SHERIFF APPEAL COURT

[2019] SAC (CIV) 21
HAM-A305-15

Sheriff Principal D L Murray
Sheriff Principal M W Lewis
Appeal Sheriff P J Braid

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL D L MURRAY

in an appeal in the cause

MB

Pursuer and Appellant

Against

LANARKSHIRE HEALTH BOARD

Defenders and Respondents

Appellant: Markie, advocate; Balfour + Manson
Respondents: Revie, advocate; NHS Central Legal Office

8 May 2019

Introduction

[1] The appellant raised an action for damages against Lanarkshire Health Board as employers of a specialist incontinence nurse in respect of an injury sustained during a catheterisation procedure. After proof the sheriff absolved the respondents.

[2] The issues explored in the appeal relate to the sheriff's findings concerning the usual and normal practice of an incontinence nurse, his assessment of the evidence about that practice, and his mischaracterisation of the basis of fault.

Background

[3] On 6 March 2012 the appellant underwent hip surgery. Post-operation she started to experience urinary incontinence, treatment for which was catheterisation. The appellant, while in recuperation in hospital and after her discharge, undertook the administration of catheterisation herself. She is a midwife and is familiar with the use of catheters.

[4] By April 2012 she began to experience some difficulty in inserting catheters due to the sensation of a blockage in her urethra. The appellant reported her difficulty and discomfort to a clinical nurse specialist and discontinued self-catheterisation. She underwent a diagnostic flexible cystoscopy at Wishaw General Hospital on 26 April 2012. This procedure was performed by a urology nurse specialist. An abnormal area was detected on the posterior wall of the bladder and a small uterine prolapse was noted.

[5] At the instigation of the appellant, Mrs P, the lead incontinence nurse for the Health Board, made a home visit on 25 May 2012. On her arrival Mrs P took a history from the pursuer in the living room. What occurred during that visit is critical to the pursuer's case. The relevant findings in fact of the sheriff are these:

> "14 After about 15 minutes the two went upstairs into a bathroom in order that Mrs P could observe the pursuer self-catheterise, viewing her technique. 300 mls of urine were drained via an intermittent catheter. The pursuer said that she had difficulty in getting the catheter in. Mrs P came beside the pursuer and tried to insert it. The pursuer said, "That's the point I'm getting stuck at, it just won't get past there." Mrs P put her hand over the pursuer's hand and tried to insert the catheter. It was uncomfortable for the pursuer and they stopped.
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> 15 The pursuer went into the bedroom and lay on the bed, and Mrs P carried out an internal vaginal examination. The pursuer's left leg was abducted to 45 degrees. Mrs P placed a catheter in the pursuer's urethra and arrived at the part where resistance had been felt before. The pursuer told Mrs P that it was sore. Mrs P asked her if she wanted her to stop and the pursuer requested to be given a minute, saying that it was quite painful but that Mrs P was telling her that her bladder needed to be

> emptied. Mrs P told the pursuer that she was going to carry on and pushed the catheter quite firmly. The pursuer experienced pain and frank, heavy haematuria, or bleeding from her urethra. The catheter was removed."

[6] The appellant continued to experience pain and discomfort, and had little or no bladder control. Further attempts at catheterisation did not result in any improvement in the appellant's condition. During a cystoscopy on 25 June 2012 by a consultant urologist, a false passage was discovered in the appellant's urethra. The false passage has since healed.

The action/decision of the sheriff

[7] The action is based on fault at common law. The appellant avers, in article 6 of condescendence:

> "no Incontinence Nurse of ordinary skill exercising a reasonable degree of care would have persisted with the catheterisation of a patient when initial resistance to the insertion of the catheter was being experienced and the patient made that clear to the Incontinence Nurse".

[8] The sheriff was satisfied on the evidence that the catheterisation procedure undertaken by Mrs P on 25 May 2012 created a false passage in the appellant's urethra. He also concluded that in order to succeed on the ground of fault pled, the appellant would require to establish that in persisting with the procedure and making a second attempt once resistance was experienced, Mrs P was departing from the usual and normal practice. He noted that the only evidence of the usual and normal practice of incontinence nurses in such a situation came from Mrs P, and her evidence was that two attempts could be made. There was no evidence from any other source that the action of Mrs P was a deviation from the normal and usual practice. The sheriff found in fact (finding-in-fact 19) that should any resistance be felt or bleeding occur, then in general the attempt at catheterisation should be terminated immediately. He also found the usual and normal practice of a specialist

incontinence nurse, in such circumstances, was not established on the evidence led. Consequently, he also concluded, at paragraph 57 of his Note, that it had not been established that the course taken was one that no incontinence nurse of ordinary skill would have taken if acting with ordinary care.

Submissions of the appellant

[9] Counsel for the appellant adopted his note of argument. He invited the court to recall the sheriff's interlocutor of 23 April; sustain the appellant's third and fourth pleas-in-law and dismiss the respondents' plea-in-law; to find the respondents liable to pay the appellant damages in the sum of ten thousand pounds and find the respondents liable to the appellant in the expenses of the process to date. The court was also invited to delete the sheriff's finding-in-fact 19 and insert the following finding-in-fact in substitution:

> "The normal and usual practice of an incontinence nurse is that when resistance is encountered, that attempt at catheterisation should cease. The resistance encountered is sometimes caused by urethral clamping. If a period of minutes is allowed to pass, the urethra can recover and successful catheterisation can occur on a second attempt. If the second attempt encounters resistance, then a referral to urology should be made. On 25 May 2012, Mrs P departed from said usual and normal practice. Mrs P encountered resistance in the insertion of an intermittent indwelling female urinary catheter. Mrs P, despite that resistance, persisted in the attempt to catheterise the appellant. No incontinence nurse of ordinary skill exercising reasonable care would have so departed."

[10] As a preliminary matter, counsel for the appellant sought to remind us of the role of an appellate court with reference to *McGraddie* v *McGraddie* 2014 SC (UKSC) 12, *Henderson* v *Foxworth Investments* 2014 SC (UKSC) 203 and *W* v *Greater Glasgow Health Board* [2017] CSIH 58. His general proposition was that the sheriff misunderstood relevant evidence and that that misunderstanding led to an error as to the proper inferences which should be drawn

from the evidence of Mrs P in relation to the usual and normal practice of an incontinence nurse. The sheriff's conclusions were not "reasonably based" and could be shown to be plainly wrong. Accordingly it was open to this court to interfere with the sheriff's findings. Against that general proposition, counsel submitted that the sheriff erred in three respects: he mischaracterised the pleaded basis of fault averred by the appellant; he misunderstood the evidence of Mrs P; and he failed to draw appropriate inferences based on those misunderstandings.

[11] In relation to the ground of fault, the appellant's case on record having regard to the test in *Hunter* v *Hanley* 1955 SC 200 required the appellant to prove the following: that the usual and normal practice of an incontinence nurse was that in an attempt to insert an indwelling female urinary catheter, if resistance is felt, the attempt should cease; that Mrs P on 25 May 2012 departed from that practice; and no ordinary incontinence nurse acting with reasonable skill would have so departed.

[12] All parts of the test were satisfied. The sheriff found that the normal and usual practice of a specialist incontinence nurse was to cease the attempt at catheterisation when resistance was felt or bleeding occurred. He also found, based on the evidence, that on 25 May 2012 Mrs P deviated from that practice and no specialist incontinence nurse of ordinary skill, acting with reasonable care, would have so departed. Having so found, the sheriff ought to have concluded the appellant had established the liability of the respondents. The final sentence in finding-in-fact [19] was not consistent with the evidence.

[13] The pleaded case is that upon encountering resistance, the attempt should cease. The sheriff was wrong to conclude that in order to succeed in this action the appellant would have to demonstrate that a second or further attempt should not have been made. By characterising the appellant's case in that manner, the sheriff placed an additional

unnecessary hurdle for the appellant to overcome. The question of whether Mrs P was engaged in a second or even subsequent attempt of catheterisation was irrelevant to the appellant's pleaded case. As soon as she encountered resistance, Mrs P should have terminated the procedure. It was her persistence in continuing with the catheterisation once resistance was encountered which resulted in the breach of her obligation.

[14] The respondents had led no evidence that an incontinence nurse who continued to insert the catheter when resistance was encountered would not be negligent. Accordingly an inference that on encountering resistance no incontinence nurse would have continued with the catheterisation should have properly been drawn by the sheriff and should now be drawn by this court.

[15] The evidence of Mrs P established: the normal and usual practice when resistance is encountered is that the attempt should cease; this resistance was sometimes caused by urethral clamping; where a period of minutes is allowed to pass, the urethra can recover and successful catheterisation can occur on the second attempt; if, in a second attempt, resistance is encountered then a referral to urology should be made. Mrs P's actions on 25 May departed from that usual and normal practice. She encountered resistance during the insertion of an internal catheter and, despite that resistance, persisted in the attempt to catheterise the appellant. No incontinence nurse of ordinary skill exercising reasonable care would have so departed. The proposed finding-in-fact accorded with that evidence.

[16] The sheriff had demonstrably misunderstood the relevant evidence, namely that Mrs P was clear that any resistance encountered during an attempt at catheterisation should result in the attempt stopping. That misunderstanding resulted in his falling into error as to the proper inference which should be drawn from the evidence of Mrs P as to the usual and normal practice of an incontinence nurse. The sheriff was therefore in error in not finding

that the evidence established that the usual and normal practice of an incontinence nurse was departed from and that no incontinence nurse of ordinary skill exercising reasonable skill would have so departed.

Submissions for the respondents

[17] Counsel for the respondents adopted his note of argument and written submissions. He invited the court to adhere to the sheriff's interlocutor.

[18] Counsel focused on the ground of fault as set out in the pleadings, which he described as narrow. In each negligence case the court must apply the test as stated in Lord Clyde's dicta in *Hunter* v *Hanley* against the background of the pleadings. The appellant's case was that the usual and normal practice of an incontinence nurse would have been to desist when encountering initial resistance. There was no evidence to support the pleadings on that matter.

[19] Five witnesses gave evidence - the appellant, Mrs P, Ms Friel, Dr Webber and Miss Chamberlain. No witnesses were led by the respondents. The appellant was a midwife and as such had no expert knowledge as to the practice of a specialist incontinence nurse. Ms Friel was a physiotherapist. She had never worked as an incontinence nurse and had no expert knowledge in the field. It had been a matter of contention between the parties as to whether or not, and the extent to which, the remaining three witnesses Dr Webber, a consultant urological surgeon, Ms Chamberlain, a renal nurse, and Mrs P, a specialist incontinence nurse, could give evidence about the standard of the incontinence nurse of ordinary skill acting with of ordinary care. The appellant now sought only to rely on the evidence of Mrs P on whose allegedly negligent actions the action was founded.

[20] Mrs P was the only witness who could give credible and reliable evidence about the standard to be expected of an incontinence nurse. She had not accepted that on encountering resistance the attempt to catheterise should cease. The sheriff accurately reflected her position in paragraph [13] of his judgment:

> "Mrs P responded that she would stop the catheterisation and try again since sometimes the urethra went into spasm and would obstruct the catheter. One more attempt should be made and then if it was not possible to insert it, it would be necessary to refer the matter on to the urology department to see what the obstruction was."

[21] Even if the appellant had established that the usual and normal practice was as averred and that Mrs P departed from normal practice, she would only have met the first leg of the three-part test expressed in *Hunter* v *Hanley*. She still required to prove that the course taken by Mrs P was one which no incontinence nurse of ordinary skill acting with ordinary care would have taken. That proposition was never put to Mrs P, was never explored and was not proved. The appellant therefore failed to prove the essential facts and accordingly the sheriff was correct in finding in favour of the respondent.

[22] Counsel did not accept that the sheriff had mischaracterised the basis of fault as pled by the appellant; *esto* the sheriff had mischaracterised the pled basis of fault, which was denied, whether it was a continuation of a first attempt or second attempt did not matter. Such a mischaracterisation mattered only if it could be shown that the three factors of the *Hunter* v *Hanley* test would have been established if the mischaracterisation had not occurred.

Decision

[23] We observe that the arguments presented to us during the appeal do not reflect the grounds of appeal. Nothing was said to us about (i) the sheriff's refusal to allow counsel for

the appellant to put the Indwelling Urinary Catheter Insertion Guidelines to Mrs P and (ii) the sheriff's decision to exclude part of the evidence of Miss Chamberlain, nor were these matters focused in the appellant's Note of Argument. Accordingly grounds of appeal (i), (iv) and (v) fail through lack of insistence.

[24] The parties were agreed that the test as set out in the well-known dicta of Lord President Clyde at page 206 in the leading case on medical negligence, *Hunter* v *Hanley*, has application to facts of these proceedings. The test is this:

> "To establish liability by a doctor where deviation from normal practice is alleged, three facts require to be established. First of all it must be proved that there is a usual and normal practice; secondly it must be proved that the defender has not adopted that practice; and thirdly (and this is of crucial importance) it must be established that the course the doctor adopted is one which no professional man of ordinary skill would have taken if he had been acting with ordinary care. There is clearly a heavy onus on a pursuer to establish these three facts, and without all three his case will fail."

Although the medical professional in these proceedings is not a doctor, she is a specialist incontinence nurse.

[25] We do not agree with the appellant's contention that the sheriff mischaracterised the pleaded basis of fault. The precise expression of fault is set out in paragraph [7] above. To succeed the appellant required to prove: there was a usual and normal practice for an incontinence nurse working in a domestic setting; Mrs P did not adopt that practice; and the course Mrs P adopted was one which no incontinence nurse of ordinary skill would have taken if she had been acting with ordinary care.

[26] The sheriff discounted the evidence of the appellant about the usual and normal practice as she was not an incontinence nurse. He similarly discounted the evidence of Ms Friel, who is a physiotherapist. He accepted the evidence of Dr Webber that a specialist nurse who is permitted to perform catheterisation in a community setting will have her own

practice body guidelines as to how she should respond in the situation of difficulty in passing a catheter but that witness had no knowledge of any such guidelines. The sheriff treated elements of the evidence of Miss Chamberlain as inadmissible because although she possessed the necessary knowledge and experience to give opinion on general nursing issues, she was not in a position to answer to what the usual and normal practice of an incontinence nurse was. The sole evidence about the usual and normal practice came from Mrs P, who was the lead specialist incontinence nurse of the Health Board. The evidence of Mrs P was that on encountering difficulty in inserting a catheter, one more attempt should be made before referring the patient to the urology department. The sheriff accepted her evidence as credible and reliable.

[27] We prefer to look at the three limbs of the *Hunter* v *Hanley* test separately. Two questions arise out of the first part of the test as set out in paragraph [24] above. First ought the sheriff to have concluded that the ordinary and usual practice of a specialist incontinence nurse was established? The evidence of Mrs P that a second attempt may be undertaken if initial resistance is encountered does not sit easily with the use of "initial" in the appellant's pleadings. Nonetheless, we accept it is tolerably clear from Mrs P's evidence that the usual and normal practice of a specialist incontinence nurse would be that catheterisation should not be persisted with where resistance is encountered. We therefore accept that on the evidence the sheriff ought to have concluded that the first leg of the tripartite test enunciated in *Hunter* v *Hanley*, namely that a usual and normal practice adopted by a specialist incontinence nurse was established. That usual and normal practice was that the attempt at catheterisation would be discontinued when resistance was incurred. Although Mrs P was clear that a second attempt could be attempted, lest the difficulty arose

from urethral clamping, her evidence was clear that catheterisation would not be persisted with when resistance was encountered. Accordingly the final sentence of finding in fact 19:

> "However, the usual and normal practice of a specialist incontinence nurse in such circumstances was not established."

cannot stand.

[28] This then leads on to the second question: whether the sheriff ought to have found that resistance was encountered as Mrs P inserted the catheter? In paragraph [7] of his judgment the sheriff records the appellant's evidence.

> "Mrs P placed a catheter in the [appellant's] urethra and arrived at the part where resistance was felt before. She said that she told Mrs P that it was really sore and tried to push Mrs P's hand away. She said Mrs P asked her if she wanted her to stop and that she had asked to be given a minute, saying that it was quite painful but that Mrs P was telling her that her bladder needed to be emptied. She said that Mrs P told her that she was going to carry on and that she pushed the catheter quite firmly. The appellant said that she experienced excruciating, burning pain and fresh bleeding from her urethra."

[29] We have considerable doubt that what the sheriff says there allows this court to be satisfied that resistance was encountered. However at paragraph [15] of his judgment the sheriff quotes from an undated letter written by Mrs P to Dr Granitsiotis:

> "Intermittent catheterisation was tried again but I met with some resistance and M complained of pain…"

He then records:

> "She said that she told the [appellant] to relax and that the catheter went in."

[30] It was not explained to us why what happened in the bedroom, which undoubtedly was critical to the case, was by agreement not explored with the pursuer. It is also surprising that the letter written by Mrs P to Dr Granitsiotis, was not included in the appendix to the appeal print. This letter which as the sheriff notes at paragraph [51]:

> "..is significant because it was a record made shortly after the event when there was no contemplation of legal proceedings. It is, therefore, likely that reliance can be placed upon it for that reason."

We consider in this case it was of important evidential value and this court was hampered by the letter not being included in the appendix. It also may well have assisted the court if the transcript of the appellant's evidence had been produced in the appendix.

[31] This issue of whether resistance was encountered is a matter where we consider the sheriff was placed in an advantageous position in evaluating the credibility and reliability of the appellant and Mrs P. It is apparent from what is within the transcript of Mrs P's evidence and what the sheriff records that there were inconsistencies between the evidence of the appellant and that of Mrs P. We accept that the answers given by Mrs P's answers in cross examination (Transcript page 31-37) particularly when taken alongside her letter to Dr Granitsiotis entitled the sheriff to find that resistance was experienced as he did in finding-in-fact 16:

> "During the attempted catheterisation of the [appellant] on 25 May 2012 by Mrs P the [appellant] exhibited resistance to the catheter…"

[32] As indicated, we consider approaching the three legs of the *Hunter* v *Hanley* test separately better focuses the evaluation of negligence and we depart from the analysis of the sheriff at paragraph 57 of his judgment. The sheriff appears to have placed substantial weight on there being no evidence that the further attempt at catheterisation by Mrs P was a deviation from the usual and normal practice of an incontinence nurse. While we accept some difficulty is created by the formulation of the pursuer's case, we would nonetheless accept that Mrs P's evidence was that in general, where resistance was incurred catheterisation should cease. That can be inferred whether this was on the first attempt or at

a subsequent attempt. Accordingly, the second leg of the *Hunter* v *Hanley* test was also satisfied.

[33] However, as the sheriff notes, the degree of force used by Mrs P was not addressed. Nor was she asked what was meant by resistance. We consider these matters to be of relevance to the third aspect of the test enunciated in *Hunter* v *Hanley*, which Lord Clyde described as being of critical importance: that it must be established that the course adopted is one which no professional of ordinary skill would have taken if he had been acting with ordinary care. As pointed out by the Lord President, this tripartite test established a heavy onus on an appellant to establish all of these three facts and without all three, his case will fail.

[34] The fundamental difficulty for the pursuer rests in satisfying the third leg of the test. In finding-in-fact 19 the sheriff found:

> "Should any resistance be felt or bleeding occur, then in general the attempt at catheterisation should be terminated immediately."

The appellant invited us to modify that finding by deleting the words "in general" but we find no basis to do so. It reflected Mrs P's evidence on normal practice when resistance is encountered (Transcript 22 June page 29). It could not be said on the evidence that the course adopted by Mrs P was "one which no professional [man] of ordinary skill would have taken if [he] had been acting with ordinary care." Having reviewed the transcript of Mrs P's evidence we accept the submission by the respondents' counsel that this proposition was not explored with her. Neither was she asked why she continued if she accepted there to have been some resistance. That some resistance was found to be encountered is not sufficient for an inference to be drawn to establish the third leg of the test.

[35] At paragraph 58 of his judgment the sheriff found:

> "In the absence of being able to make a finding as to deviation from usual and normal practice, there being not valid evidence upon which to base this, it has not been established that the course taken was one which no incontinence nurse of ordinary skill would have taken if acting with ordinary care."

We find no error in that finding of the sheriff. There was no evidence which entitled the sheriff to make a finding that the third leg of the *Hunter* v *Hanley* test was satisfied. There was no evidence to allow the court to find that no incontinence nurse would have done as Mrs P did if acting with ordinary care. It was never put to her that no other incontinence nurse would have done as she did. Accepting, as we do, that the sheriff was entitled to find the third leg of the test was not satisfied, we conclude that he should have made the following finding in fact and law to reflect the appellant's failure to satisfy the *Hunter* v *Hanley* test:

> "The false passage created in the pursuer's urethra was not caused by the fault of the defenders' employee."

That finding substantiates the sheriff having upheld the third plea-in-law for the defenders.

[36] Accordingly we conclude that this appeal must fail because the appellant failed to establish that the actions of Mrs P were such that they would not have been adopted by a specialist incontinence nurse in a domestic setting in the circumstances of the case when acting with ordinary care. We shall therefore refuse the appeal and adhere to the sheriff's interlocutor of 23 April 2018.

Expenses

[37] Parties were agreed that expenses should follow success and that the case was suitable for the employment of junior counsel. We were however also advised that the appellant was in receipt of legal aid for the appeal. In the event the respondents wish to seek expenses, they should enrol a motion so that a hearing may be fixed.