OUTER HOUSE, COURT OF SESSION

[2018] CSOH 126

PD12/18

OPINION OF LORD TYRE

In the cause

ANJI MANNAS (AP)

Pursuer

against

CHIEF CONSTABLE OF THE POLICE SERVICE OF SCOTLAND

Defender

and

JAMES McSWEEN

Third Party

Pursuer: Di Rollo QC, L Thomson; Digby Brown LLP
Defender: Maguire QC, Cowan; Clyde & Co (Scotland) LLP
Third Party: Balfour; BLM

28 December 2018

Introduction

[1] On 20 January 2001, the pursuer sustained injury in a road traffic accident. Early in 2004 she raised the present action for damages against the defender's predecessor. On 16 February 2004 the action was sisted to enable the pursuer to apply for legal aid. Legal aid was granted on 11 May 2004. However the action remained sisted until the sist was recalled in January 2017. The defender has now made an application under Rule of Court 21A to

have the action dismissed due to inordinate and inexcusable delay by the pursuer and/or her former agents in progressing her claim, resulting in unfairness.

Rule of Court 21A

[2] Rule of Court 21A(5) provides as follows:

> "In determining an application made under this rule, the court may dismiss the claim if it appears to the court that –
>
> (a) There has been an inordinate and inexcusable delay on the part of any party or any party's agent in progressing the claim; and
>
> (b) Such delay results in unfairness specific to the factual circumstances, including the procedural circumstances, of that claim."

[3] Guidance on the proper application of Rule of Court 21A(5) is provided in the opinion of the court, delivered by the Lord Justice Clerk (Carloway) in *Abram* v *British International Helicopters Ltd* [2014] CSIH 53, especially at paragraphs 24-28. That guidance may be summarised as follows. The rule requires a court at first instance to adopt a two stage approach. Firstly, the court must decide whether the criteria set out in paragraphs (a) and (b) are both satisfied: ie that there has been an inordinate and inexcusable delay in progressing the claim *and* that that delay has resulted in unfairness specific to the circumstances of the claim. Secondly, if the court determines that those criteria have been met, it must decide whether the power to dismiss the claim should be invoked. In the exercise of that discretion, the court must have regard to whether it is in the interests of justice that the action should be dismissed or be allowed to proceed. But the power is a draconian one which should not be invoked other than as a last resort. It should only be exercised if the court is satisfied that there is at least a substantial risk that justice cannot be done, or, to put it another way, that a fair trial cannot occur, if the proceedings are allowed

to continue. In an action between private parties, if a fair trial remains possible in a realistic sense, justice requires a determination of the issue at stake even if some unfairness which the court may find it difficult to remedy has entered the process.

The parties' pleadings

[4] The pursuer avers that on 20 January 2001 she was a rear seat passenger in a car being driven by the third party along a street in Glasgow. The third party stopped at a junction controlled by traffic lights and indicated his intention to turn right. As he was executing the right turn, his car was struck by a police van driven by a PC Cartwright which had approached at speed from the rear in the opposite carriageway. The pursuer suffered injury as a consequence.

[5] In response, the defender admits the occurrence of the accident but asserts that it occurred without any fault on the part of PC Cartwright. He avers that driving in the opposite carriageway was necessary in the circumstances to avoid delay in responding to an emergency call. His klaxon, blue lights and flashing headlights were activated. The accident had been caused by the fault of the third party who had failed to indicate his intention to turn right. The third party, who was only convened as such in 2018, denies liability. He avers that he was indicating his intention to turn right, and that the klaxon on the police van was not operating when PC Cartwright moved out to overtake the line of traffic in which he was situated.

[6] Although the physical injuries sustained by the pursuer were modest, she avers that as a consequence of the accident she has suffered severe and continuing psychological injuries, including depression and panic disorder, agoraphobia, obsessive compulsive disorder, major depressive disorder, and fear of contamination by contact with other people.

She has claims for past and future solatium, past and future loss of earnings, loss of pension benefits, past and future services, and inability to provide services to her disabled daughter.

[7] The pursuer further avers, and the defender admits, that the accident was the subject of a civil action raised in Glasgow Sheriff Court by another passenger in the third party's car. A proof in that case was heard in 2006, following which the sheriff issued a judgment finding the defender 20% and the third party 80% to blame for the accident.

Contemporaneous evidence

[8] On the morning of the hearing of the defender's motion, it came to light that certain documents, not previously identified, were still in existence. These comprised:

- Witness statements taken by police officers shortly after the incident from the pursuer, the third party, two other passengers in the third party's car, the occupants of another car at the locus, a police officer who was in the van driven by PC Cartwright, and two police officers who attended at the scene following the accident. One of the latter officers, a police sergeant, had expressed a clear opinion as to blame. There was no statement from PC Cartwright because of the context in which they had been taken, namely a report to the procurator fiscal.
- A printout of the police incident log for the accident.

These documents were produced and referred to in the course of the hearing. I was informed by senior counsel for the defender that attempts to contact PC Cartwright and the officer who was in the van with him had not so far been successful.

Argument for the defender

[9] On behalf of the defender it was submitted that the conditions for application of Rule of Court 21A were all fulfilled. It was a matter of admission that there had been inordinate and inexcusable delay on the part of the pursuer's former agents in progressing the action. To proceed now would be to cause unfairness to the defender both in relation to his defence on liability and as regards investigation of quantum, and the court should exercise its discretion to dismiss the claim.

[10] As regards liability, the sheriff's determination in the related action would not be admissible as evidence: cf Walker & Walker, *The Law of Evidence in Scotland* (4th ed, 2018), paragraph 9.4.2 and authorities cited there. No shorthand notes of the evidence in that case were available. Recall of events by witnesses would be of poor quality after such a long time: see eg the observations of the Lord Ordinary (Pentland) in *Prescott* v *University of St Andrews* [2016] CSOH 3 at paragraph 42. In particular, there was a substantial risk that the extent of the defender's liability, if any, as between him and the third party could not now be adjudicated upon fairly. Justice as between all parties was impossible.

[11] With regard to causation, the pursuer put in issue her daily life over a period of more than 21 years, during which time she had suffered a number of psychological stressors. These included an alleged assault by police in 1997 (an action in respect of which was raised in 2000, sisted for 17 years and recently dismissed due to delay); the birth of her daughter with severe congenital deformities (with regard to which the pursuer had raised an action for professional negligence that was abandoned in 2005); an incident in 2006 when the police arrested an intruder hiding under her bed; two bereavements and an injury following a fall, all in 2008; two miscarriages in 2014; the birth of a child by caesarean section in 2015; and a threatened eviction from her home in 2016. She had been described by a treating

physician as "having adopted the role of perpetual victim". If the present action had been pursued expeditiously, the court would not have had to adjudicate on the difficult question of the extent, if any, to which the pursuer's psychological injuries were attributable to the 2000 road accident as opposed to any or all of the above stressors. It was unfair to expose the defender to the claim now being made, with the risk of being found liable without any possibility of seeking a contribution from the solicitors who were responsible for the delay.

[12] Finally, as regards damages, the defender had no contemporaneous independent psychological or psychiatric evidence of the pursuer's symptoms. Nor did he have any material to enable him to assess her claims for wage and pension loss. For all of these reasons the second criterion in Rule of Court 21A, namely unfairness to the defender, was met.

[13] The court should exercise its discretion to dismiss the claim, having regard to the following factors:

- In all of the circumstances described above, a fair trial was no longer a possibility.
- Exhaustive investigations would now be required as regards liability, causation and quantification. A proof would be lengthy and much judicial time would be taken up.
- The defender is a publicly funded authority and should not be required to expend disproportionate and unrecoverable resources upon this claim.

Argument for the third party

[14] Counsel for the third party concurred in the defender's motion and adopted the submissions made on his behalf. Rule 21A was not restricted in its terms to the defender:

unfairness to a third party would also fall within Rule 21A(5)(b). That unfairness was exacerbated by the fact that the third party had not been a party to the action until convened earlier this year.

Argument for the pursuer

[15] On behalf of the pursuer it was submitted that the motion should be refused. The case concerned a straightforward road traffic accident; the only issue on the merits was whether the third party ought to have been aware of the approaching police van. It could not be said that the delay had resulted in the defender being unable to defend the action. The witnesses had been identified and had provided *de recenti* statements; some had given evidence in the sheriff court case. The defender had investigated the accident to the extent that the investigating officer had been able to form a view on liability. Although the sheriff's findings were not strictly admissible as evidence in the present proceedings, the court could take account of the fact that there had already been a determination that the defender was partly liable. The defender had not identified any evidence that had been lost over time, nor any specific prejudice. There would be no unfairness specific to the case in proceeding with the action. Any delay in bringing the third party into the action should be laid at the door of the defender, not the pursuer.

[16] As regards causation and quantum, the expert psychiatrists instructed by both sides had been able to express opinions. If the defender wished to argue that the pursuer's condition had been caused or exacerbated by delay in pursuing the claim, this could be raised as a *res noviter* restricting the defender's liability. Again there was nothing before the court that amounted to unfairness specific to the case.

[17] In all the circumstances the court should, in exercise of its discretion, allow the action to proceed. If there were uncertain or unsatisfactory aspects to the evidence, those were points that could be made against the pursuer in submissions after proof.

Decision

[18] A delay of the length that has occurred in this case will inevitably create difficulties for all parties to a litigation. Witnesses may be difficult to trace and, as is well recognised, memories may have faded with the passage of time and become unreliable. To the extent that these difficulties affect the presentation of the defence, I accept that they introduce an element of unfairness into the proceedings. Despite this, I am not persuaded that the circumstances of this case are such that there is a substantial risk that justice cannot be done.

[19] As regards the circumstances of the accident, it has emerged that contemporaneous witness accounts are available. Although there may still be difficulties in tracing witnesses, these statements may help, as regards witnesses who are traced and cited to give evidence at proof, to refresh their memories of the incident. It has to be borne in mind that the onus of proof will rest upon the pursuer. If the court were to find that the evidence was too unreliable to permit critical findings in fact to be made, it is the pursuer who would be prejudiced by failing to prove her claim. The factual issues likely to be canvassed at the proof are in narrow compass, and assessment of the credibility and reliability of witnesses does not appear to me to be an unduly difficult task.

[20] The issue of whether I am entitled to attach any weight to the determination of the sheriff in the 2006 action by another passenger has become less acute with the discovery of the police statements. For what it is worth, however, my view is that I am not. The general rule is that a decree in an earlier cause is not admissible in evidence in another cause. In a

passage which has received judicial approval (*William Bain & Co (Joinery) Ltd* v *Gilbert Ash (Scotland) Ltd*, Sheriff Principal Dick at Glasgow, 28 January 1982, unreported) Walker & Walker state:

> "At common law the decree or verdict in an earlier cause, whether civil or criminal – as distinct from a judicial admission in that cause, is not admissible in evidence in another cause except for some limited purposes."

None of the exceptions applies in the present case. I reject the suggestion that the court could, for the purposes of deciding whether to grant a motion under Rule 21A, have regard to the fact that the defender has been found liable in a previous action. That would, in my view, be a contravention of the general rule in the same way as admitting the judgment as evidence of any fact in the present proceedings.

[21] The situation regarding causation is admittedly more complex. However, it does not appear to be the case that expression of expert opinion on causation has become impossible due to the passage of time. The pursuer and the defender both have written opinions of consultant psychiatrists expressing views, albeit with some difficulty, on whether and if so to what extent there is a causal link between the accident and the pursuer's symptoms. Although these issues are far from straightforward, it does not appear to me that the passage of time has rendered a fair trial impossible. In so far as delay in the resolution of the case may of itself have exacerbated the pursuer's symptoms, I accept without expressing a concluded view that there may be an argument available to the defender that this should be regarded as a *res noviter*, limiting his liability even though the solicitors who are blamed for the delay are not a party to the action. Overall, it seems to me that uncertainty in the expert opinions as to causation is likely to operate against the pursuer's interests in the same way as will concern about reliability of evidence on the merits.

[22] Lastly, in relation to damages, it again seems to me that any uncertainties or evidential gaps are more likely to operate against the pursuer than in her favour, and that these do not give rise to a real risk from the perspective of the defender and third party that justice cannot be done.

Disposal

[23] For these reasons I refuse to grant the defender's motion to dismiss the action. There is clearly, however, a need for this action to be actively managed to avoid further delay. I shall put the case out by order to hear submissions on further procedure.