



SHERIFF APPEAL COURT

**[2023] SAC (Civ) 23
PIC-PG25-20**

Sheriff Principal D Pyle
Sheriff Principal N A Ross
Appeal Sheriff T McCartney

OPINION OF THE COURT

delivered by Sheriff Principal N A Ross

in appeal by

ROGER McCALLUM

Pursuer and Appellant

against

ALAN MACDONALD MORRISON

Defender and Respondent

**Pursuer and Appellant: A Smith KC and C Smith, advocate; Thompsons
Defender and Respondent: I Ferguson KC; MDDUS**

20 June 2023

[1] The respondent was formerly a dentist who operated from dental practices in Cumnock and Drongan until 2013. On 18 September 2013 the respondent's dental practices were closed by the local health board due to concerns the respondent had failed to comply with dental infection control procedures. On 5 February 2016 the Professional Conduct Committee of the General Dental Council found the respondent had failed to maintain adequate infection control between 16 November 2012 and 18 September 2013.

The respondent was removed from the Dentists Register as a result.

[2] The appellant was a patient at the Cumnock Practice. He received dental treatment from the respondent on 18 and 26 February 2013. Later that year, in October 2013, the health board sent letters to the respondent's former patients. The first letter, in October 2013, advised of a low risk of infection by blood-borne viruses (BBVs). The respondent did not receive that letter. He did receive a subsequent letter, in March 2014. He learned of the risk of BBVs as a result of that letter. That letter (the "March 2014 letter") stated that the risk of infection was very low, but offered all patients the option to take a blood test to check for infection.

[3] Upon receiving the March 2014 letter, the appellant became distressed. He was concerned that he may have contracted a BBV unknowingly and transmitted it inadvertently to family members. The appellant was subsequently diagnosed as having suffered an acute stress disorder as a result of receiving the March 2014 letter.

[4] The appellant took a blood test in April 2014. He tested negative for any BBV. His stress disorder improved thereafter. In the event, only four of 2,250 former patients who were tested returned a positive test. The four positive test returns were for Hepatitis C only, were only from the Drongan Practice, and of those, three showed evidence of unrelated causes.

[5] The appellant raised this action, as have many of the respondent's former patients. A proof before answer was conducted on the basis of agreed evidence and submissions alone. The claim was presented on three grounds, namely (i) breach of duty of care; (ii) breach of an implied term under contract; and (iii) assault. The sheriff assoilzied the respondent on all three grounds. He found that the psychiatric injury was not foreseeable and not compensatable, in the light of *Rothwell v Chemical Insulation Co Ltd & Anr* [2008] 1 AC 281. He found there was no contract and no assault. The sheriff valued quantum

at £2,000. On appeal this valuation was accepted as appropriate. The appeal was advanced on the same three grounds.

Submissions – breach of duty of care

[6] The primary focus of the appeal was duty of care, and whether the sheriff correctly found that the psychiatric injury sustained by the appellant was not reasonably foreseeable to the respondent and thus not compensatable in law. Before the sheriff both parties' submissions were primarily focused on three decisions of the House of Lords: *Page v Smith* [1996] 1 AC 155 ("*Page*"); *Simmons v British Steel* 2004 SC (HL) 94 and *Rothwell v Chemical Insulation Co Ltd & Anr* [2008] 1 AC 281 ("*Rothwell*"). On appeal the appellant no longer insisted on a second argument, based on alleged physical injury caused by taking of blood, on the basis that it was de minimis and in any event incurred subsequent to the psychiatric injury.

[7] Senior counsel for the appellant did not challenge the sheriff's findings in fact. The appeal was about the application of the law to the facts. He submitted that the sheriff had erred by regarding the appellant as a secondary victim. The appellant was a primary victim, who had been subjected to material physical harm as a result of the potential use of non-sterile equipment in his mouth. As he was a primary victim, the sheriff erred in considering whether the risk of psychiatric harm was reasonably foreseeable. The majority of the House of Lords in *Page* found that reasonable foreseeability was not required where the pursuer was a primary victim. That criterion was only applicable to secondary claims. Notwithstanding that, the sheriff relied upon the decision of the House of Lords in *Rothwell* to find that the harm the appellant suffered was not compensatable in law. With respect to *Rothwell*, senior counsel submitted that Lord Hoffman's comments were generalised and not

directed towards primary victims. Further, the members of the House had resorted, in his submission, to unusual means to distinguish the position of Mr Grieves in *Rothwell* from that of the plaintiff in *Page*. He submitted that the decision in *Rothwell* could not be reconciled with the position of the majority in *Page*.

[8] Senior counsel referred to Lord Hope's reasoning in *Rothwell* at page 301H to explain the difference between the claim of Mr Grieves in *Rothwell* and that in *Page*. A distinction was made on the basis of (i) immediacy, or the lack of it, and (ii) the causal chain.

He submitted that the present appellant was in immediate proximity, akin to Mr Page.

The March 2014 letter issued by the health board failed to explain to patients how infection control procedures had been deficient. Unlike Mr Grieves in *Rothwell*, who had been aware of the potential risk of inhaling asbestos for many years, the appellant only became aware of the potential risk of being exposed to a BBV in March 2014. There was no means by which the appellant could have discovered that risk sooner than he did, other than receiving the letter issued in October 2013, which he did not. The time lag between the treatment in February 2013 and the issuing of the letter in March 2014 was all part of the same chain of causation. Reliance was placed on Lord Hope's speech in *Rothwell* at page 302A. But for the failure to follow appropriate infection risk controls, there would have been no need for the letter to be sent by the health board.

[9] Senior counsel for the respondent submitted that the sheriff had correctly followed *Rothwell* and that his finding in fact and law, that it was not reasonably foreseeable to the respondent that the appellant would develop a psychiatric illness, was correct. The appellant had to prove reasonable foreseeability of psychiatric harm as a result of the treatment given in February 2013. There was no challenge to the findings in fact. The sheriff did not find that the appellant had, in fact, been exposed to any BBV. All he could find was

that the appellant was exposed to a risk of transmission. The immediacy that was present in *Page*, namely the psychiatric illness which developed soon after the event, was not present in this case. There had been a 12 month delay between treatment in February 2013 and the March 2014 letter. The March 2014 letter was the alleged cause of psychiatric injury.

Counsel accepted that if the appellant had been told immediately after treatment that non-sterile equipment had been used, and thereafter developed a psychiatric injury as a result of the information, then *Page* might entitle him to damages. Counsel relied on Lord Hope's speech in *Rothwell* at page 301H to explain that it was immediacy and the causal chain which distinguished *Rothwell* from *Page*. The appellant was in the same position as Mr Grieves in *Rothwell*. That being so, this court was bound by *Rothwell* as respects breach of duty of care and the appeal should be refused.

Submissions – breach of an implied term

[10] The sheriff made a finding in fact that there was no contract between the appellant and the respondent in relation to the respondent's provision of NHS treatment.

The relationship was regulated solely by the statutory scheme for the provision of NHS dental services as regulated by section 25(1) of the National Health Service (Scotland) Act 1978, and supplemented by the National Health Service (General Dental Services)(Scotland) Regulations 2010 and the National Health Service (Dental Charges)(Scotland) Regulations 2003.

[11] Senior counsel for the appellant submitted that the sheriff erred. It was possible for there to be a contract between a patient and a medical practitioner at the same time there being a relationship under the statutory scheme (*Dow v Tayside University Hospitals NHS Trust* 2006 SLT (Sh Ct) 141). The relationship between a patient and a medical practitioner is

quasi-contractual. It was an implied term of the contract between the parties that the respondent would treat the appellant in accordance with the standards of treatment required by the General Dental Council. It was an implied term of the contract that the respondent would exercise the usual skill and care. By conducting himself in the manner found proved by the General Dental Council the respondent was in breach.

[12] Senior counsel for the respondent submitted that this submission was misconceived. The pleadings lacked sufficient specification and relevant averments to establish such a contract existed. Separately, the appellant was an NHS patient. There were no grounds to imply the existence of a contract in this situation. The relationship was regulated by section 25(1) of the National Health Service (Scotland) Act 1978, as amended, and the National Health Service (General Dental Services)(Scotland) Regulations 2010. The respondent relied on the *Royal Commission on Civil Liability and Compensation for Personal Injury 1978*, Cmnd. 7054, Vol. 1 (The Pearson Commission) at paragraph 1313, to the effect that in the NHS there was no contract between a doctor and a patient, and that a pursuer must rely on an action based on breach of duty of care. Reference was also made to *Jackson & Powell on Professional Liability* (8th Edition, 2016) at paragraph 13-002 and *Grubb's Principles of Medical Law* (4th edition, 2017) at paragraphs 3.08 to 3.09.

Submissions – Assault and the *actio iniuriarum*

[13] For the appellant it was submitted that a patient consents to the potential of injury in medical treatment on the condition that a medical practitioner follows correct practice for their discipline. A dentist, such as the respondent, can only carry out treatment where they either have express or implied consent (*Thomson v Devon* (1899) 15 Sh Ct Rep 209; *Marshall v Curry* [1933] 3 DLR 260). It was accepted that whether the respondent did intend to cause

bodily harm was unknown. Nonetheless, the actions of the respondent and his failure to follow professional practice with respect to sterilisation of equipment was a sufficient basis upon which to establish that the appellant had been assaulted by the respondent.

[14] For the respondent it was submitted that civil assault is defined as an overt physical act intended to affront another, and committed without lawful justification or excuse (*Greens Encyclopaedia of the Laws of Scotland* (1931), Volume 12, para 1124). "Affront" or "insult" is properly understood as an invasion of the person. The affront may involve actual physical (or mental) harm or harm that threatens the victim's bodily integrity. It was accepted that the respondent's treatment of the appellant, in a manner which breached professional requirements of hygiene, was capable of being an affront or insult. For threatened harm to amount to an assault, proof was required of both an intention to harm on the part of the perpetrator and of a reasonable apprehension of harm on the part of the person against whom the threat was directed. On the facts of this case, the appellant was treated in February 2013 and had no reasonable apprehension of harm at the time he was treated. The appellant had consented to the treatment. He had not suffered a BBV. At the time of the physical act he could not have been apprehensive of danger to his person. Taken together, there was no basis to establish assault by the respondent against the appellant.

Decision – breach of duty of care

[15] Following his two visits to receive dental treatment, the appellant left the dentist's chair having suffered no injury. He was not physically injured. He was not infected with a BBV. He did not consider himself to be injured, or have any reason to do so. Although the respondent had breached his professional duties in failing to exercise proper infection control during the dental treatment, the appellant was not aware of it. Although exposed to

the risk of infection, the appellant was not harmed. On finishing treatment on 26 February 2013 he had sustained no loss, injury or damage.

[16] That remained the case between 26 February 2013 and March 2014, a little over one year. The appellant first realised something was amiss with his treatment following reading the March 2014 letter.

[17] The March 2014 letter comprised a patient notification letter sent by the local health board, enclosing an information leaflet. The March 2014 letter advised that potential breaches of infection control procedures could have occurred at the respondent's practices prior to October 2013. It stated that new information had been assessed and, while the risk of infection to patients was considered to be very low, they "cannot rule this out completely". Specific risks were mentioned. There was a risk of Hepatitis C (described as very low), or of Hepatitis B or HIV (even lower). Testing was offered as a precaution. Special clinics were subsequently set up in Cumnock and Drongan for that purpose.

[18] As a result of the March 2014 letter, the appellant arranged and underwent a test for BBVs in April 2014. He tested negative. It is not disputed that between these dates, for a period of approximately four weeks, he suffered anxiety about himself and his family members, and a variety of other symptoms which led to a diagnosis of Acute Stress Disorder (DSM-V diagnostic code 308.3). This resolved after approximately four weeks, following the blood test results.

[19] The appellant is a primary victim, in that he suffered the original defective treatment (*Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310). The treatment did not directly lead to injury. The trigger for the psychiatric symptoms was not the respondent's treatment. It was the March 2014 letter, drafted and sent by a third party. Parties did not

dispute that this intervention by a third party was foreseeable and did not break the chain of causation.

[20] Sending the March 2014 letter was not a wrongful act or a harmful event. It was no more than a notice of an earlier wrongful act or omission. In effect, therefore, it is directly analogous to the role played by pleural plaques in *Rothwell*. It bears consideration that the March 2014 letter was drafted in such a way as to make specific references to particularly alarming possibilities, such as HIV, and that the terms of the letter were beyond the respondent's knowledge or control.

[21] The appellant's case relies on the application of a wide test, namely the test in *Page v Smith*, a decision of the House of Lords. There Lord Lloyd described the test for whether psychiatric harm was compensatable for a primary victim as:

“...whether the defendant should have reasonably foreseen that the plaintiff might suffer physical injury as a result of the defendant's negligence, so as to bring him within the range of the defendant's duty of care. It was unnecessary to ask, as a separate question, whether the defendant should reasonably have foreseen injury by shock; and it is irrelevant that the plaintiff did not, in fact, suffer any external physical injury.” (at p 190F)

[22] We acknowledge that this test is apt to cover the present circumstances. It is an entire answer, however, that the House in the subsequent case of *Rothwell* limited the scope of recoverability which *Page* otherwise left open. Specifically, it imposed restrictions on liability for psychiatric injury.

[23] In *Rothwell* the House of Lords held that claimants who had pleural plaques in their lungs, which were symptomless and did not increase their susceptibility to other asbestos-related diseases or shorten their life expectancy, did not suffer damage that could give rise to a cause of action. One of the claimants, Mr Grieves, suffered a recognised psychiatric illness as a result of the discovery. He claimed the defendants owed him a duty of care in respect

of psychiatric illness caused by his anxiety at the prospect of future illness. The House of Lords recognised that the pleural plaques were not injuries. They were no more than an alert that Mr Grieves had previously been exposed to asbestos particles, which had penetrated his lungs. As such, detection of Mr Grieves' pleural plaques had a similar effect to the March 2014 letter in the present case. They both alerted the pursuer/plaintiff to previous wrongful exposure to injury. They were both subsequent and separate events to the initial wrongful event.

[24] Lord Hoffman considered that psychiatric illness, caused by apprehension that an event may occur, was not an actionable risk and he considered *Page* should not be extended for that occurrence (at para 33). Lord Hope distinguished *Page* as follows:

“...The category of primary victim should be confined to persons who suffer psychiatric injury caused by fear or distress resulting from involvement in an accident caused by the defendant's negligence or its immediate aftermath. A person like Mr Grieves who suffers psychiatric injury because of something that he may experience in the future as a result of the defendant's past negligence is in an entirely different category. The immediacy that is characteristic of the situation that applies to primary victims as contemplated in *Page v Smith* [1996] AC 155 is lacking in his case.

Secondly, the causal chain between his inhalation of the asbestos dust and the psychiatric injury is stretched far beyond that which was envisaged in *Page v Smith* [1996] AC 155. That case was concerned with an immediate response to a sudden and alarming accident, for the consequences of which the plaintiff had no opportunity to prepare himself. In this case Mr Grieves inhaled asbestos dust for about eight years. It was not until the end of that period that he became worried. This was because of the risk that he or his wife or daughter might contract a disease in the future. And his depression did not occur until he was told 20 years later about the results of his chest x-ray. He believed then that his worst fears were being realised. But this was because of the information that he had now been given by his doctor, not because of anything that happened or was done to him by his employers while he was inhaling the asbestos. His exposure at work was not to stress, but to risk...” (at para 54, 55)

[25] Lord Scott found that a risk of an adverse condition arising at some time in the future does not constitute damage sufficient to complete a tortious cause of action (at para 67).

Similarly, Lord Rodger observed that in *Page*, and in *Simmons v British Steel* 2004 SC (HL) 94,

the psychiatric illnesses were prompted by a reaction to a very unpleasant event that had actually occurred, not by contemplation of the risk that something unpleasant might occur in future (at para 97).

[26] We consider that *Rothwell* is directly analogous to the present claim, and that we are bound to follow it, including the basis upon which it distinguished *Page*. Mr Grieves in *Rothwell* was alerted long after the exposure to risk. He suffered a psychiatric condition caused by fresh information, not by the exposure itself. His psychiatric condition related to fear of a diagnosis which never occurred. The present appellant's claim is, in our view, properly analysed in the same way, with the same consequences. This case lacks the immediacy required by *Rothwell*. It also has a causal chain which is stretched far beyond that envisaged by *Page* or *Rothwell*. The risk of the psychiatric harm was not damage sufficient to complete a delictual cause of action. The condition was prompted by fear of an event which did not materialise. This first ground of appeal must be refused.

Decision – Breach of implied term

[27] It is an elementary requirement of pleading a breach of contract that the contract itself be identified. The essence of contract is voluntary agreement between parties to be bound by contract terms. The court requires to be able to identify who the parties were, when agreement was reached, and in what terms. The appellant's averments about contract do not contain any such information. They assert that a contract of service was entered into. An implied term is specified, but no express terms are discussed or even mentioned. The appellant's pleadings are so lacking in specification with regard to contract as to fail to advance a relevant case. The respondent did not seek a debate to challenge these averments, no doubt because the proof before answer was on the basis of joint minutes alone, the scope

of evidence was known in advance, and challenge could be left to submissions following proof.

[28] No evidence was led which supported the existence of a contract. The joint minutes do not contain any factual evidence about the formation of contract between the parties. This submission depends entirely on legal inference. We do not accept that any such legal inference is available to the appellant. We are unable to find any contract was concluded between the parties. The parties were in a relationship which was regulated by section 25(1) of the National Health Service (Scotland) Act 1978, as amended and the National Health Service (General Dental Services)(Scotland) Regulations 2010. We find no support for the appellant's submission that the relationship was quasi-contractual. The possibility which the appellant asserts, of there being a co-existent contract, is unexceptionable, but does not by itself prove or imply that a contract existed in the present case. In any event, there are no findings in fact which could support the formation of any contract between these parties, or supply the terms thereof. We reject this submission as unsupported in averment, evidence, findings in fact or as a matter of law.

Decision – Assault and the *Actio iniuriarum*

[29] The appellant submitted that the dental procedures, to the extent they breached professional requirements of hygiene, were carried out without consent. The procedures amounted to an “affront” in the form of an assault. Damage was caused. The *actio iniuriarum* was therefore available. The essence of the *actio* is harm to dignity of the person, rather than loss, and is apt to include defamation. There is no need to show breach of duty. The *actio iniuriarum* became neglected in the 19th and 20th centuries as a result of the

development of the law of negligence, but remains available. It was successfully pled in *Stevens v Yorkhill NHS Trust* 2006 SLT 889 (OH).

[30] There are two requirements for this remedy to be available. The first is an affront to a protected interest. The second is that the act complained of was intentional and without legal justification.

[31] For the respondent it was accepted that the essence of the *actio iniuriarum* is of unwarranted interference with the person (Bell: *Principles of the Law of Scotland* (10th ed 1889) section 2028). An assault would amount to an affront or injury to dignity as well as to the person. There was no assault in the present case because consent was given, there was no bodily harm, and at the time of the act the appellant could have had no apprehension of harm. There was no evidence of intent to harm, and none could be inferred.

[32] We note that there are almost no modern instances of the *actio iniuriarum* being relied upon for a remedy. In *Stevens*, a health board removed and retained the internal organs of the pursuer's deceased baby, without her knowledge. The remedy was applied in the absence of a duty of care. We agree with the respondent's submission that the court should be slow to cut across the developed law of negligence, where the limits of recovery of damages have been extensively regulated by reference to duty of care. The appellant is unable to demonstrate modern authority for this approach. There is no prior Scottish authority directly in point in relation to civil liability for intentional injury by a doctor (Prof. E. Reid: *The Law of Delict in Scotland* (2022), para 16.47).

[33] The appellant's case offers to prove assault, not merely affront or insult. The definition of assault in civil law is an "overt physical act intended to insult another and committed without lawful justification or excuse" (*Greens Encyclopaedia of the Laws of Scotland* Vol 12, paragraph 1124). "Insult" is to be understood as an interference with the

person. Civil assault can either involve physical harm (actual or reasonably apprehended as threatened) or mental harm invading the victim's bodily integrity.

[34] Although the respondent's submission discussed events in terms of threatened harm, the appellant's submissions founded on actual harm. It is difficult to see that the respondent's analysis of threat is correct: the dental procedures were overt acts, with no threat, and the March 2014 letter contained no threat, only an alert. This is a case of perceived harm, but not based on threat.

[35] The dental procedures were carried out with the appellant's consent. Consent was not withdrawn. The respondent submitted that the claim of assault cannot be made in the face of express consent, with no harm having been committed, and where no harm was anticipated or threatened. We do not accept that assault, in the *Greens Encyclopaedia* sense of unlawful "interference with the person", is demonstrated by the averments, or has been proved. The "interference", namely the dental procedure, was lawful. It was expressly consented to, and no infection was passed.

[36] Further, the appellant's case is not based on an overt act, but rather a failure or refusal to observe professional standards. While deliberate circumventing of hygiene standards might, in these circumstances, be classed as an act rather than omission, it was not an overt act of harm to the appellant. The appellant knew nothing about it. Had it been an overt act, he would not have consented to treatment.

[37] Further, intention is not made out. "Intended to insult", in the sense of causing physical harm, is neither pled nor proved. There is no reason to find, and less to anticipate, that the respondent actively intended to harm his patients. His actions were entirely consistent with hoping to remain undetected in the course of saving money by re-using disposable items. Harming his patients would increase the likelihood of being detected.

If intervention by the General Dental Council were foreseeable, it is unexplained why the respondent intended his own disgrace and removal from the profession. Separately, there is no hint of personal malice in the claim, either to the appellant or other patients, and no reason to anticipate such.

[38] It might be, in some circumstances, possible to infer harmful intent from the quality of the actions themselves. That proposition has an insecure foundation in the present case, as there is a rational and obvious alternative explanation for the actions, namely saving money on dental supplies. If the proposition were sound in this case, it is theoretically possible to infer intention from recklessness. The *actio iniuriarum* can be:

“capable of including ‘conscious recklessness’, where a person is indifferent to a risk of injury that could have been foreseen with substantial certainty, proceeding without concern for the possible consequences of his or her conduct” (Reid: *above*, para 16.08)

[39] We note, however, that this risk of physical injury, far less of psychiatric injury, was not foreseeable with “substantial certainty”. The March 2014 letter deemed the risk of physical infection to be very low. If intention is to rely on inference, then reasonable foreseeability of injury becomes central once more. That has been discussed above in the context of *Rothwell* and *Page*. On those authorities, reasonable foreseeability is not made out in this context. There was no reason to reasonably foresee psychiatric injury to the appellant. There is no basis on which to disturb the sheriff’s finding on this point. Further, we agree with the respondent’s submission that the extremely low risk of infection (and thus the risk of a recognised psychiatric condition) actively points away from the foreseeability of harm.

[40] For these reasons, the *actio iniuriarum* is not available to the appellant, and we reject this ground of appeal also.

Disposal

[41] We will refuse the appeal. Parties agreed that expenses should follow success, and that the appeal should be certified suitable for the employment of junior and senior counsel. We will issue an interlocutor accordingly. We record that we were much assisted by the careful and analytical submissions for both parties.