

SHERIFFDOM OF LoTHIAN AND BORDERS AT EDINBURGH

[2024] EDIN 40

EDI-A245-24

JUDGMENT OF SHERIFF WENDY A SHEEHAN

in the cause

LM, AD AND JM

Pursuers

against

AM

Defender

Pursuers: Elder

EDINBURGH, 9 OCTOBER 2024

The sheriff, having resumed consideration of the cause, finds the following facts to be established;

Findings in fact

1. The defender was born in Philadelphia, USA on 9 July 1951. He moved to the UK in the early 1970s and has resided in the UK since then. He was domiciled in Scotland. He was habitually resident in the Sheriffdom of Lothian and Borders until 23 June 2023. This court accordingly has jurisdiction.
2. The defender married CR in Edinburgh in 1985. They had three children; LM (born 11 May 1995) (the first pursuer), AD (born 20 April 1985 (the second pursuer) and JM (born 24 November 1989 (the third pursuer). CR has received intimation of these proceedings, has not entered the process and is supportive of the pursuers' application.

3. The defender's parents are deceased. He had one sibling, LM, who lives in Pennsylvania, USA. She has received intimation of these proceedings and has not entered the process.
4. The defender was happily married was latterly resident with his wife CR in North Berwick, East Lothian.
5. The defender was appointed as a Senior Lecturer in Scottish History at The University of Edinburgh in 1985. He retired in 2014 and was then appointed as an Honorary Fellow. Following his retirement, he continued to go into the University School of History each day, undertaking research, publishing books and articles and supervising PhD students. His work was his main focus in life.
6. The Covid-19 restrictions imposed in March 2020 prevented the defender from going into the School of History and from utilising the University library and research facilities. He was unable to work or to socialise with colleagues. He found this to be challenging and felt frustrated and isolated.
7. The defender swam at a local pool four or five times a week in order to keep fit. He was no longer able to do this once the Covid-19 restrictions were imposed in March 2020.
8. On 16 December 2021, the defender was admitted to the Royal Infirmary of Edinburgh by ambulance having suffered a stroke. He was treated and was then discharged on 21 December 2021, with prescription medication; Aspirin, Clopidogrel and Amlodipine (to reduce hypertension, thin his blood and to reduce the risk of further stroke). These medications had side effects. The defender suffered from a severe skin reaction which despite treatment with various topical creams and UV light therapy, continued to trouble him and prevented him from sleeping. The defender remarked to his wife on one occasion in 2022 "I can't stand this. I don't want to wake up again".

9. Despite the intensive engagement with physical therapy, the stroke left the defender with significant physical and cognitive deficits. He suffered from a cramping or clawing of his right hand which prevented him from writing. He became reliant on family members for aspects of personal care. His cognition declined which prevented him from working and impacted on his ability to hold a conversation. The defender's father had suffered a stroke at a similar age. The defender became preoccupied with his declining health. He disliked having to rely on family members for care and assistance. He felt guilty, anxious and depressed. He appeared to his family to be a shadow of the person he had been.

10. In spring 2023, the defender repeatedly vocalised his fears of being dependent on his family. A neighbour saw him standing in the garden staring into space. He became withdrawn. He mentioned suicide to more than one family member.

11. On 22 June 2023 the defender retired to his bedroom for the night. At approximately 9.30am on 23 June 2023, the defender's wife noticed that he was not in their home. She had not seen him since approximately 10pm the night before. It was out of character for the defender to leave the house without telling his wife where he was going.

12. The defender had a close relationship with his wife and children. They have not heard from him since 23 June 2023.

13. The defender left his home on the morning of 23 June 2023, wearing shorts, a shirt and shoes. He took his glasses and house keys with him but did not take his phone or his wallet.

14. At approximately 6.30am on 23 June 2023 a member of the public observed an elderly man matching the defender's description walking on the beach at North Berwick with purpose. The beach is approximately 500 yards from the family home. The walk was familiar to the defender who could navigate it unaccompanied.

15. The defender's house keys and glasses were found on a rock on North Berwick beach. The defender and his family regularly walked on the beach and referred to this particular rock known locally as "Gary's Point" as "the point of no return". It was a habit of the defender and his wife to walk to this rock, touch it and then turn to walk home. The location was of emotional significance to them.

16. The pursuers contacted the police on 23 June 2023 to report the defender as a missing person. Police officers searched the defender's home, accessed his phone, checked CCTV footage of North Berwick and made enquiries in the local community to no avail.

17. The pursuers posted notices on social media in order to obtain information from potential witnesses. The posts were widely shared and were picked up by media outlets. No information was forthcoming. The defender was well known in the local community. No further sightings of him were reported.

18. On 27 June 2023, Police Scotland held a Gold Circle meeting with an oceanographer to explore the proposition that the defender had walked into the sea on North Berwick beach and had taken his own life by drowning. The oceanographer modelled the water and tides at the pertinent time and concluded that had the defender done this, there was a 92% chance that his body would have been washed out to sea.

19. Police Scotland ceased to make further missing persons enquiries regarding the defender's disappearance after 27 June 2023.

20. The pursuers and the defender's wife believe that the defender took his own life on the morning of 23 June 2023 at approximately 7am.

21. The defender retained his US citizenship. He kept in regular contact with his sister and cousins by email. They have received no communication from him since 23 June 2023. The defender held a US passport. It was found in the family home by police officers on

24 June 2023. The defender has not travelled to the USA. His bank account and assets held in trust in the USA have been frozen since 23 June 2023.

22. The defender's mobile phone was found by Police Scotland at his home on 24 June 2023. The call and message history were checked. His mobile number has not been used since 23 June 2023.

23. The defender held two accounts with the Bank of Scotland a Bank of Scotland credit card. All three were held jointly with his wife. The cards for those accounts are in the family home. The defender has not accessed any of these accounts since 23 June 2023. Police Scotland have undertaken a search and have confirmed have that the defender did not hold any other bank accounts or credit cards.

Finds in fact and law

1) On the balance of probabilities, the defender walked into the sea at North Berwick beach at 7am on 23 June 2023 and took his own life by drowning. Decree of declarator that the defender died on said date and at said time should be granted as craved.

INTERLOCUTOR

Edinburgh, 9 October 2024

The sheriff, having resumed consideration of the cause and having considered the evidence and submissions, grants decree of declarator that the defender AM died at 7am on 23 June 2023.

NOTE**The legal framework**

[1] Section 2 of the Presumption of Death (Scotland)Act 1977 (“the 1977 Act”) provides that the court, having heard proof and being satisfied on a balance of probabilities that the missing person:

- (a) has died, shall grant decree accordingly and shall include in the decree a finding as to the date and time of death;
provided that when it is uncertain when, within any period of times, the missing person died, the court shall find that he died at the end of the period;
- (b) has not been known to be alive for a period of at least seven years, shall find that the missing person died or the end of the day occurring seven years after the date on which he was last known to be alive and shall grant decree accordingly.

[2] In terms of OCR 37.4(1):

“in an action for declaratory where no minute has been lodged, the pursuer shall, after such advertisement as may be craved under rule 37.3, apply to the sheriff by motion for an order for proof. (2) A proof ordered under paragraph (1) shall be by affidavit evidence unless the sheriff otherwise directs”

MacPhail Sheriff Court Practice paragraph 20.12:

“If, having heard proof, the sheriff is satisfied on a balance of probabilities that the missing person has died, he grants decree of declaratory accordingly and includes in the decree a finding as to the date and time of death. If however, it is uncertain when within any period of time, the missing person died, the sheriff must find that he died at the end of the period. If the sheriff is satisfied that the missing person had not been known to be alive for a period of at least seven years, the sheriff must find that he died at the end of day occurring seven years after the date on which he was last known to be alive and grant decree accordingly.”

Stair Memorial Encyclopaedia paragraph 651;

“When a person who is missing is thought to have died or had not been known to be alive for a period of at least seven years, any person having an interest may seek a declarator of death of the missing person. There is no longer any need to wait seven years in all cases. If the missing person is thought to have died, an action can be raised immediately”

[3] There are few reported cases and none that I have been able to identify which post-date the 1977 Act. Each case turns on its own facts and circumstances. In terms of the factors which the court may take into account, in *Lapsley v Grierson* (1845) 8D 34 which applied the common law pre-dating the 1977 Act, the then Lord Justice Clerk held ;

“It appears to me, that nothing could me more absurd than that there should be a presumption of life or death, without reference to the age, circumstances, situation of life, and common habits of the party. Can there be the same presumption as to a party who is 100 and one who is 35? As the party who was in good health when last heard of and one who was proved to have then had a disorder upon him which was likely, speeding, to terminate his life? It cannot be. It is altogether a question of fact.”

This decision was reflected in commentary of the Law Commission report which preceded the 1977 Act. At paragraph 7:

“Account, however, is always taken of the age, health and habits of life of the person concerned, of the circumstances of his employment or vocation, and of the country in which he was last known to have lived”

The facts and circumstances

[4] The pursuers are the defender’s only children. This action was warranted on 26 March 2024. In terms of the warrant, intimation was effected in the defender’s wife and only sibling. Intimation was also effected on the University of Edinburgh and the on the Lord Advocate. The action is undefended. An undefended proof hearing was assigned for 4 July 2024. On that date, having considered that affidavits deponed by the pursuers and defender’s wife, the Police Scotland missing person’s report and the defender’s medical records contained in the first inventory of productions, there were matters of fact which

required further investigation and clarification in order for the court to be satisfied that on a balance of probabilities that the defender had died. An adjourned diet was fixed for 19 September 2024 to enable further consideration of the second inventory of productions when then enabled findings in fact 14, 21, 22 and 23 to be made.

[5] The defender was last known to be alive on 22 June 2023 when aged 72 years. He was married and had close and loving relationships with his wife and adult children. He was a man who kept to routines and who did not ordinarily leave the house without telling his wife where he was going. He would not usually leave the house without his wallet and mobile phone. He did just that early on the morning of 23 June 2023. At around 6.30am he was seen by a member of the public walking purposively on North Berwick beach. His glasses and house keys were deliberately left at a place known to his family and referred to by then as “the point of no return”.

[6] The defender was well known in the local community. Despite extensive appeals and social media posts, he has not been seen since 6.30am on 23 June 2023. He was not been in contact with his family, friends, colleagues or students since then. His passport, mobile phone and bank accounts remain untouched.

[7] The defender suffered poor physical and mental health. He repeatedly vocalised his fear of further strokes, of his life following the same trajectory as that of his late father and of becoming dependant on others for care. He expressed suicidal ideation to more than one family member. He was withdrawn and preoccupied prior to 23 June 2023.

[8] On 27 June, after a Gold Circle meeting with a specialist oceanographer, Police Scotland concluded that the most probable explanation for the defender’s disappearance was suicide by drowning. It was determined that had the defender walked into the sea at

North Berwick beach on the morning of 23 June 2023, then there was a 92% chance that his body would have been washed out to sea.

[9] In all the facts and circumstances of this case, it can safely be concluded on a balance of probabilities that the defender took his own life by drowning at around 7.00am on 23 June 2023 and accordingly that the declarator sought should be granted as craved.