson referred to *supra.*"

The Lord Ordinary refused the motion to allow the minute of amendment to be received. Counsel for the pursuer then moved the Lord Ordinary to discharge the proof to allow time for the preparation of another minute of amendment. This was said to be necessary because of the potential significance of the letter; it was submitted that there was a hole in the pursuer's case and it was desired to advance additional breaches of duty. This was opposed on the ground that it was no more than seeking the Court to overturn its own previous ruling regarding the refusal to receive the minute of amendment and allow amendment of the record. The Lord Ordinary refused the motion to discharge the diet of proof.

[7] The pursuer's counsel then made a motion for leave to reclaim the decision not to allow the minute amendment to be received and to amend the record in terms thereof. With considerable hesitation the Lord Ordinary granted leave to appeal, the consequence of which was that the diet of proof had to be discharged.

The first reclaiming motion

[8] The pursuer duly enrolled a reclaiming motion. However, on 20 December 2012 she moved the Inner House to dismiss her reclaiming motion because she was no longer insisting in it. By interlocutor of that date the reclaiming motion was dismissed and the cause was remitted to the Lord Ordinary to proceed as accords.

The second minute of amendment

[9] It was against that background that six months later, on 19 June 2013, the pursuer moved the Lord Ordinary to receive the minute of amendment which is the subject of this reclaiming motion. The new minute of amendment dealt first with some confusion over the spelling of the name of the general practitioner. The correct spelling was "Andersen". The substantive minute of amendment was in the following terms:

"(ii) between the letters A and B, insert the following after the sentence ending "exclusively by their employees", namely:

Dr Andersen provided the pursuer with a letter to hand in to the orthopaedic department of GRI. The pursuer handed the letter over on her attendance there. The letter has subsequently gone missing. Dr Andersen stated in the letter that the pursuer was unable to feel herself pass urine; that she described the feeling that she should go to the toilet, pressing down, hearing some tinkling in the bowl without any sensation; and that she had numbness of her left labia and perineum, numbness of her heel, and some toes."

(ii) [*sic*] between letter B and C, insert the following after the sentence ending "his employment, the defenders are responsible", namely:

"Dr Jamieson read the letter from Dr Andersen which the pursuer had handed in to GRI, as hereinbefore condescended upon."

[10] The Lord Ordinary took the view that the minute of amendment tendered on 19 June 2013 was in substantially the same terms as the minute of amendment tendered in the course of the proof in June 2012. Each set out the details of what the general practitioner wrote in the letter which was given to the pursuer to be handed in at the hospital. Both minutes stated that Dr Jamieson had read the letter. Both set forth information which it was alleged was before Dr Jamieson and which was therefore relevant to the question of his state of knowledge at the material time. The essence of each of the minutes of amendment was the same. Any differences were matters of form rather than substance. He held that in all material respects the two minutes of amendment were identical.

[11] The Lord Ordinary stated that in refusing to allow the minute of amendment to be received he followed the decision of Lord McPhail in *Bremner* v *Martin t/a George Martin Engineering* 2006 SLT 169.

Relevant statutory provisions

[12] Section 18 of the Court of Session Act 1988 (the 1988 Act) provides:

"Every interlocutor of the Lord Ordinary shall be final in the Outer House, subject however to the review of the Inner House in accordance with this Act."

Section 5 of the 1988 Act provides:

"The court shall have power by Act of Sederunt -

...

(m) to modify, amend or repeal any provision of any enactment including this Act relating to matters with respect to which an Act of Sederunt may be made under this Act. "

Rule of Court 24.1 provides:

"(i) in any cause the court may, at any time before final judgment, allow an amendment mentioned in paragraph (2).

(ii) Paragraph (1) applies to the following amendments -

(a) an amendment of a principal writ which may be necessary for the purpose of determining the real question in controversy between the parties..."

Submissions for the pursuer and reclaimer

[13] Mr Di Rollo QC who appeared on behalf of the pursuer before us (but not before the Lord Ordinary) moved us to allow the minute of amendment to be received. There had been a material change of circumstances in respect that the original diet of proof had been discharged and a new diet of proof appointed. Rule of Court 24 was not restricted or fettered by any other provision. It would be wrong to read into that provision an inability to make a different decision on a different day if circumstances had changed. Section 18 of the 1988 Act did not trump the powers of amendment provided in Rule of Court 24.1 (1) and did not fetter the discretion of the court. It was not uncommon for interlocutors to be pronounced in cases where there had been a change of circumstances. For example, in the present case on 12 June 2012 the Lord Ordinary refused to discharge a diet of proof and then shortly afterwards when circumstances had changed he granted the motion. The rule governing amendment was not qualified and refusal at one point did not mean that a minute of amendment in similar terms could not be received. While the circumstances surrounding the previous decision could be weighed in the balance, the minute of amendment could competently be allowed to be received. Mr Di Rollo submitted that *Bremner* was wrongly decided.

[14] If we were satisfied on the question of competency we should exercise our discretion in favour of allowing the minute of amendment to be received.

Submissions for defenders and respondents

[15] Mr Dunlop QC on behalf of the defenders moved us to refuse the reclaiming motion. The decision whether to allow the minute of amendment to be received was one for the Lord Ordinary and unless it could be demonstrated that the Lord Ordinary had erred the reclaiming motion did not get off the ground. The Lord Ordinary was correct in concluding that the minutes of amendment were substantially in the same terms. The case was indistinguishable from *Bremner*. *Bremner* was correctly decided. The Lord Ordinary (Lord MacPhail) who decided *Bremner* was widely recognised as an expert on procedure. Lord Macphail had relied on section 18 of the Court of Session Act. It was axiomatic that delegated legislation could not trump an Act of Parliament save where amending power was given and was exercised. No attempt had been made by Act of Sederunt to amend section 18. Lord Macphail had approached the issue on the basis that the interlocutor

refusing the first minute of amendment was final in the Outer House. The remedy was to reclaim. The only exceptions to the general principle were that errors of expression could be corrected and that an interlocutor could be altered or corrected of consent. There was no general exception to section 18 for a change of circumstances. Where a Rule of Court allowed the effect of an earlier interlocutor to be altered on a change of circumstances provision was made for that within the rule. Examples included the rules with respect to summary decree (Rule 21.2(5)); Rule 32.2(3) with respect to transmission on contingency; and Rule 43.11(6) with respect to interim payment on damages.

[16] In addition, section 39 of the 1988 Act was engaged. The interlocutor of the Inner House refusing the reclaiming motion in December 2012 was final in both the Inner House and the Outer House. In any event, the pursuer had acquiesced in the Lord Ordinary's decision in 2012 by abandoning her reclaiming motion. Finally, Mr Dunlop submitted that we should not exercise our discretion in favour of the pursuer.

Discussion and decision

[17] We agree with the Lord Ordinary that the two minutes of amendment were in substantially the same terms. Each set out the details of what the general practitioner wrote in the letter which was given to the pursuer to be handed in at the hospital. Both minutes stated that Dr Jamieson had read the letter. Both set forth information which it was alleged was before Dr Jamieson and which was therefore relevant to the question of his state of knowledge at the material time. We agree that any differences were matters of form rather than substance. In our view the Lord Ordinary was correct to conclude that in all material respects the two minutes of amendment were identical.

[18] In *Bremner* (*supra*) a diet of proof was fixed for 29 November 2005. On 11 November 2005 Lord MacPhail refused a motion by the pursuer to allow a minute of amendment to be received. On 25 November 2005 the proof was discharged. A new diet of proof was set down for 11 July 2006. On 25 January 2006 the pursuer tendered a minute of amendment in identical terms to the minute which Lord MacPhail had refused to allow to be received on 11 November 2005. The pursuer argued that the motion was competent since there had been a material change of circumstances in that the diet of proof fixed for 29 November 2005 had been discharged and the proof was now set down for 11 July 2006. Lord MacPhail refused the motion on the ground that it was incompetent. At p 170 he said:

"If I were now to allow the second minute to be received, I would in effect be recalling the interlocutor of 11 November 2005 and superseding it with a new interlocutor which said the opposite. Section 18, however, requires that the interlocutor of 11 November 2005 must remain undisturbed in the Outer House."

[19] In our opinion *Bremner* was correctly decided. The general rule is clearly set out in section 18 of the 1988 Act. That section has not been amended by any Act of Sederunt using the powers under section 5. This case is not concerned with the rule permitting the correction or alteration of an interlocutor to bring it into line with the intention of the court. Where as a result of amendment procedure it is necessary to revisit the appropriate mode of inquiry the court may do so (*Bendex* v *James Donaldson & Sons Ltd* 1990 SC 259). That is not the position here. In certain circumstances express provision is made for reconsideration and varying the effect of an interlocutor on a change of circumstances. As was pointed out by Lord MacPhail in *Bremner* there is no such provision in chapter 24 of the Rules which is concerned with the amendment of pleadings. We reject Mr Di Rollo's contention that rule 24.1 could in some way circumvent section 18.

[20] In *Bremner* Lord MacPhail expressed the view that section 18 was in accordance with principle, under reference to the following passages from the opinion of Lord Justice Clerk Ross in *Campbell* v *Walker* (*supra*) at pp 264 and 265:

"In my opinion, the general principle is that the substance of an interlocutor cannot be altered once the interlocutor has been signed and issued. The only exceptions to that general principle are that it has always been recognised that errors of expression may be corrected (*Cuthill v. Burns* at p. 859), and that an interlocutor may be altered or corrected of consent...

I would only add that there are good reasons why a Lord Ordinary should not be entitled to alter the substance of an interlocutor. Giving such power to a Lord Ordinary would only lead to uncertainty. Once an interlocutor has been pronounced in the Outer House, the general rule must be that it stands unless and until it is recalled by the Inner House."

We note that in *Campbell* the Lord Justice Clerk reserved his opinion on the issue which was subsequently decided in *Bendex.*

[21] The circumstances in the present case are indistinguishable from those in *Bremner.* Accordingly, we are of the view that the Lord Ordinary was correct in following *Bremner* and holding that it was incompetent to grant the motion to allow the minute of amendment to be received. It is not necessary to consider the subsidiary arguments advanced by Mr Dunlop with respect to section 39 of the 1998 Act and the question of acquiescence. Nor, in the light of our conclusion on competency, is it necessary to address the question of the exercise of discretion.

[22] For the reasons set out above, we refused the reclaiming motion.