



SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 74
A294/07

Lord Justice Clerk
Lord Malcolm
Lord Pentland

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in the Reclaiming Motion

by

DARREN JOHN CONQUER

Reclaimer

against

LOTHIAN HEALTH BOARD

Respondent

Reclaimer: Smith QC, Henderson; Campbell Smith WS, LLP

**Respondent: Stephenson QC, Khurana QC; National Services Scotland; NHS Scotland Central
Legal Office**

30 December 2020

Introduction

[1] The reclaimer in this action was awarded damages for the consequences of a negligent failure, in 2003, correctly to diagnose and promptly to repair a detached tendon in his right elbow (“the injury”). By the time of the proof, liability was admitted, it being a matter of agreement that prompt repair would have resulted in a good outcome in terms both of function and pain. In fact the reclaimer has never regained full function of his arm

and has a marked disability as a result, and continues to suffer activity related pain in his arm. Had the injury been properly identified and treated he would not have required subsequent operations in 2004 and 2009, during one of which inadvertent division of a cutaneous nerve left him with pain and altered sensation in the area of the nerve. The other operation, which involved a graft from his hamstring, left pain and discomfort at the graft site. Following a proof on quantum the Lord Ordinary awarded damages in the sum of £542,397.16 (inclusive of a sum already received as interim damages). This sum included the Lord Ordinary's assessment of the total past and future wage loss consequent upon the claimer's inability to pursue his trade as a plumber.

[2] Notwithstanding the admission of liability, there remained numerous issues in dispute at the proof. Two key areas of dispute at the proof, and the subject matter of this reclaiming motion, were (i) whether serious gastro intestinal ("GI") complications that the claimer suffered, principally following surgery in August 2012, were causally connected to the injury, and had contributed to his wage loss; and (ii) how the claimer's loss of income should be calculated. The first ground of appeal was that no reasonable judge could have reached a conclusion other than that the GI complications were causally related to the injury. In reaching a contrary conclusion the Lord Ordinary had ignored or given insufficient weight to evidence, said to be "unchallenged", given by a gastric surgeon led on behalf of the claimer. The second and third grounds were that no reasonable judge could, in the circumstances of the case, have rejected unchallenged evidence from the claimer's employment expert, or reached the conclusions on wage loss arrived at by the Lord Ordinary in this case. On both issues the Lord Ordinary's opinion was unreasonable and unreasoned.

[3] It was not disputed that from the period September 2003 onwards the claimer had also suffered a number of other injuries and medical conditions which had required treatment. The claimer accepted that injuries affecting his shoulders, spine, and left arm were not causally connected to the respondents' negligence, and that the effect of these would have to be reflected in the wage loss calculation.

GI Difficulties

[4] It was accepted that the claimer had suffered gastro intestinal problems going back many years, at least to 1989, and that these had worsened over the years. The parties agreed a history of treatment received for these which included numerous investigations, and the identification of oesophagitis (Grade A 2004, Grade B 2008) and hiatus hernia. He continued to suffer symptoms through 2010 and 2011, although his condition worsened from 2012, in particular following an operation in August of that year for fundoplication (a form of gastric bypass). Post-operative complications led to further hospital admissions. He was admitted to hospital twice in October 2012, once in November and once in December. In 2013 he was admitted to hospital 7 times with GI problems, and underwent surgery in connection therewith in October of that year. In 2014 he had many hospital attendances and was in fact admitted on 6 occasions. He underwent laparoscopic insertion, and subsequent removal, of a feeding jejunostomy, in June and December of that year. In January 2016 he underwent repair of a hernia, and continued to seek medical assistance for GI problems during the year, for pain and bloating. In January 2016 it was noted that he continued to have symptoms and it was recorded that he was struggling to decrease his opiate use. In addition it was not disputed that the difficulties which the claimer experienced following the operation in August 2012 were caused by chronic use of opioids.

[5] At proof, the argument for the claimer was that his chronic use of opioids had arisen because of the ongoing pain in his right arm. The injury had thus caused, or made a material contribution to, the development of his serious GI problems, and the wage loss thereby occasioned.

[6] On behalf of the claimer, evidence was led from a gastro-intestinal surgeon, Mr Manson, who noted that the claimer had an unusual pain reaction following the operation in August 2012. Although there had been nothing wrong with the operation, the claimer had such severe pain thereafter that it required the administration of morphine via a patient controlled pump. This was a very unusual reaction. Mr Manson had not seen such a reaction before nor had colleagues with whom he discussed it. The conclusion he drew was that the claimer had an abnormal pain perception, for which the commonest and likeliest explanation would be opioid usage. It was very difficult to explain this in any other way. It was Mr Manson's understanding that for some time prior to the operation the claimer had been taking opioid medication. For this understanding he referred to a peri-admission note which referred to the claimer taking dihydrocodeine. Mr Manson had also seen, in hospital records, a letter from the claimer's GP which stated "Tramadol, 50 mg capsules, one capsule 4 times a day when required from 25/1/2010 to 27/8/2014". In cross-examination he accepted that if there was no evidence to support chronic opiate use prior to August 2012, his explanation would require to be questioned:

"Yes, I would actually. If there really is no evidence of chronic opioid use leading up to the operation in 2012, if there really is no evidence then I would have to accept that my explanation should be questioned."

Cross-examined about a lack of indications within the GP records of sustained prescription of Tramadol prior to the fundoplication he said "I think, these records are very hard to know

exactly what they represent and I think the person who can probably tell us best of all is Mr Conquer himself.”

[7] The claimer himself did not give evidence about opiate use, whether as to the commencement, frequency or duration thereof. In the claimer’s pleadings, the history of his GI problems is narrated, amongst which it is averred that:

“By 2010/2011 the pursuer’s reflux had worsened. He started to take and persisted in taking opioid analgesics.”

The fundoplication in August 2012 is noted with the averment that

“By this time he had developed a significant tolerance to analgesics.”

[8] The Lord Ordinary was not satisfied that the protracted GI illness from about 2012 was caused or materially contributed to by the admitted negligence. Her reasons are set out in paras [85] – [108] of her opinion [2020] CSOH 8. She considered in detail the GP records, which had been examined with several witnesses. The detail of those is given in her opinion and need not be repeated here. Taken short, the point is that there was no evidence of significant opiate use prior to August 2012 in the GP records. There was no such evidence from the claimer. The letter referred to by Mr Manson was not spoken to in evidence by its author, and it could not be said whether it was meant to indicate continuous use or occasional prescription during the period in question. It was not clear that it referred to continuous use over the period, or occasional “as required” use. Examination of the GP records was not consistent with the former, which had been the inference drawn by Mr Manson. The only records so far as GP prescribing before August 2012 is concerned, were of occasional prescriptions of opioid medication for short term use, a number being for conditions other than right arm pain. There was some short term provision of opioid medication following hospital appointments and admissions, but not in relation to right arm

pain. The Lord Ordinary was not satisfied that there was an evidential basis to justify Mr Manson's opinion that the claimer already had a significant tolerance to opioids by the time of the operation in 2012. The evidence of the claimer's protracted illness between 2012 and 2018, and the effect it had on his ability to work, caused her to exclude that period from her calculation of wage loss.

[9] It was asserted in support of the first ground of appeal that on both these points the Lord Ordinary erred, and that no reasonable Lord Ordinary could have reached these conclusions. We disagree. The Lord Ordinary examined the evidence in detail and the conclusions she reached were conclusions which were open to her on the evidence. Whether others may have reached a different conclusion is neither here nor there: the only question is whether the conclusions reached by the Lord Ordinary were reasonably open to her on the evidence, and it is patent to us that they were. The first ground of appeal must therefore fail.

[10] In our view there is even less merit in the second and third grounds of appeal. The Lord Ordinary explained the history of the claimer's work as a plumber, on a self-employed basis and in respect of various companies he set up to pursue that business, most of which failed. She concluded that the employment history was not straightforward, but in fairness to the claimer also recognised that he was hard working and entrepreneurial and would have been likely to earn more than an employed plumber. She found a reasonable method, on the evidence, for compensating him on that basis. The argument that her failure to accept the "unchallenged" evidence of the claimer's employment expert was in the circumstances of the case unreasonable, and that no reasonable Lord Ordinary would have acted as she did, must also fail. The Lord Ordinary carried out a detailed and comprehensive examination of the evidence, weighed up all the appropriate factors and

reached conclusions which were perfectly open to her on the evidence. On questions relating to past and future wage loss it is trite that the first instance court should take a broad and reasonable approach towards assessing damages, especially where imponderable factors arise as they do in the present case. That is exactly the approach that the Lord Ordinary adopted, having given close consideration to all the relevant strands of evidence. There is no legitimate basis on which this court could or should interfere with her conclusions.

[11] Overall, we consider that the reclaiming motion amounted to no more than a thinly veiled attempt to persuade this court to retry the case. The limited grounds upon which the court will set aside findings on matters of fact have been articulated in numerous decisions in recent years. Suffice to say that the claimer's submissions fell far short of satisfying us that there is any sound basis for interfering with the Lord Ordinary's cogent analysis and assessment of the evidence and the issues before her. For all these reasons the reclaiming motion will be refused.