

SCOTLAND / JUDGMENT

A v N [2008] ScotCS CSOH_165 (05 December 2008)

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[2008] CSOH 165 OPINION OF LORD McEWAN in the cause A Pursuer; against N Defender:
----- ____ INFO Pursuer : Barne, Drummond Miller LLP Defender : McGregor, Balfour + Manson LLP December [1] In this case the pursuer sues in reparation for damages due, she says, to prolonged sexual abuse when she was a young girl at the hands of the defender. The abuse, it is said, continued until she was about thirty years of age and happened at various addresses. [2] The amended record in the case is lengthy and from the pursuer's averments I summarise the main points. Article 4 narrates that the abuse began in 1975 when she was seven and the defender came to live in her family home. At the time the defender was a serving policeman. Digital, oral and full sexual intercourse went on at various addresses for 22 years. The pursuer's sisters and others were similarly abused (Article 5). In Article 6 the pursuer blames the habituation to the abuse, her emotional dependence on the defender, his control over her and her other problems and other difficulties both social and cognitive for her inability to divulge the abuse and end it before 1997. [3] In Article 7 it is averred how she informed the police and was interviewed in 1998. The defender was indicted for trial (twice) convicted, imprisoned and then successfully appealed in 2003. Until that time the pursuer avers that her mind had been locked off to the abuse and any reactions. The serious mental trauma is then set out at some length in Article 9. [4] Article 10 then admits that her action is time barred but seeks excusal in terms of section 19A of the Prescription and Limitation (Scotland) Act 1973. She accepts that she had solicitors acting for her within 2 years of the ending of the abuse (Reville & Co) and her solicitors had made a claim for Criminal Injuries Compensation. She avers that she has a right of action against her solicitors for failing to advise her to raise the present proceedings in time. [5] There then follows a lengthy explanation as to

why as a victim of abuse she would suppress her memory and not have awareness of the legislation. She was unable to identify herself as a victim and had many social problems. The reporting to her lawyers and the police led to advice to Claim Criminal Injuries Compensation. [6] Next is a litany of events concerning her problems with several firms of solicitors who were advising her between 1998 and 2001 over her claims. The trial of the defender had adversely affected her and her experience of legal advice was negative. There is a narrative of how she relied on assurances given by the Procurator Fiscal, consulting her present lawyers, medical examination, legal aid procedures and instruction of counsel. The delay in raising proceedings was due to the abuse. All the facts had been investigated and preserved. She wished her allegations to be vindicated in Court. [7] At the first hearing the defenders (who had lodged a written argument) moved me to dismiss the action or only allow a preliminary proof on section 19A. The question was asked why if she had advice to seek Criminal Injuries Compensation she had not sought damages at common law. By 1997 she must have known she had suffered injuries warranting suing. The law was well known in 1997 and she had not been frank about who were her solicitors or what advice she got. Three cases were referred to viz Carson v Howard Doris 1981 SLT 273 at 275; Cowan v Toffolo Jackson 1998 SLT 1000 at 1002/3 and Morrice v Martin Retail 2003 SCLR 289 at 290. The pursuer accepted that her claim was time barred. The defender here was not a Local Authority. He was an individual and self funding. [8] Having heard all of this the pursuer sought leave to amend, did so and the second debate took place on the amended pleadings. These now disclose much more about her various sets of solicitors. [9] When the debate resumed some months later on the new amended record the defender's counsel emphasised that the role of the pursuer's solicitors was crucial. Although the facts now averred were clearer there was still no basis for the Court to operate section 19A. The abuse ended in 1997 and her loss was known in 1998. The triennium expired in 2001 with this action three years later. However, there was no medical case to back lack of awareness. She simply got no advice to make this claim. Her seeking Criminal Injuries Compensation sat uneasily with an alleged inability to contemplate a civil claim. Accepting, as she did, that her solicitors were negligent she had not discharged the onus on her of showing why it was equitable for this action to proceed. [10] The power under section 19A had to be used ..."sparingly and with restraint..." (Carson approved in Bowden) since the section 17 limitation period was the norm and 19A the exception. The admittedly negligent solicitor militated against the discretion. She had to answer for her agents' acts and omissions (Donald v Rutherford 1984 SLT 70). The negligence had to be viewed against two criminal trials and an appeal. The whole matter had been fully investigated. Reference was made to Forsyth v Stoddart 1985 SLT 51 and Cowan . The pursuer's loss of a right of action was cancelled out by the defender's loss of his defence. Here the pursuer had the benefit of legal aid and the defender did not. She averred she had a strong claim against her agents in which case she may suffer no prejudice. (Morrice and Fleming v Keiller

[2006] CSOH 163 Leith v Grampian

[2005] CSOH 20). There should be no proof leaving all pleas standing. [11] In reply Mr Barne who also lodged a written argument said that the case could have two possible triennia 1997 or 1983. Clearly the latter involved a longer period to explain. The Court would have to say what period needed an explanation. The issue of failing to come forward and the effects of the abuse are inter related. There should be a proof at large. Being able to sue her solicitor was only one factor. Such claims were never easy, especially where there had been sequestration and files passed on. It was not a simple case of missing a deadline but a failure to advise involving a number of people. After Bowden the "sparingly etc" test in Carson was no longer good law; that would fetter the Court. Counsel referred to a Scottish Law Commission report. [12] There was no evidential prejudice here (unlike in Bowden) as the evidence had been preserved by both trials. Because of her condition the pursuer was unaware that she had a remedy McLaren v Harland and Wolff 1991 SLT 85 Comber v Great Glasgow Health Board 1989 SLT 639. This was not a claim out of nowhere like the cases involving institutions. The defender was well aware personally and would suffer no prejudice. [13] Counsel went on to say that it was clearly averred how poor the advice to her had been from a number of people. The fact that she had to answer for the fault of her solicitors does not mean that other explanations had to be disregarded. The strength of the case against the agents had to be considered (Reference was made to Anderson v Glasgow District Council 1987 SLT 279, McFarlane v Breen SLT 1320 and Hartley v Birmingham City District Council [1992] IWL 968). [14] It was proper to consider the therapy of vindicating herself against the defender. In any event the solicitors might have a defence. Suing them was subject to the vagaries of litigation. The case concerned advice not missing a date. Reference was also made to Ferla v Secretary of State 1995 SLT 662. [15] Let me now look briefly at some of these cases. [16] In Carson the issue was over a "third party" notice, the action having been served in time. When the pursuer amended to make a third party a second defender he was out of time. At the time (1981) the section 19A power was new. In allowing the amendment and the matter to proceed against the third party the Lord Ordinary found they were not prejudiced and that the pursuer had given a sufficient explanation of his being unaware of their involvement. I shall have some further observations on this case elsewhere in this opinion. In Cowan the condition was asbestosis and the case was clearly time barred. The action was raised about four years after the end of the time bar. The pursuer could not aver himself within section 17(2)(b), and the equitable provisions of section 19A could not be operated. The Lord Ordinary was of the view that the prejudice to each party balanced out. There was no available remedy against a solicitor. Donald was referred to principally as authority for the proposition that the pursuer has to answer for the fault of his solicitor. The action was served over two years beyond the end of the time bar. The Lord Ordinary misdirected himself, and the matter was considered afresh and at length by the Inner House. The equities were carefully balanced on a claim which had been fully investigated. It seems to have been accepted that the negligent solicitors had no defence and that important factor was the reason the Court kept the time bar in place and refused to operate section 19A. Hartley was a case where the plaintiff tripped in the grounds of a school and her solicitors served

her claim one day late. The claim had been fully investigated, the defendants accepted liability and the plaintiff had an unanswerable case against her solicitors. The Court of Appeal had little difficulty in dissapplying the Limitation provisions (979 3/4) and declined to issue guidelines. Leggatt L. J. pointed to the dangers of relying on the results of other cases where the facts may be different (983). In Forsyth the summons was 48 days late due to the fault of the pursuer's solicitors. That fact together with the provision of legal aid persuaded the Second Division not to apply section 19A. The case made it clear that all circumstances had to be considered and that the three matters mentioned in Carson were not all embracing. Also in the lower courts the case of Donald had not been referred to. In Fleming the pursuer was injured during a game shoot. The summons was served one day late. The Lord Ordinary balanced many considerations before refusing to operate section 19A. There was a seemingly unanswerable case against his second set of solicitors although to quote Lord Drummond Young that "... (introduced) an inevitable degree of complication...". *Morrice v Martin* concerned an accident in a shop. The summons was some seven months late. That, it was accepted, was due to her agents' negligence. The Lord Ordinary refused to operate section 19A notwithstanding this oversight. The pursuer had accepted that there was no real prejudice because she had a claim against the agents. In *Leith* the pursuer's claim was based on medical negligence. The summons was nine months late. The medical position was complicated and the pursuer had had to consult a number of solicitors. It was averred that he might not succeed in any claim against his solicitors. Section 19A was not operated by the Lord Ordinary. [17] To the opposite effect are three cases where on different facts section 19A was operated viz *McFarlane v Breen* ; *Ferla v Secretary of State* and *Anderson v Glasgow District Council* (after a preliminary proof). In the latter case, following *Forsyth* it was said that all the considerations had to be balanced and none can be conclusive in itself. There are two other useful examples of the operation of section 19A both decided after a preliminary proof. In *McLaren* Lord Milligan allowed the action to proceed as well as deciding it was time barred. In *Comber* , Lord Morton, after discussing the history of the legislation did the same. In neither case did it appear there was any remedy against a legal adviser. [18] Let me now look at *Bowden v Poor Sisters of Nazareth*

[2008] UKHL 32 . This is the latest report of the case also known as *B v Murray* (No2) 2005 SLT 982) Lord Drummond Young after a preliminary proof refused to apply section 19A, and dismissed the action. The Inner House confirmed this decision (*B v Murray* (No3) 2007 S. C.688. It has to be noted that for the purposes of such a proof the Court assumes that the factual averments (about the abuse) are correct (see in the House of Lords para 15). Before the House of Lords the discussion seems to me to look at the issue as one of practice and procedure (see para 21) with the attendant complications on the facts (see para 20). The case of *Carson* is criticised at para 25 to the extent that Lord Ross's words about the section 19A powers being used "...sparingly and with restraint..." are no longer a correct test. Thus four years on after much Court proceeding and little evidence on the merits, the test case was dismissed. The position seems to be different in England and although the

legislation is slightly different the problem of sexual abuse cases is the same. In the House of Lords in the same year (*A v Hoare* and four other cases [2208] UKHL

- 6) can be observed a more relaxed attitude to exercising a discretion to allow actions to proceed (see para 49). I also note from that case it is not uncommon to have a trial (proof) on liability causation, limitation and quantum (see para 27). I am, of course, bound by *Bowden* and can only look with some degree of envy at the ease with which the English courts have found a way round the difficulty as seen in *A* . Three judges were common to each Appellate Committee. [19] What then are the factors to be balanced. As far as the defender is concerned they are as follows. He says the case is time barred and so if it now proceeds he will have lost an unanswerable defence. There is no behaviour on his part which can be criticised and he maintains his denial of any breach of duty to the pursuer. He has twice been acquitted in the criminal court. He is not insured and will have to fund his defence to the action from his own resources. He points to the fact that the addresses of the alleged abuse may have changed internally, that the pursuer's mother is now dead and two other witnesses cannot be traced. I regard these last three matters as of less importance. [20] In addition the record (even after amendment) does not make it clear why the solicitors failed to advise the pursuer about a civil claim and so there is nothing to deserve a proof in spite of the *Hunter v Hanley* formula being quoted. The defender also points to the possibility of two different periods of time bar and that is obviously relevant to delay. I have looked at the report of the criminal trial (2003 SCCR 378) the indictment is printed and shows the end of the latitude as 1987 when this pursuer was 20. [21] The defender also argues the fact of the pursuer having a remedy against her solicitors (... "a second string to her bow..." as Lord Wheatly put it in *Forsyth*) and I now look at that. What the record says amounts to this. Her claim relates to all the sexual abuse suffered from childhood until 1997 when she was aged 30. She says the abuse itself had an inhibiting effect on her ability to disclose it and be aware of "...the statutory facts..." (I assume this may relate to section 17(2) (b) of the Act). She continued to have strong feelings for the defender. There then follows a narrative of her dealings with a number of solicitors and Legal Aid applications. She says the only advice she got was in relation to Criminal Injuries Compensation and was never advised she had a civil claim. By the time of her CICB award in 2001 the time bar had probably expired. The first criminal trial of the defender was in 1999, the retrial in 2000 and the defender's successful appeal in 2003. She says that only in 2003 was she aware she had a civil claim and by January 2004 this action was raised. Even if she had been aware earlier she was not in a fit state to undertake a civil action. [22] On these averments it is anything but clear that the pursuer does have a good or any claim against her solicitors or which of them. The fact that it is not a good cause is not conclusive either way. It is merely a factor to be considered (*Anderson* cit sup at 288 referring to *Forsyth*). This is not a case of missing a deadline but of a failure by someone to advise a damaged woman in the midst of criminal trials and an appeal as well as a CICB claim. There is also the complication of the advice from the procurator fiscal. [23] Turning to the equities that affect the pursuer it is said that to operate the time bar against her would lose her a good case and a chance to vindicate

herself against her abuser. It was said, rightly in my view, that the evidence is not old as in some of the cases involving institutions. It was preserved for the criminal trials and must have been thought good enough to go to a jury on the higher criminal standard of proof. I also think in a case like this it is quite proper for her to want to vindicate herself against the defender. He is alive, indeed he came to the debate, and able to give evidence. It is not like the case where an institution is involved and the witnesses or perpetrators are dead or cannot be traced (see *B v Murray (No 2)* para 137). [24] The conduct of the pursuer cannot really be criticised since she offers to prove that the reason for any delay is the very behaviour which the defender perpetrated on her. In any case the delay here is minimal since the issues have already been before a Court and nobody can be heard to say that memories have been affected. Although the pursuer has to answer for her agents that in itself has not resulted in any delay since from 1998 to 2003 everyone involved was focussing on the criminal proceedings. [25] It is quite clear from the cases that limitation under section 17 is the norm and section 19A is the exception. The pursuer has the burden of showing that she should in equity have the benefit of that exception. Having looked at all the factors I am satisfied that the balance favours the pursuer and I propose to operate section 19A to disapply the section 17 limitation. I do not think any further enquiry by way of preliminary proof is necessary. I will repel the defender's first and second pleas in law and the pursuer's first plea in law. I sustain the pursuer's fourth plea in law and allow a proof. [26] In *J A v Glasgow City Council*

[2008] CSOH 27, (cited to me in passing in the present case) I had occasion to comment on the problems of limitation I now add this as a postscript. It seems to me that the mischief behind the legislation is really the need to prevent stale claims where a defender or insurer is taken by surprise and there is either no hope of evidence in rebuttal being recovered or leaving the defender a task of proving a negative. I think unfortunately this has led to a very legalistic attitude to the legislation especially when a date has been missed by a short time. Most of the early cases dealt with relatively simple reparation where the medical facts were well known and easy to understand. I very much doubt if the discussions and work which led to sections 17 and 19A had in contemplation the kind of case now posed involving blanking out of abuse, recovered memory and the other symptoms described here and in some of the other cases. I have an uneasy feeling that the legislation and the strict way the Courts have interpreted it has failed a generation of children who have been abused and whose attempts to seek a fair remedy have become mired in the legal system. [27] One of the problems in the present case is that time bar is admitted and, after amendment, it is said that solicitors were negligent in not advising civil suit. The first of these propositions really excludes any section 17 argument which is a pity. The second fails to persuade me, as I have said elsewhere, that there is a good or any case against solicitors. It was known in 1999 that there was to be a criminal trial and a CICB claim was already in contemplation. It could not have been known whether the defender would be convicted and any acquittal on the facts would be serious for the pursuer. Soon after the second trial in 2000 the time bar was nearly gone as it certainly

was by the time of the successful appeal in 2003 leaving the defender free. I have looked at both reports of the criminal trials and it is clear that the acquittal was unrelated to the pursuer's evidence when she was a complainer. The Appeal Court found that the trial judge had misdirected the jury on other matters. In those circumstances it is wholly unclear that any solicitor would have advised this confused woman to sue in the midst of a CICB claim and two trials. The defender was convicted and in prison after 2000 until his successful appeal. He may not have been worth suing. [28] The concerns I expressed in *J A v Glasgow City Council* remain with me although sitting in the Outer House there is little I can do about it except to hope that reform will not be long delayed. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: https://www.bailii.org/scot/cases/ScotCS/2008/CSOH_165.html

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