

SCOTLAND / JUDGMENT

G. v. S. [2006] ScotCS CSOH_88 (06 June 2006)

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[2006] CSOH 88,

[2006] ScotCS CSOH_88 [New search] [Help] OUTER HOUSE, COURT OF SESSION

[2006] CSOH 88 OPINION OF LORD TURNBULL in the cause G Pursuer; against S Defender: ____
Pursuer: Stevenson, SolicitorAdvocate; Thompsons Defender: Dunlop, Advocate; Balfour
& Manson 6 June 2006

Introduction

[1] This action, raised by summons, has two conclusions. The first is for payment by the defender to the pursuer of the sum of £20,000. The second is for the expenses of the action. The summons commences with the description: "(Personal Injures Action) Action of Harassment". The pursuer is a lady aged 36. The defender is a man, whose age is not given, but who would appear to be a mature individual. They are unrelated. The summons bears to be raised in terms of Chapter 43 of the Rules of Court. [2] The statement of claim sets out in paragraph 4 a set of circumstances in which the defender's conduct is said to have scared and distressed the pursuer. It includes averments to the effect that the defender contacted the pursuer on various occasions, saying things such as that he wished to marry her and that unless she agreed to see him he would destroy her career. It concludes with the sentence that: "The defender's course of conduct towards the pursuer from in or about the summer of 2003 was such as to amount to harassment." Paragraph 5 of the statement of claim explains that the pursuer seeks an award of damages in terms of section 8(5)(a) of the Protection from Harassment Act 1997. Paragraph 6 of the statement of claim is in the following terms: "The pursuer's loss, injury and damage was caused by the defender's breach of the duties incumbent on him in terms of section 8(1) of the Protection from Harassment Act 1997." The Motion Before The Court [3] The summons was raised on March 2006 . On 3 May defences in skeletal form were lodged. The matter came before me on the Motion Roll on 18 May. The motion enrolled was in the following terms: "On behalf of the defender and

in respect that this is not properly a personal injuries action falling under Chapter 43 procedure and to allow it to proceed as an ordinary action." Mr Dunlop, Advocate appeared for the defender and moved the motion. Mr Stevenson, Solicitor Advocate appeared for the pursuer and opposed the motion. Defender's

Submissions

[4] Mr Dunlop introduced his argument by explaining that the current action is brought in terms of the provisions of the Protection from Harassment Act 1997 (hereafter referred to as "the act"). He took me to section 8 of the act, the relevant parts of which are in the following terms: "8. (1) Every individual has a right to be free from harassment and accordingly, a person must not pursue a course of conduct which amounts to harassment of another and (a) is intended to amount to harassment of that person; or (b) occurs in circumstances where it would appear to a reasonable person that it would amount to harassment of that person. (2) An actual or apprehended breach of subsection

- (1) may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question; and any such claim shall be known as an action of harassment. (3) For the purposes of this section "conduct" includes speech; "harassment" of a person includes causing the person alarm or distress; and a course of conduct must involve conduct on at least two occasions. (5) In an action of harassment the court may, without prejudice to any other remedies which it may grant (a) award damages (b) grant i. interdict or interim interdict ii. if it is satisfied that it is appropriate for it to do so in order to protect the person from further harassment, an order, to be known as a "nonharassment order", requiring the defender to refrain from such conduct in relation to the pursuer as may be specified in the order for such period (which includes an indeterminate period) as may be so specified, but a person may not be subjected to the same prohibitions in an interdict or interim interdict and a nonharassment order at the same time (6) The damages which may be awarded in an action of harassment include damages for any anxiety caused by the harassment and any financial loss resulting from it. (8) In section 10(1) of the Damages (Scotland) Act 1976 (interpretation) in the definition of "personal injuries" after "to reputation" there is inserted "or injury resulting from harassment actionable under section 8 of the Protection from Harassment Act 1977". [5] Mr Dunlop's submission was that notwithstanding the terms of section 8(8) of the act an action of harassment did not fall within the ambit of the Chapter 43 procedure. This chapter of the Rules of Court he submitted only applied to a certain class of action, as could be seen from the terms of Rule of Court 43.1(2). There it can be seen that Chapter 43 only applies to a "personal injuries action", which is defined as an action of damages for, or arising from, personal injuries or death of a person from personal injuries. "Personal injuries" are defined as including any disease or impairment, whether mental or physical. [6] Mr Dunlop's submission was that the ability to claim in damages for anxiety caused by harassment, as provided for by section 8(6) of the act, introduced a type of claim which fell short of psychiatric injury in the form of a recognised psychiatric illness and was not otherwise compensable. Accordingly this was a

claim under a statutory provision which did not meet the ordinary test of what would sound in damages for personal injuries. It therefore was not within the ambit of Rule of Court 43.1(2). He pointed out that actions of harassment were dealt with separately in the Rules of Court by chapter 43A, although the only procedure set down in that chapter relates to variation or revocation of a nonharassment order. [7] Mr Dunlop referred to the opinion of Lord Reed in *Rorrison v West Lothian Council* 2000 SCLR, X245 and to the case of *Mack v Glasgow City Council*

[2006] CSIH 18 30 March 2006, in support of his proposition that mere distress or other emotional reaction does not sound in damages and is thus not regarded as constituting personal injuries. [8] Despite this restriction Mr Dunlop went on to explain that for various different purposes the term "personal injuries" was defined differently by certain statutory provisions. He gave the following examples: 1. Section 10(1) of the Damages (Scotland) Act 1976, as amended by section 8(8) of the act, which now reads as follows: "In this Act unless the context otherwise requires "personal injuries" includes any disease or any impairment of a person's physical or mental condition and injury resulting from defamation or any other verbal injury or injury to reputation, or injury resulting from harassment actionable under section 8 of the Protection from Harassment Act 1997." 2. Section 13 of the Administration of Justice Act 1982, which reads as follows: "(1) In this part of this Act, unless the context otherwise requires "personal injuries" includes any disease or any impairment of a person's physical or mental condition and injury resulting from defamation or any other verbal injury or other injury to reputation." 3. Section 22 of the Prescription and Limitation (Scotland) Act 1973, which reads as follows: "(1) In this part of this Act "the court" means the Court of Session or the sheriff court; and "personal injuries" includes any disease and any impairment of a person's physical or mental condition." Accordingly, he submitted that in the absence of any extended definition the term "personal injuries" where it appeared in Rule of Court 43.1(2) could not cover a claim of damages for anxiety which was only competent by virtue of section 8(6) of the act. [9] Mr Dunlop further pointed out that section 10 of the act amended the Prescription and Limitation (Scotland) Act 1973 by inserting what becomes section 18B of that act. As a result, actions of harassment which include a claim of damages are subject to a prescriptive period of 3 years. An action of damages in respect of personal injuries, as defined by section 22 of that act, is subject to the prescriptive period set out in section 17 of that act. [10] Mr Dunlop then took me to the Court of Session Act 1988 section 11, which enumerates the type of actions which can be tried by jury. Although both actions of damages for personal injuries and actions for libel or defamation are listed, an action of damages brought under the Protection from Harassment Act 1997 is not. [11] Drawing these submissions together, Mr Dunlop argued that since the definition of "personal injuries" in Rule of Court 43.1(2) was the same as that to be found in Section 22 of the Prescription and Limitation (Scotland) Act 1973, it was clear that it could not extend to a claim of damages for anxiety which was only competent by virtue of section 8(6) of the act. If it were otherwise there would have been no need to insert section 18B into the 1973

act. This definition could be contrasted with the extended definition of personal injuries as provided for by the Damages (Scotland) Act 1976. That this act did not provide a general extension of the meaning of personal injuries was clear from the separate enumeration of actions of damages for personal injuries and actions for libel or defamation within section 11 of the Court of Session Act, despite the inclusion of the later within the definition of personal injuries to be found in the 1976 act. Despite the inclusion of damages arising out of harassment within the 1976 act definition it was clear, he said, that such an action could not be tried by a jury. [12] Finally Mr Dunlop turned to the terms of the Practice Note No. 2 of 2003 which contains the following guidance: " Rule 43.1 Application and interpretation Personal injuries actions are defined as actions of damages for or arising from personal injuries or the death of a person from personal injuries and personal injuries are defined as including any disease or impairment, physical or mental. It is not intended that actions of defamation or any actions which are not, in ordinary parlance, concerned with personal injuries should be covered by these rules. Any such actions are likely to be transferred to the ordinary roll if they are raised under Chapter 43." In this context he also referred me to the decision of Lord Cameron of Lochbroom in *Tudhope v Finlay Park* 2004 SLT 783. In that case his lordship was considering a similar motion to that before me. The action was raised against the pursuer's solicitor for alleged professional negligence on his failure to advise on the effect of section 17 of the Prescription and Limitation (Scotland) Act 1973, resulting in the pursuer's claim for vibration white finger becoming time barred. His lordship held that the pursuer's action was not one to which Chapter 43 procedure was applicable. [13] At paragraph 10 on page 786 Lord Cameron of Lochbroom said this: "I am fortified in my conclusion by a further consideration. The definition of "personal injuries" in section 10(1) of the 1976 act and in section 13(1) of the 1982 act includes "injury resulting from defamation or any other verbal injury or other injury to reputation". But such injuries have no place in the definition of "personal injuries" in rule 43.1 (2). Accordingly, it is plain that an action for defamation or other injury to reputation, albeit it is an action of damages for personal injuries in a broad sense (though distinct from an action of damages for personal injuries in s.11 of the Court of Session Act 1988), does not fall within the ambit of Chapter 43." At paragraph 11 his lordship said: "In particular I do not agree that the present action does "arise from personal injuries" within the meaning of the new rules or that the new rules demonstrate any intention to embrace every action which could possibly qualify as a personal injuries action. Far from supporting such a broad interpretation of the new rules, the terms of the Practice Note No. 2 of 2003 point to an opposite conclusion. In ordinary parlance the present action cannot be said to be concerned with personal injuries." Mr Dunlop invited me to follow Lord Cameron of Lochbroom's interpretation of the meaning of personal injuries in Rule 43.1(2) and to follow his interpretation of the terms of the Practice Note. [14] Further, and in any event, Counsel submitted that this action should be withdrawn from Chapter 43 procedure because of the factual issues which arise. He suggested that in the context of this case detailed pleading and analysis of the sort found in ordinary procedure was appropriate. For all of these reasons Mr Dunlop

moved that I should withdraw the present case from the Chapter 43 procedure and allow it to proceed as an ordinary action. The Pursuer's Submissions [15] Mr Stevenson for the pursuer put his position more shortly. He submitted that the inclusion of injuries resulting from harassment within the definition of personal injuries as found within the Damages (Scotland) Act 1976 was indicative of the fact that an action of harassment should be regarded as a personal injuries action for the purposes of Chapter 43 of the Rules of Court. [16] He referred me to statement five of the summons in which the effect of the defender's conduct towards the pursuer is described. It is stated there that the pursuer developed symptoms of anxiety and stress, that she attended her GP and underwent psychological treatment. Mr Stevenson said that were the case to proceed as an ordinary action he would introduce further and fuller averments in this regard. He did not suggest however that he could aver that the pursuer suffered from psychiatric injury in the form of a recognised psychiatric illness. [17] Mr Stevenson submitted that the terms of the Practice Note No. 2 of 2003 could be prayed in aid of his opposition to the motion. His submission was that the Practice Note broadened out the types of cases which should be brought under Chapter 43 procedure to all actions which were in ordinary parlance concerned with personal injuries. He submitted that this reference should be seen as including anxiety and stress within the concept of personal injuries. He also submitted that *Tudhope v Finlay Park* could be distinguished. In his submission Lord Cameron of Lochbroom had given particular emphasis to the reference to "the defender" in Rule of Court 43.1. He drew my attention to paragraph 10 of his opinion where it was said: "... it becomes impossible to construe the reference to the defender in rule 43.1 as other than to the individual party who is alleged to have been responsible for causing the personal injuries, in the sense of injuries to the person as narrowly defined by rule 43.1(2), which are the subject of the action of damages." As the defenders in that case were the solicitors who were alleged to have acted negligently, rather than the person responsible for causing the original personal injuries, Mr Stevenson said that it could be seen why the action could not proceed under Chapter 43 procedure. Mr Stevenson submitted that there was nothing further about the factual nature of the present case which rendered it unsuitable for Chapter 43 procedure. Discussion [18] In my opinion it is clear that a claim for damages arising out of anxiety would not normally sound in damages. It is only the statutory provision found in section 8(6) of the act which permits this. No contrary suggestion was made on behalf of the pursuer. Accordingly, in my opinion such a claim would not normally be described as an action for personal injuries. The fact that a claim actionable in terms of section 8 of the act is included, along with a claim arising from defamation, within an extended definition of "personal injuries" within the Damages (Scotland) Act 1976 is in my opinion consistent with this analysis. It is only for the purposes of that act that a claim actionable in terms of section 8 of the act falls to be considered as an action concerning personal injuries. It is clear from the references to other statutory definitions that when the term "personal injuries" is used its definition may vary according to the context of the statute in question. Further, as noted above, in an action of harassment a pursuer may seek the grant of orders other than, or additional to,

damages. Mr Stevenson accepted that if such an action sought only a nonharassment order it would be difficult to think of it as a personal injuries action. [19] In considering the submissions presented to me I found the analysis undertaken by Lord Cameron of Lochbroom in the case of Tudhope v Finlay Park to be of assistance. I agree with him, for the reasons which he gave, that there is a distinction to be made between actions which in a broad sense may be described as actions of damages for personal injuries and those which fall within the narrow definition of "personal injuries" to be found in Rule of Court 43.1(2). Additionally, in my opinion, the terms of the Practice Note No. 2 of 2003 support the defender's contentions. In ordinary parlance it cannot be said that an action of harassment is one concerned with personal injuries. Decision [20] For the reasons given above I am satisfied that the defender's submissions should be preferred and I will grant his motion to withdraw this case from the Chapter 43 procedure and allow it to proceed as an ordinary action. In any event, I also agreed with the submission made by Mr Dunlop that the factual issues in this case were better suited to ordinary procedure. Parties were agreed that, in this event, I should order that an open record should be lodged within four weeks of the date of this decision. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: https://www.bailii.org/scot/cases/ScotCS/2006/CSOH_88.html

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