

SCOTLAND / JUDGMENT

Agnew v. Scott Lithgow Ltd & Ors

[2002] ScotCS 95 (5th April, 2002)

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[2002] ScotCS 95 [New search] [Help] Agnew v. Scott Lithgow Ltd & Ors [2002] ScotCS 95 (5th April, 2002) OUTER HOUSE, COURT OF SESSION OPINION OF T. G. COUTTS, Q. C. (Sitting as a Temporary Judge) in the cause JOHN AGNEW Pursuer; against SCOTT LITHGOW LIMITED AND OTHERS Defenders:

Pursuer: S. O'Brien, Q. C., Sheldon; Balfour & Manson (for Bonnar & Co, Solicitors, Airdrie)
Defenders: Stacey, Q. C.; Simpson & Marwick, Glasgow, for 1 st , 2 nd and 3 rd Defenders
5 April 2002 This matter came before me for the proof before answer allowed by The Honourable Lord Hamilton. His decision on the matter of relevancy is reported 2001 SC 516. His Lordship, after a review of the pleadings and certain authorities cited to him, was of the view that the pursuer's averments might disclose a relevant case that the pursuer's action was not time-barred in terms of Section 17(2)(b) of the Prescription and Limitation (Scotland) Act 1973. The pursuer contended that if he failed under that Section to establish that that action was timeous, he was entitled to invoke Section 19(A) of that Act and that it would be equitable to allow his action to proceed. The pursuer claims damages at common-law from three of his former employers on the basis that he has suffered loss, injury and damage because of his developing the sensorineural and vascular symptoms of Vibration White Finger (VWF) as a result of his working with vibrating tools in the course of his employment. It was not disputed that he did work with such tools, nor was it disputed that his exposure to vibration ceased in September 1995. The present action was signetted on 17 June 1999 and accordingly is time-barred unless the provisions of said Section 17(2) apply. Section 17(2)(b) and 19(a) read as follows: "Section 17(2) of the Act provides - 'Subject to ... section 19A of this Act, no action to which this section applied shall be brought unless it is commenced within a period of three years after - (a) the date on which the injuries were sustained or, where the act or omission to which the injuries were attributable was a continuing one, that date or the date on which the act or omission ceased, whichever is the later; or (b) the date (if later than any date mentioned in paragraph (a) above) on which the pursuer in the action

became, or on which, in the opinion of the court, it would have been reasonably practicable for him in all the circumstances to become, aware of all the following facts - (i) that the injuries in question were sufficiently serious to justify his bringing an action of damages on the assumption that the person against whom the action was brought did not dispute liability and was able to satisfy a decree; (ii) that the injuries were attributable in whole or in part to an act or omission; and (iii) that the defender was a person to whose act or omission the injuries were attributable in whole or in part or the employer or principal of such a person'. Section 19A(1) provides - 'Where a person would be entitled, but for any of the provisions of section 17 ... of this Act, to bring an action, the court may, if it seems to it equitable to do so, allow him to bring the action notwithstanding that provision'. The pursuer's averments about his experience and awareness of significant matters relating to his hands include the following (in art 2) - "The tools transmitted excessive vibration to the pursuer's upper limbs. Until 1995, the pursuer had accordingly been exposed to excessive vibration for his entire working life ... During the period for which he was using the tools, the amount of vibration created by the tools did not change. The pneumatic tools used by the pursuer often became frosty on the outside. They frequently caused his gloves to become frosty, wet and cold. From the early 1980's the pursuer became aware of persistent tingling, numbness and blanching in his fingers and at the base of his thumbs. In or around 1982 the pursuer was aware of his hands going white and then red when taking his gloves off after using chipping guns. At the time the pursuer did not attribute his symptoms to his work. Initially the attacks occurred mainly in the winter. He assumed that they were due to the weather ... The attacks persisted and have become permanent ... Since September 1995 the pursuer has undertaken employment which does not expose him to vibrating tools of any sort". In art 5 he avers - "Since the early 1980's the pursuer has suffered from intermittent tingling, coldness, numbness and blanching in all of his fingers and at the base of his thumbs. These blanching attacks increased in frequency until eventually they were an everyday occurrence. He also had occasional attacks when not at work. The attacks would affect the whole of the pursuer's finger, down to the metacarpophalangeal joint. They could last for over an hour and at their conclusion, the pursuer would be aware of re-warming tingling. Since ceasing to use pneumatic tools in 1995, his condition has improved slightly. However, he continued to have blanching attacks about twice a week. They occur all year around, and can occur even in warm environments, but are worse when the weather is cold or damp. While in his former employment the pursuer had difficulty in climbing ladders because of numbness in his hands. He often required to stop work to warm his hands at a burner. He required to give up his former employment as a foreman welder because of his condition". In response to the defenders' plea that the action is time-barred, the pursuer in art 6 avers that he was not aware until 15 March 1999 of the relevant facts and continues - "Explained and averred that during the 1980's the pursuer's symptoms were intermittent and not serious. He thought that they were attributable to the weather. He did not attend his General Practitioner and was not aware of the diagnosis thereof. He was not aware that his symptoms had anything to do with his work. In or about 1996 the pursuer heard of other shipyard workers who had made claims for benefit payments from the DSS, arising from similar symptoms. He heard that a Welfare Rights Officer, Pat Clarke, was advising on these claims, and he consulted Mr Clarke. The pursuer submitted a claim to the Benefits Agency in or about 11 August 1997. He was medically

examined in relation thereto on or about 3 February 1998. He was not shown a copy of any medical report prepared in consequence of that examination. On or about 20 February 1998 the pursuer was informed that he had been awarded benefit in respect of a prescribed disease, namely VWF. In the said circumstances, it was not reasonably practicable for him to become aware of the relevant facts prior to 20 February 1998 at the earliest. Had the pursuer become aware of all of the relevant facts prior to 20 February 1998 he would have taken steps to raise an action against the defenders. People in Greenock were not generally aware that they could claim from the Benefits Agency for incapacity arising from VWF before in or about 1996. Initially, the majority of those claims which were made were refused, to the extent that the disability was assessed at 10%, which was below a level (14%) where money was payable. Pat Clarke encouraged claimants to appeal to the Medical Appeal Tribunal, and some then succeeded. From in or about early 1997, successful claimants encouraged their friends to submit similar claims. The pursuer was not a member of a Trade Union. He did not receive education or information from the defenders. He knew only what he heard from other claimants. Further, few General Practitioners in the area were aware of VWF, or able to diagnose it competently, before the mid 1990s. Once the pursuer had succeeded with his said benefit claim, he sought legal advice. His Solicitors, Messrs. Bonnar and Company instructed a medical report from a specialist, John K. Drury, Consultant Vascular Surgeon, at Ross Hall Hospital, Glasgow. The pursuer was examined by Mr Drury on 15 March 1999 and a report was prepared on the said date. The said medical report dated 15 March 1999 was the first written confirmation of the diagnosis of VWF available to the pursuer. A claim was thereafter intimated to the defenders and these proceedings were raised. In the said circumstances the pursuer's right of action has not time-barred". Thereafter following an implicit reference to sec 19A of the Act, the pursuer continues - "The condition is insidious. It develops gradually. Like most shipyard workers and union officials, the pursuer was aware through the early 1990s that symptoms such as his own could constitute an industrial disease. Like other shipyard workers in Greenock, he was unaware of the term "Vibration White Finger". Like other workers, the pursuer was unaware that his own symptoms could be indicative of a condition which would have long-lasting or permanent consequences, even after he stopped work. A few workers became aware that such symptoms could give rise to a claim for DSS benefit in or about 1995. The pursuer did not become aware that a claim for benefit could be made in respect of his symptoms, or similar symptoms, until in or about 1996 at the earliest. The pursuer would not have an alternative remedy. Because of the nature of the injuries sustained by the pursuer, the defenders would not be prejudiced in their investigation of the pursuer's claim". The pursuer, after the raising of his action, unfortunately sustained a subarachnoid haemorrhage in December 1999. As a result of that, in a report by Doctor Susan Copstick, Consultant Clinical Neuro-Psychologist, at the Renfrew and Inverclyde Ravenscraig Hospital, Greenock it was said that: "He had been referred for assessment of his continuing psychological disabilities, such as memory and concentration problems and fatigue". She went on to opine: "It is consistent with this man's medical history that he should have difficulties with sustained attention or concentration, and that he should have problems with memory. He may have difficulty in recalling information and may lose track of things relatively easily". He became manifestly tired when giving his evidence and there were several examples of confusion. His counsel conceded

that he might be unreliable but submitted that he was credible. The Court had an anxious task in assessing the pursuer's credibility and reliability upon the matters before the raising of the action in the light of his subsequent incapacity. There is, however, sufficient in the evidence pertaining to the period before his haemorrhage to make his case based on his alleged lack of constructive knowledge, lack conviction. In particular, the pursuer, while accepting that he had signed a résumé of the history that was given to the adjudicating medical authority when he made a claim for benefit, contested the passage in it which recorded that he had given up work as a result of the state of his hands making dealing with tools and climbing ladders hazardous. He said that he had been made redundant and there was no question of him having to give up work. In his application for benefit he had inserted a date, 3 June 1972, as being the date on which he thought he started to suffer from the disease. There was no explanation for that date appearing. There was no evidence about any assistance given to the pursuer in completing the form and the appearance of that date remains a mystery. It is some months prior to the date given on the DSS form (2/4/73) of his having ceased to work with his first employer, Lithgow Limited, at Kingston Shipyard. Of course Lithgows and Kingston Shipyard in fact employed the pursuer subsequent to 2/4/73. It seems unlikely that the pursuer himself was unaware of the date he last worked at Kingston Shipyard and it would be unusual that he had asserted that he began to suffer from VWF in 1972, let alone at a precise date, the first Monday of June, if he had completed the form himself. The matter had the appearance of a misguided attempt to involve the first of a series of employers. The pursuer led evidence from Mr Ronald Conway, his Solicitor, who spoke of his involvement. Since that involvement was all subsequent to June 1996, his evidence had little relevance to the major issue on Section 17(2). What his evidence did do however, was to convince the Court that in relation to Section 19(A) the pursuer could have no alternative remedy against his Solicitor. Mr Conway, or rather his firm, were first contacted about 24 November 1999 through the medium of a Mr McCourt, who did not give evidence, but who seemed to play some part in organising litigation on behalf of shipyard workers in Inverclyde. Mr Conway did state however that the pursuer was one of the later cases with which he had been involved. He stated that a subsequent witness, whose name appears on record, Mr Clarke, had a pending claim himself. He had prepared an extended precognition of the pursuer. He was unable to give any explanation for the 1973 date on the DSS form. The pursuer's evidence in Court was, in chief, that he first noticed his hands going cold in 1985. He did not go to his doctor. He had received no information in the shipyard in relation to his hands, but he said he heard the term VWF in 1995 to 1997 after he left the shipyard. In cross-examination however he described conversations being held amongst his former colleagues who had also left the shipyard in September 1995 about the state of their hands and possible claims arising from having contracted Vibration White Finger. He was, understandably, as a result of his present condition, vague about dates but his evidence was quite clear that it was before Christmas and perhaps even in November of 1995 that these conversations took place. He was adamant that he had not given up his job but that he had been made redundant. He admitted signing the medical history taken from him in relation to his claim to the DSS for disablement benefit which he submitted on 11 August 1997. He was seen by the adjudicating medical officer to whom the claim had been referred on the basis that VWF had commenced on 3 June 1972. In that history it is recorded that he stated that he was thirty-three

years at welding until two years ago, (the two years prior to the date of examination on 3/2/98) "when I gave it up". The trouble with his hands began he said in 1988 and he then gave a history. He said, and agreed in Court that he had said, that when in the shipyards he felt holding onto ladders and dealing with tools was hazardous. The next sentence in the history reads "that was why I gave it up". The physical examination found his hands cool to touch but well perfused with slow return of colour after pressure blanching. There was no blanching on elevation (of both hands) for 30 seconds and blanching only on the right hand on cold water immersion for thirty seconds. He had some dulling of sensation to touch on the fingers, full movement and a good grip. The examining doctor recommended an award of 14% disability. The pursuer also gave a history to a Consultant Mr John Drury, on 15 March 1999, in which he is recorded as saying that he found climbing ladders difficult and he could not hold onto the rung with his hand and that he often stopped to heat his hands when working. The pursuer said that he had been made redundant. Mr Drury, who gave evidence, found that the pursuer had freezing cold hands and fingers but no other signs and in particular he found muscle power in terms of grip strength to be good. He found no alteration to fine touch in the fingers despite being given a history of trouble with manual dexterity and freezing cold hands in a warm room. He expressed the opinion that the pursuer had a moderate degree of VWF, Stage 2 on the Taylor Pelmear and the Stockholm Scale. Mr Drury's diagnosis of VWF was based on a process of elimination he said. In cross-examination the pursuer gave the date of 1982 as being the time when he knew his fingers went white and tingled and that it was also happening to other men alongside him. He was also restricted whilst still working in the shipyard, in his pastime of bowling having to drop the bowl. He said that he knew his fingers were going white, although he did not know the cause of it, although it happened when working with chipping guns. After leaving the shipyard he obtained employment in the computer industry and he knew then that vibrating tools were implicated. He did not, he said, rush off to the doctor. He went to see Mr Clarke for advice first, and then to Mr McCourt. In re-examination he stated that he did not think that he had VWF. Mr Patrick Clarke gave evidence. The purpose of his evidence appeared to be an attempt to establish the pursuer's averments about the generality of knowledge or rather, lack of knowledge of VWF in the area and in particular in the shipyards. The effect of Mr Clarke's evidence was that when he took up his position in the Social Work Department of the local authority in 1995, it was his task to maximise the benefit income of clients of the Social Work Department by whom he was employed. He said that in 1997 about two or three hundred cases of VWF were known to him and that he had conducted many appeals, particularly about the level of benefit assessment. He said that claims before that were fairly "poor" in number and that people did not make the connection between work and VWF prior to about 1997. Mr Clarke's evidence on this matter, however, requires to be treated with some caution. He left the shipyard in 1982, went to Strathclyde University and studied Industrial Relations and Economic History prior to obtaining employment with Strathclyde Social Work Department. It emerged that he himself had a claim pending in relation to alleged VWF. He was extremely reluctant to acknowledge this fact and indeed required to be instructed by the Court to answer questions put to him in cross-examination. Having regard to the date at which his own exposure to vibrating tools ceased, 1982, he must, to progress his own claim, be maintaining his own ignorance and a general ignorance on the subject. It is clear that

he had no first hand knowledge of the yards or a knowledge of VWF therein at the time with which the present case is concerned. For that reason I was not prepared to regard his evidence on the matter of knowledge as persuasive. His evidence was that he had been consulted by the pursuer. He could not recall whether he had given the pursuer any advice or counsel about the completion of the DSS form, but thought that one of the assistants in his office might have assisted in its physical completion. The actual writing on the form was that of the pursuer. The Court did not, apart from Mr Clarke, have evidence from any shipyard worker, any trade union person or any of the other people in Greenock referred to in the pleadings. Albeit it was averred that "few general practitioners in the area" were aware of VWF or able to diagnose it competently, the Court was not given any evidence from any such person, not even the pursuer's own GP. It requires to be considered, whether, on the basis of that evidence, the pursuer had discharged the admitted onus upon him of establishing that he comes within said Section 17(2). The pursuer's own averments in seeking to attribute knowledge to the defenders indicate that various government committees considered the question of Reynaud's Phenomenon, that it had been noted that the condition VWF was widespread amongst workers who required to use pneumatic tools, that government committees and the Industrial Injuries Advisory Council considered and published reports, that the Health and Safety Executive laid down acceptable levels of vibration for chain saws and guide lines for the proper evaluation of exposure. It is averred that the defenders knew or ought to have been aware of the risk of vibrating tools. So too it might be thought would the trade unions operating in the shipyards. It is wholly of comment that there was no evidence from any such body before the Court, these unions being, as is well known, participants of committees or members of such government committees and consultative bodies as were attended to by the pursuer. If that comment were in fact erroneous, it would be a matter which, in the light of the pursuer's own averments, might have been important in establishing the general level of awareness in the shipyards. The pursuer himself was not, he avers, a member of any trade union but it is difficult to accept that he would not have been aware of general welfare and learn knowledge in the yards. Having regard to the averments which were remitted to probation by Lord Hamilton on the basis that they might disclose a relevant case, I am not satisfied that the pursuer has established that he was in the situation that it was not reasonably practicable for him to become aware of the relevant facts prior to June 1996. He avers that he was not aware until March 1999 of the relevant facts. That would appear to be based upon his consultation with Mr Drury but it is quite clear that he had actual awareness that he was considered to be suffering from VWF, and that to a material degree, in February 1998. He actually avers, although he denied the fact in evidence, that he had to give up his former employment as a foreman welder because of his condition. I cannot accept his denial of that averment, particularly in light of the signed account given to the adjudicating medical authority before mentioned. I hold therefore that the pursuer was aware that he had sustained significant injury by the time he had left work. That the injury was significant is clearly evidenced by the fact that he was awarded a disability of 14%. That is not an insignificant sum. It is totally erroneous to assert on averment that claims were refused to the extent that disability was assessed 10%, which was below a level of money at which was payable. In the context of national insurance percentages, 10% is a significant disability albeit payment is not made therefor. It is more than

the government prescribed amount for the loss of some fingers. The pursuer offered to prove that "like other shipyard workers in Greenock", he was unaware of the term "vibration white finger". He also avers that he did not become aware that a claim for benefit can be made in respect of his sentence "until 1996 at the earliest". He gave no further or, indeed proper specification of that date and it could on averment have been before June 1996. Since it is of the essence of VWF that blanching occurs throughout the year, I cannot accept that the pursuer could reasonably attribute his condition by September 1995 to cold weather alone. I hold that the pursuer was aware by the end of 1995 that he had a significant disability in his hands, that he was aware that this arose because of his employment in the shipyard, that the defenders were his employers and that the condition of his hands was due to his employment. He has not established, however, that it was not reasonably practicable for him to become aware of the material facts by a date prior to June 1996. That I would have found to be the case, whether the question of reasonable practicability for this pursuer was approached in a subjective or objective basis. I consider that the pursuer's case is time-barred under Section 17 of the Prescription and Limitation (Scotland) Act 1973. The question remains whether the Court should exercise its discretion in terms of Section 19(A) of the said Act. The law on that matter is clear. The Court has an unfettered discretion to be exercised on the material placed before it. The law is conveniently summarised in *Craw v Gallagher* 1988 SLT 204 by Lord Jauncey at 205K to 206B. In the present case the pursuer properly accepted that the onus was upon him and his counsel argued the various factors to which, in this case, the Court might have regard. One factor was that the defenders would suffer no prejudice in the availability or otherwise of evidence, whereas the pursuer would lose his claim. Both Counsel indicated that they felt that the fact that the present claim was for various reasons, which need not be entered upon at this stage, a rather small one in the light of the events which had happened to the pursuer was a neutral circumstance. I do not necessarily agree with that approach. If the pursuer had a very valuable claim reflecting damage to his entire life and happiness, then I am not persuaded that that is a factor which is equally balanced by a defender losing statutory protection. In the present case the factors may be equally balanced because of the smallness of the claim. In the light of the conclusion to which I have come about the pursuer's constructive knowledge, it does not appear to me that my discretion should be exercised in his favour. He actually knew in February 1988 that he had a valuable claim. The action was not raised until 1999. Had the action been raised immediately upon the adjudication of the DSS claim, the situation might have been different, although even then the action would have been time-barred. So far as the pursuer's averments in relation to Section 19(A) go, the principal features would seem to be that he was unaware of the term "vibration white finger"; that he did not become aware the claim for benefit could be made until in or around 1996 at earliest, whereas a few workers did become so aware in about 1995 and that he has no alternative remedy. There has been no satisfactory proof of any of those averments save the last. On the contrary, the weight of the evidence is that the pursuer became aware in 1995 that he could claim benefit for the condition of his hands. Whether or not he knew that it could be particularly labelled "vibration white finger" does not seem to be either here or there. The condition is now commonly referred to as "hand arm vibration syndrome". It has been referred to as Reynaud's Phenomenon. All that was necessary was for the pursuer to be aware that he was significantly

disabled as a result of the state of his hands which manifested itself in episodic blanching. The pursuer has not established the averments "like most shipyard workers and union officials", the pursuer was unaware through the early 1990's that symptoms such as his own could constitute an industrial disease. As a matter of relevancy, an averment of early 1990's must be read as prior to 1 January 1996, but in any event there was no satisfactory evidence surrounding those averments. I accept that the pursuer has no alternative remedy. I should record that I was referred to a body of authority. Apart from the cases dismissed by Lord Jauncey in *Craw*, the only Inner House authorities were *Kane v Argyll & Clyde Health Board* 1998 SLT 823 and *Carnegie v Lord Advocate* 2001 SC 802. Numerous Outer House cases were cited, including one of my own, but each of these, in my view, depends upon its own facts and circumstances, and the matter in this case is factual, to be decided upon credibility and reliability. I was also directed to English cases - *Armstrong v BCC*

(1997) and *Allen v NRE*

(2001) but, again, found these of no particular assistance on the matter of principle. In the whole matter, I do not consider that this is a case in which it can be said that it would be equitable in all the circumstances to allow the action to proceed. I accordingly sustain the defenders' second plea-in-law, repel the pursuer's third and fourth pleas-in-law and dismiss the action. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/scot/cases/ScotCS/2002/95.html>

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