

SCOTLAND / JUDGMENT

RP v Duncan [2013] ScotCS CSOH_41 (08 March 2013)

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[2013] ScotCS CSOH_41 [New search] [Help] OUTER HOUSE, COURT OF SESSION

[2013] CSOH A576/05 OPINION OF LORD JONES in the cause AP ON BEHALF OF RP, (AP),
Pursuer; against (FIRST) DR JANICE A DUNCAN, DR J S BUMBRA, DR K J THOMPSON, and
DR A CROSBY, and (SECOND) DR PAULINE FLEMING, Defenders.

Pursuer: McLean QC; Anderson Strathern LLP First Defenders: McGregor; MDDUS 8 March 2013

Background

- [1] The pursuer in this action seeks damages on behalf of her son, RP, who was born on August 1997. The case came before me for a hearing on the procedure roll on 2 November 2012, on the first defenders' motion. Counsel for the first defenders sought dismissal of the action, insofar as laid against them, arguing that it is irrelevant.
- [2] According to her averments, on or about 18 December 1996, the pursuer was attended by a doctor practising at the Levenmouth Emergency Medical Service. She complained of various symptoms. She was prescribed medication and was advised to discuss her symptoms with her own GP. On 23 December 1996, the pursuer attended the surgery of the GP's practice with which she was registered, and which was run by the first defenders. She was seen by a locum GP. The surgery was operated by the first defenders and staffed by the first defenders' practice nurses and others. She was complaining of nausea and occasional vomiting of bile for more than a week and it was noted by the GP that her last period had ceased on 24 November 1996. The pursuer told the locum doctor that she was worried that she might be pregnant. The doctor requested pregnancy and liver function tests. The pursuer avers that the liver function test required the taking of a sample of blood and the pregnancy test involved the provision of a sample of urine. The doctor did not request that any other urine

tests should be carried out.

- [3] The pursuer attended at the surgery to provide the samples, on or about 6 January 1997. She avers that the sample of urine was sent by the first defenders' practice staff, in error, for bacteriological testing by way of a mid-stream urine (MSU) test, rather than for pregnancy testing. The pursuer re-attended at the first defenders' surgery on 14 January, to receive the results of her tests. She saw the second defender on that occasion. The second defender was also working as a locum in the first defenders' practice. At the time of the pursuer's visit, there was no pregnancy test result available. The result of the MSU test (which was normal) and of the liver function test were held by the practice and were available to the second defender. The pursuer avers that the second defender recorded the results of these tests in the pursuer's GP notes, and added "No pregnancy test result available". The second defender advised the pursuer that her results suggested that she was suffering from thyroid problems and that that explained her symptoms, rather than pregnancy. She told the pursuer that she was not pregnant. The pursuer was relieved to be told that she was not pregnant. The prospect of pregnancy had been causing her some concern because of her age and the size and stage of her family. She was 54 years old and already had four children living with her, the last of whom had been born in 1984. Unknown to the pursuer, however, she was pregnant.
- [4] By letter, dated 20 January 1997, the second defender referred the pursuer to the Victoria Hospital in Kirkcaldy for an endocrine opinion. The pursuer was referred on to the Royal Infirmary in Edinburgh, where radioactive iodine was administered to her. Radioactive iodine was again administered to her at the Royal Infirmary on 27 February 1997. The pursuer still continued to feel nauseous despite the treatment, and it was subsequently discovered that she was pregnant and, in due course, she gave birth to RP.
- [5] The pursuer avers that RP's thyroid gland was damaged by the radioactive iodine that was administered to her when she was pregnant, and that the damage is permanent. She avers that radioactive iodine should not be given in pregnancy, as it crosses the placenta and enters the foetal thyroid gland. She had been asked about her reproductive history by those treating her. If she had known that she was pregnant, she avers, she would have told them. If it had been known to those treating the pursuer at the Royal Infirmary that she was pregnant, radioactive iodine would not have been administered to her, and RP's thyroid would not have been damaged. The pursuer's case against the first defenders is, in essence, that the harm that RP has suffered was caused by failures in their administrative systems, caused by the first defenders' negligence. But for these failures, it is averred, RP's loss, injury and damage would not have occurred. The issue
- [6] Mr McGregor, who appeared for the first defenders, submitted that the facts and circumstances of the case as averred by the pursuer fail to reveal any causal connection between the alleged acts and omissions of these defenders and RP's loss, injury and damage. The first defenders' argument

- [7] The appropriate starting point for an analysis of the pursuer's case against each of the defenders, contended Mr McGregor, was to consider whether it meets the "but for test". On the pleadings, he argued, that test is satisfied as regards the second defender. She, it is averred, told the pursuer that she was not pregnant. If she had not done so, when the pursuer was asked about her reproductive history she would have said that she was pregnant, and radioactive iodine would not have been administered to her. By contrast, the pursuer's case against the second defenders focusses on their failure to send the urine sample for pregnancy testing, because of a "mix up" in labeling. The question is, submitted Mr McGregor, whether the pursuer can argue that "but for" the mix up, RP would not have suffered damage. He contended that the answer to that question is "a resounding no".
- [8] There was no pregnancy test result available to the second defender when she saw the pursuer on 14 January 1997. All that can be said of any failure by the first defenders to have such a result available at that time is that the second defender was in a state of ignorance about the pursuer's condition when she told the pursuer that she was not pregnant. RP's condition was caused by the second defender's positive act in telling the pursuer that she was not pregnant. Nothing links the two defenders in that act. The second defender assumed that the pursuer was not pregnant, but the second defenders' failure to have the test done by 14 January does not provide justification for that assumption.
- [9] Counsel for the first defenders acknowledged that the pursuer avers that, if her urine sample had been sent for the correct test on or about 6 January 1997, it would have shown that she was pregnant and that that information would have been reported back to the first defenders' practice by 14 January. The second defender, it is averred, would have known the result on that date, and the pursuer would have been told that she was pregnant. The second defender would have included that information in her referral letter of 20 January 1997, and the pursuer would have communicated the fact of her pregnancy to those treating her at the Royal Infirmary.
- [10] Mr McGregor took issue with the pursuer's averment that the first defenders' failure lay in not having what is described in the pleadings as "robust systems" in place, whereby the urine sample would have been sent for the correct test and, in the event that the sample was sent off for the wrong test, for noting that the correct test had not been carried out and advising the patient accordingly. He questioned how the existence of such "robust systems" would have affected what the second defender told the pursuer on 14 January. The pursuer's response
- [11] In moving that the whole action be sent for proof before answer, Mr McLean QC, for the pursuer, submitted that the case against the first defenders is that they are responsible for the second defender's being in a state of ignorance on 14 January 1997. The first defenders' argument proceeded, he contended, on the erroneous assumption that the second defender would have acted negligently, no matter what information had been before her on 14 January. It was not appropriate, counsel submitted, to assume that, if the first defenders had fulfilled what are averred to have been the duties incumbent on them, a second act of

negligence by the second defender would, nonetheless, have occurred. Discussion

- [12] On the pursuer's averments, which are denied, the second defender advised the pursuer that she was not pregnant. That was a positive assertion, made in circumstances in which the second defender had no information to support it. The pursuer offers to prove that, if the second defender had had the result of a test before her, showing that the pursuer was pregnant, she would not have advised the pursuer to the opposite effect. Counsel for the first defenders argued that, since the second defender denies that she told the pursuer that she was not pregnant, there cannot be any evidence which could be led at proof to the effect that, if the second defender had known the result of a pregnancy test, that would have prevented her from telling the pursuer that she was not pregnant. I reject that argument. I can envisage circumstances in which the court might hold, for example, that, in her state of ignorance, the second defender may have said something to the pursuer that caused her to believe that she was being advised that she was not pregnant. I can also envisage that the court might hold that, if the result of the pregnancy test had been available to the second defender, she would have told the pursuer, in terms, that she was pregnant. The position will only become clear when evidence is led and tested.
- [13] A number of authorities were cited to me on the subject of causation. In my view, however, determination of the question raised by the first defenders in this case does not depend on the resolution of any issue of law, but on a proper understanding of what the pursuer offers to prove. I should note that the first defenders' argument in support of their motion for dismissal proceeded solely on the causation point. Decision
- [14] It follows from the outcome of the foregoing discussion that I shall remit this action to a proof before answer. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/scot/cases/ScotCS/2013/2013CSOH41.html>

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