

SCOTLAND / JUDGMENT

Chinn v Cyclacel Ltd [2013] ScotCS CSOH_17 (30 January 2013)

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[2013] ScotCS CSOH_17, 2013 GWD 6-152, 2013 SLT 278,

[2013] CSOH 17 [New search] [Help] OUTER HOUSE, COURT OF SESSION

[2013] CSOH 17 A619/09 OPINION OF LORD WOOLMAN in the cause AMANDA SUTHERLAND
CHINN Pursuer; against CYCLACEL LIMITED Defenders:

Pursuer: Anderson QC, Hodge; Balfour + Manson LLP Defender: Ellis QC; bto January 2013

Introduction

- [1] In 2003 the pursuer raised an action of damages against the defenders. She claimed that she had sustained an injury to her upper limbs arising out of repetitive tasks she did at work. The defenders challenged the relevancy and specification of the summons. After a debate in 2007, Lord McEwan dismissed the action. He held that the pursuer's averments were deficient both on the merits and in relation to loss. The pursuer marked an appeal. Shortly before the reclaiming hearing in late 2008, the pursuer sought to amend her pleadings. The Inner House refused the motion.
- [2] In light of that refusal, the pursuer chose not to insist in the appeal. Instead she raised the present action in June 2009. It arises out of the same facts as the earlier action, but differs from it in certain respects. The case on the merits has been recast. In addition the pursuer now gives a more specific diagnosis of her medical condition. This action was also sent to debate at the instance of the defenders. In March 2010 Lady Smith held that it was time-barred. But she allowed a preliminary proof on the question of whether the Court should exercise its discretion to allow the action to proceed in terms of section 19A of the Prescription and Limitation (Scotland) Act 1973.

- [3] Prior to the preliminary proof, counsel reached agreement about a number of matters, including a detailed chronology of events. In consequence, it was only necessary to call four witnesses. The pursuer led the evidence of Mr Robert Carr, the solicitor who formerly acted for her, and Professor Peter Buckle, ergonomist. The defenders' witnesses were Mrs Suzanne Elland, who took over the pursuer's job with the defenders; and Dr Richard Graveling, ergonomist. Counsel agreed that this is a novel application. In the great run of cases involving section 19A, the pursuer has failed to raise an action before the expiry of the triennium. Here the pursuer invites the court to exercise its discretion after a timeous action has failed. The

Facts

- [4] The chronology of events is very important to the decision in this case. It is therefore necessary to set out the facts in some detail. The pursuer was born on 4 April 1973 and is now aged 39. She worked for the defenders as a research assistant from January 1999. Initially her services were contracted through a recruitment agency. She became an employee on 1 February 2000. Part of her job involved pipetting samples. She ceased carrying out these tasks in March 2000, but her employment did not formally terminate until November 2000. She claims that the task was repetitive and strenuous and that in consequence she developed various problems in her hands and arms. Initially the medical experts were unable to come to a firm diagnosis. They classified her problem as work-related upper limb disorder ('WRULD'). It is now accepted, however, that she suffers from compartment syndrome and intersection syndrome.
- [5] The pursuer consulted Anderson Strathern ("the firm") on 9 August 2000, where she saw an employment law specialist within the firm. He made a claim to the Employment Tribunal on her behalf. As it was believed that the pursuer might also have a personal injury claim, the case was referred at the same time to Mr Carr, the head of the firm's court department. He qualified as a solicitor in 1982, became a solicitor advocate in 1994, and is an accredited specialist in personal injury and medical negligence. He became chairman of the firm in 2005.
- [6] A qualified solicitor within the firm's court department took a detailed witness statement from the pursuer on 14 August 2000. The firm then submitted an application to the Scottish Legal Aid Board ("the Board") for legal advice and assistance. The tribunal claim resolved by means of an extra judicial settlement in July 2001.
- [7] On 10 May 2002 the firm intimated a claim to the defenders. On 10 October 2002 it instructed Mr David Aaron, consultant orthopaedic surgeon, to examine the pursuer. In his report dated 26 November 2002, he concluded: "This is a most unusual case, in that an unusual form of suspected repetitive strain injury has caused persistent symptoms for over 21/2 years and is ongoing. In clinical practice, this is virtually unknown." He suggested that there might be a psychological component to the problem and thought that there would be a full recovery.

- [8] Mr Carr met the pursuer on 12 December 2002. He explained the various difficulties facing her claim, in particular the uncertain diagnosis made by Mr Aaron. Mr Carr agreed to seek sanction for a second medical opinion. Proceedings in the Outer House
- [9] The triennium was due to expire in early March 2003, as the pursuer's last working day was 3 March 2000. Accordingly on 17 February 2003 the firm raised an action against the defenders seeking damages of £200,000. The summons alleged that they had breached their common law and statutory duties of care toward the pursuer. It was signetted shortly before the introduction of chapter 43 proceedings. The pleadings were therefore more extensive than would be common in a personal injury action today. On 21 March the action was sisted to enable the pursuer to apply for legal aid.
- [10] During 2003, the firm obtained an increase in legal aid to carry out various investigations. It arranged for the preparation of a video showing the nature of the pursuer's work with the defenders. It instructed a report from Dr Paul MacLoughlin, occupational physician. In 1998 he had published a book entitled RSI and Work Related Upper Limb Disorders . In 2005 he published Understanding and Treating RSI . The firm's letter of instruction dated 28 January states in the heading "work-related upper limb disorder (bilateral)". It enclosed a comprehensive review of the medical texture prepared by the pursuer with the aid of her family. Mr Carr explained that while she has a master's degree, her father is an epidemiologist and her mother a nurse. Dr MacLoughlin examined the pursuer on 24 April and provided a report dated 15 May. He concluded that she suffered from upper limb disorder, which was work-related. He believed that her long term prognosis was good. The firm sent a copy of the report to her on 20 May for her comments.
- [11] The firm also instructed Professor Buckle, ergonomist. At that time he was Director of the Robens Centre for Health Ergonomics at the University of Surrey. He is now at Imperial College London. In his report dated 29 September he concluded that there was a causal link between the pursuer's upper limb disorder and her work: "I am of the view that the most likely cause of [her] injury was the period of increasingly intense pipetting that she undertook immediately prior to the onset." The firm recovered the pursuer's medical records from her general practitioner in early October.
- [12] During that year, the defenders were also investigating the claim. Dr Campbell Semple, consultant orthopaedic surgeon, examined the pursuer on their behalf in November. He concluded that: "I am of the firm opinion that what I am seeing here is simply illness behaviour. Ms Chinn is producing a whole range of complaints, none of which are supported by any objective abnormalities on clinical examination, and she is claiming that she is suffering from a nebulous concept of "work related upper limb disorder". In my opinion, this young lady's forearms, wrists and hands are normal in all respects and there is no physical reason why she should not be able to carry out a whole range of duties, including pipette work or similar tissue culture work if she so wished."

- [13] The firm applied for a full legal aid certificate for the pursuer on 3 February 2004. The defenders' agents objected to that and various subsequent applications. On 16 June the Board requested a note on quantum to assist in its deliberations. The firm precognosed the pursuer again on 25 June and sent a quantification of her claim by letter dated 7 July. The Board granted legal aid for the action on 16 July. The sist was recalled on 12 August. By letter dated 10 September the firm instructed counsel to prepare adjustments. During October, further precognitions were taken from various witnesses. At the instance of the pursuer, the cause was kept on the adjustment roll for a lengthy period during late 2004 and early 2005.
- [14] The record closed on 19 January 2005. In the preceding week, however, a consultation took place at which counsel discussed further revision of the pursuer's pleadings. On 16 February the firm lodged a minute of amendment. It included brief averments relating to loss and increased the sum sought to £450,000. On 28 April the firm took a precognition from Barry Williams, who had prepared the 2003 video. The defenders lodged answers amplifying a number of matters in the defences. On 16 June, this particular chapter came to an end. The closed record was opened up and amended in terms of the minute and answers.
- [15] A by order (adjustment) roll hearing took place on 1 February 2006, when the case was sent for debate at the instance of the defenders. By letter dated 1 March their agents intimated a note of arguments. It contained detailed criticisms of both the common law and statutory cases maintained by the pursuer. By email dated 26 April the firm sought junior counsel's views on the note. The next day she replied recommending (a) the instruction of senior counsel, and (b) a consultation with Professor Buckle and Dr MacLoughlin prior to the debate.
- [16] On 25 May the firm wrote to the Board seeking sanction for employment of senior counsel. On 9 June the application was refused, on the basis that the case did not have sufficient complexity or novelty. On 6 September, the parties went to the office of the Keeper of the Rolls to arrange a two day debate. He fixed a procedure roll hearing to commence on 30 November. Following a further consultation on 26 October 2006, counsel prepared another minute of amendment.
- [17] The firm identified a senior counsel who was prepared to act on a speculative basis. It sent him a letter of instruction dated 1 November. He approved the draft minute of amendment and the firm enrolled a motion to allow it to be received. Answers were lodged and both parties took the opportunity to revise their respective pleadings. By now they were extensive. The closed record dated November 2006 is over sixty pages in length.
- [18] When the debate began on 30 November, senior counsel for the pursuer tendered a further handwritten minute of amendment at the Bar. It sought to delete articles 7, 8 and 10 of the condescendence. Lord McEwan granted the pursuer's unopposed motion to amend. The procedure roll discussion did not conclude and the hearing was adjourned until February 2007.

- [19] On the advice of senior counsel, the firm sought sanction from the Board on 9 December 2006 (a) to obtain updated reports from Professor Buckle and Dr MacLoughlin,
- (b) to instruct a psychiatrist in light of certain averments in the defences, and (3) to consult with each of these experts. The Board granted sanction later that month.
- [20] The consultation with Dr MacLoughlin took place on 19 January 2007. He sent a draft updated report to the firm on 2 February. It was faxed to counsel on 5 February, with instructions to junior counsel to draft a Minute of Amendment. By email dated 7 February she responded advising the firm to enrol a motion to discharge the continued hearing. The defenders did not agree to this proposal and the debate resumed on 15 February. During the course of his submissions, senior counsel for the pursuer invited Lord McEwan to put the case out by order if he thought there was merit in the defenders' arguments, so that further amendment could be considered.
- [21] A few days after the debate, Dr Colin Rodger, consultant psychiatrist, examined the pursuer. In his report of 27 February, he stated (i) that the pursuer was mentally well and (b) that he did not consider that any of her difficulties had been caused by any underlying psychiatric disorder. The firm sent copies of the report to senior and junior counsel.
- [22] On 7 August Lord McEwan dismissed the action. In his opinion, he stated at para 13: "The authorities make it clear that the court will be slow to dismiss an action at the stage of relevancy. However, in my opinion that is the only course open to me on the pleadings as they stand. I think that Miss Shand was correct to describe them as misconceived and totally confused." He declined to give the pursuer a further opportunity to amend.
- [23] The following week, the firm instructed counsel to advise on the prospects of success in a reclaiming motion. It also asked them to consider (a) whether the pleadings should be amended and (b) what further investigations were required. A consultation to place on 24 August attended by Mr Carr, senior and junior counsel and the pursuer. Subsequently, the firm enrolled a motion seeking review of the Lord Ordinary's interlocutor and lodged grounds of appeal. On 2 November 2007, the court fixed a summar roll hearing. It was scheduled to take place on 2 and 3 December 2008. Proceedings in the Inner House - 2008 Further medical investigations
- [24] In early 2008 the pursuer underwent pressure tests at Ninewells Hospital, Dundee. They indicated that she might be suffering from compartment syndrome. She had operations on both her forearms in January and March respectively. These significantly improved her symptoms. The pursuer and her family sought to identify an expert who might be able to assist her case. Their research led him to Mr Michael Hutson, a consultant orthopaedic surgeon and sports physician in Leeds.
- [25] On 19 March the firm wrote to Mr Hutson and he replied on 16 April with a note of his estimated fee. On 13 May the pursuer's father agreed to pay the fee. By letter dated 16 May the firm instructed Dr Hutson and he examined the pursuer on 1 July. He provided a draft

report on 4 July and a final report on 20 October. There are no material differences between the two versions. Dr Hutson concluded that "she developed intersection syndrome which is (always) the consequence of repetitive manual activities and undoubtedly, in my view, a consequence of repetitive manual activities as described to me". He also thought that she suffered from chronic compartment syndrome and added "These usually arise independently of each other, but I am satisfied that Miss Chinn was unlucky enough to suffer from both these conditions." He concluded that both of them were "the consequence of the nature of her workload", but expected her to make a full recovery.

- [26] On the basis of the diagnosis contained in Dr Hutson's draft report, the firm wrote to the Board on 1 August asking for sanction to instruct counsel to prepare a Minute of Amendment. On 25 August the firm instructed senior and junior counsel jointly to prepare a Minute. An email reminder was sent to counsel on 4 September. Junior counsel responded by email dated 19 September, stating that senior counsel wished to consult with Dr Hutson. That took place on 29 October. The First Minute of Amendment in the Inner House
- [27] On 30 September junior counsel forwarded a draft minute of amendment to senior counsel for revisal. It focused on the pursuer's medical condition. It did not address the defects on the merits identified by Lord McEwen. On 29 October the matter came before the Inner House, which continued the hearing for one week. On 5 November junior counsel appeared for the pursuer to argue that the minute should be received. The court refused the motion. The Second Minute of Amendment in the Inner House
- [28] Following that hearing, the firm decided to instruct new counsel. On 10 November Susan O'Brien QC accepted instructions to draft a fresh minute of amendment. She produced a very substantial revision of the pleadings, which was intimated and lodged. On 18 November a motion was enrolled to allow that minute to be received, which was heard on the single bills on 21 November. A solicitor for the defenders attended the hearing and produced a note. It records that: "Miss O'Brien frankly conceded that the pursuers pleadings to date were lamentable and indefensible. She had considered matters and felt that the pleadings could not be defended in their current form and that the grounds of appeal had no prospect of success at Summar Roll as things presently stood. She acknowledged that this was a frank statement of the position. She said that she did not consider that the case could proceed further without the amendment being allowed. If the amendment were refused the prejudice to the customer would be total as this would be the end of her case."
- [29] The note also records that Lord Clarke queried whether a fresh action could be raised. Miss O'Brien responded that this was not straightforward. She accepted that the defenders could have a reasonable defence based on time bar. Miss Shand QC for the defenders and respondents indicated that they might take such a point. The Court refused the minute on the basis that no explanation had been offered for the motion to amend coming at such a late stage.

- [30] Unsurprisingly, the reclaiming motion did not proceed. On 24 November Miss O'Brien provided two notes. One supported an application for legal aid to raise a fresh action. The other commented adversely on the performance of senior and junior counsel previously instructed on behalf of the pursuer. The Present Action
- [31] On 25 November 2008 the firm instructed a new junior counsel to draft a fresh summons. A consultation with the pursuer took place on 5 January 2009. The summons was signetted on 3 June 2009. In December 2009 the cause was appointed to the procedure roll. The defenders sought to insist on their argument that the action is time-barred in terms of Section 17 of the 1973 Act. Lady Smith heard the debate on 5 February 2010 and issued her opinion on 16 March 2010. As mentioned above, she held that the action was time-barred but allowed a preliminary proof on the question of whether the Court should exercise its discretion in terms of section 19A. The Protective action
- [32] In October 2011 the pursuer raised an action against her original counsel. It was immediately sisted, pending the outcome of these proceedings. In January 2012 the Board refused legal aid for the protective action on the ground that it was premature. The firm withdrew from acting for the pursuer on 27 April 2012. In July 2012 the pursuer convened the firm as the third defender in the protective action. The

Legal Framework

- [33] Section 19A of the 1973 Act gives the court the power to override a time-limit "if it seems to it equitable to do so." In *AS v Poor Sisters of Nazareth* 2008 SC (HL) 146 , at para 5 Lord Hope of Craighead discussed the underlying principles: "The law of limitation of actions in Scotland is set out in Part II of the Prescription and Limitation (Scotland) Act 1973. The limitation periods that it sets out are the product of the judgement of the legislature as to where the interests of justice lie in the case of delayed claims in the civil courts. Breaches of the criminal law are, except in the case of those that are to be prosecuted summarily, not normally subject to any time limits. But in the case of civil justice the position is different. It has been observed repeatedly that where there is delay the quality of justice diminishes. Witnesses may have died, memories may have become dimmed and relevant documents may have been destroyed or lost. As time goes on these effects may become less easy to detect, and this in itself is apt to produce injustice. Times change too, and conduct which may seem reprehensible today may have been regarded as acceptable or even as normal many years ago. So, as McHugh J said in *Brisbane South Regional Health Authority v Taylor*
- [1996] 186 CLR 541, 553, the public interest requires disputes to be settled as quickly as possible. A judgment has been made by the legislature where the balance lies between the demands of justice and the general welfare of society. The responsibility of the courts is to give effect to that judgment."

- [34] Later in his opinion (at para 25) Lord Hope again cited McHugh J and approved his view that "it seems more in accord with the legislative policy that the pursuer's lost right should not be revived than that the defender should have a spent liability reimposed on him." Lord Hope continued by stating that "proof that the defender will be exposed to the real possibility of significant prejudice will usually determine the issue in his favour. This is a question of degree for the judge by whom the discretion under section 19A is to be exercised" (*ibid*).
- [35] The burden of satisfying the court rests on the pursuer: Johnston Prescription and Limitation para.12.04. Although the discretion is unqualified, it must be exercised within certain limits: In Donald v Rutherford 1984 SLT 70, 75, Lord Cameron stated: "The language of s. 19A, in my opinion, plainly carries the implication that it is for the pursuer in such a time-barred action to satisfy the court of the equity of his claim to be allowed to proceed, and consequently for the court to proceed from that point of departure. At the same time equity requires that an equitable decision should be one which proceeds on a fair balancing of the interests and conduct of the parties and their advisers, as well as the nature and circumstances and prospects of success in pursuit of the time-barred claim itself. But the attention to be paid and the weight to be given to these various considerations are for the court vested in this jurisdiction, as well as the balancing of the degree of prejudice which either party may be expected to suffer according as the court decides."
- [36] Lord Ross stated that no one factor is conclusive and "the broad question is - where do the equities lie": Anderson v City of Glasgow District Council SLT 279, 287J-K. The Factors Conduct of the pursuer and her representatives
- [37] There is nothing in the pursuer's conduct that has led to the delay in raising the present action. But that is not the end of the matter. Even if no personal blame attaches to a party "he is answerable for the acts of his agents": Donald per Lord Cameron at p 77. For this purpose the solicitor is the pursuer's "alter ego": *ibid* per Lord Dunpark at p 78. Lord Justice Clerk Wheatley put the matter this way: "the pursuer in such circumstances has to accept responsibility for the sins of omission or commission of his agent - his solicitor": Forsyth v A F Stoddard & Co Ltd 1985 SLT 51, 54. Counsel do not act as agents. They have a different role. In this context, however, I see no reason to distinguish between solicitors and counsel. They both act as the legal representatives of the pursuer . It would be very odd if a court reached a different result, depending on whether or not a party instructed counsel.
- [38] In my view, there was ample opportunity to plead a relevant and specific case on behalf of the pursuer. Prior to the debate, there were extensive periods of adjustment and amendment. From March 2006, the pursuer's legal representatives knew that substantial criticisms were to be levelled at her pleadings. But no revision was proposed until the eve of the debate. It is reasonable to infer that during the course of the debate itself, senior counsel for the pursuer realised that the action was in jeopardy. That is why he wished to discharge the continued hearing and why he invited Lord McEwan to put the case out By Order after he issued his opinion.

- [39] When Lord McEwan issued his decision in August 2007, the pursuer's position was stark. One would have expected early and earnest scrutiny of the pleading problems. But yet again nothing happened until close to the summar roll hearing. In my view, the Inner House would have been much more likely to be receptive to a relevant amendment lodged shortly after Lord McEwan's decision. The position was naturally different at the point where the minute of amendment was actually lodged. By then the case had been in the Inner House for about a year. If granted, it would almost inevitably have led to a discharge of the summar roll hearing.
- [40] In addition the first minute only dealt with medical issues. It did not address the criticisms levelled at the merits. That seems to have been a major factor in its refusal. The second minute drafted by Miss O'Brien effectively rewrote the pursuer's case. During the course of cross-examination, Mr Carr accepted that the pleading defects were obvious.
- [41] The late diagnosis of compartment syndrome and intersection syndrome does not affect matters. In the joint minute lodged at the commencement of the preliminary proof, the parties agreed: 1. "That Compartment Syndrome and Intersection Syndrome with which the pursuer was diagnosed in 2008 have at all material times fallen within the umbrella term Work Related Upper Limb Disorder. 2. That the absence of the diagnoses of Compartment Syndrome and Intersection Syndrome, which were not made until 2008, would not have prevented the pursuer from relevantly stating a claim for damages for the claimed injuries to her upper limbs caused by her working conditions in her employment with the defenders."
- [42] In my view, that concession was properly made by counsel in this action. Shortly before the first action was raised, the Court of Appeal in England held that an upper limb claim could be made without a precise diagnosis: *Alexander v Midland Bank plc*
- [2000] ICR 464 . Other cases illustrate the same approach. In *Gallagher v Bond Pearce* 2001 WL 1135197, HH Judge Tyzack found in favour of the claimant on the basis that she suffered from a form of WRULD, despite there being "ongoing debate in the medical world" about the condition. Another later example is *Goodwin v Bennetts UK Ltd*
- [2008] EWCA 1374.
- [43] Mr Anderson was careful in his choice of language. He said that the pursuer was not well served in this case by a number of professionals and that the original counsel did not cover themselves in glory. I agree. In my opinion, the reason for section 19A being invoked arises to a material degree out of the conduct of the pursuer's legal representatives. I should add that there was nothing in the conduct of the defenders which occasioned delay. It was perfectly proper for them to oppose the pursuer's applications for legal aid. Prospects of success in this action

- [44] What are the prospects of success in the present action? Mr Anderson invited me to conclude that there is a convincing case. He relied on the fact that the medical experts for both parties now all arrive at the same diagnosis. In June 2011 the pursuer was examined on behalf of the defenders by Mr Oliver, consultant orthopaedic surgeon. He referred to "an extremely complicated case due to multiple treatments and the passage of time". He agreed with Dr Hutson's diagnosis of compartmental syndrome and intersection syndrome in both forearms, although he also mentioned tenosynovitis/peritendinitis crepitans in both wrists and dependence on pain medication. Mr Oliver commented that "if she had not seen true experts in this area, the diagnosis would not have been made".
- [45] While I accept that there is a prima facie case, in my opinion that is all that can be said at this stage. It is not possible for me to come to a view on the merits. The pursuer has not given evidence, so it is not known what facts will be held proved. The defenders contest all aspects of the claim. In particular Dr Graveling states that in his opinion: "not only was it not foreseeable that the work of the pursuer would have caused her to develop the compartment syndrome but the work of the pursuer offers, in my opinion, no causal pathway at all" (para 5.4.5 of his report). He makes the same point about intersection syndrome (paras 5.5.6 and 6.8). Alternative remedy
- [46] The existence of an alternative remedy is a matter of great importance: *Anderson v City of Glasgow District Council* 1987 SLT 279, 287J-K. In earlier cases, the court has been strongly influenced where a pursuer has had a strong chance of success against his former solicitor. In *Williams v Forth Valley HB* the claim was described as "almost certain of success" 1983 SLT 376, 377. In *Whyte v Walker* 1983 SLT 441 counsel for the pursuer conceded that he had "a cast iron case against his solicitors" (at p 443). In *Donald v Rutherford* Lord Cameron said "I find it difficult to see what defence the solicitors could make" (at p 77), while Lord Dunpark stated "I cannot envisage any valid defence to such a claim" (at p 78).
- [47] Mr. Anderson said the protective action could not be described as a cast iron case. It involved certain difficulties, mainly because it was drafted against counsel and he did not know what line of defence would be taken. He also submitted that the issues on the merits would be better ventilated against the original defenders. He mentioned that the legally position was uncertain.
- [48] By contrast Mr Ellis submitted that there is a reasonably good chance of success against one or other or all of the pursuer's original advisers. He pointed out that there is no theoretical difficulty in suing counsel and that it is not essential to have expert evidence of another advocate, although it may be preferable to do so: *Moy v Pettman Smith*
- [2005] 1 WLR 581 at para 19 per Lord Hope and at para 26 per Lady Hale. Mr Ellis accepts that the pursuer may have to run both branches of her claim, but said that it is common for parties to reach agreement about the chances of success in the original action.

- [48] I acknowledge that such an action might be unwieldy. The pleadings would have to cover both professional negligence and the claim against the defenders. However, in my view the pursuer has a prima facie case against her former legal advisors. With regard to funding, the Board has only refused the application on the ground of prematurity. It seems likely that she will be able to show probable cause and if she satisfies the financial criteria, it would be surprising if legal aid was refused. Prejudice to the defenders
- [49] In my view if I allow the action to proceed, the defenders will suffer prejudice. First, there is the question of expenses. In the original action, their costs totalled £43,300, which were irrecoverable. There are also the expenses of the current action. To date they have been significant. If the action is allowed to proceed, the defenders will face further expense in fighting what are essentially the same allegations. They have no realistic prospect of recovery from the pursuer, even if they are successful.
- [50] Secondly there is the question of the quality of the evidence. The present action comes six years after the expiry of the triennium. Mr Ellis submitted that the fine detail relating to the pursuer's tasks may be critical to both foreseeability and causation. The factual matrix was critical to the ergonomists' evidence. He contended that the longer the period between the events and the testimony, the more likely that a person's memory would diminish. He suggested that it would not hamper both sides equally. The pursuer has lived and thought about her case throughout those years. By contrast Mrs Elland, who replaced the pursuer in her job with the defenders, said that her memory has been affected by the delay. She said that she only had a vague memory of the details of the tasks she undertook.
- [51] I agree with Mr Anderson that certain factors mitigate the risk of degradation of the quality of the evidence. Medical evidence was recovered by both sides during the course of the tribunal proceedings. After the action was raised in 2003, the defenders arranged the following: (a) a video of the workplace, (b) for Dr Graveling to take statements from fellow operatives, and (c) for Mr Semple to examine the pursuer. Further, during the course of her work with the defenders, the pursuer completed eight "lab books". They were meticulously kept and have been subject to detailed analysis by Dr Graveling. However, he said that it was very important to know exactly how the work was done and that the lab books don't give a real insight into this question. Professor Buckle agreed with that proposition. Dr Graveling believes that the difference in their respective opinions extends from the description of the tasks provided to each of them. Accordingly, it is not possible to arrive at a final view of the risk of deterioration of the quality of the evidence.
- [52] The third factor under this head is in my view the most important. In a standard section 19A case, the court recognises that the consequence of the exercise of its discretion will be that one of the parties will suffer prejudice. If it finds against the pursuer, he will lose his right of action. But if it does exercise its discretion, the defender will lose its complete defence to the action. These two factors are normally taken to cancel each other out. Here, however, the pursuer has had a full opportunity to establish her claim. She had the benefit of full legal representation. In my view that places her in a different category from someone who has

never had the chance to vindicate his or her right. There is the potential for the scope of section 19A to be widely expanded if a pursuer can say it was wrongly framed first time round.

- [53] A losing party will often speculate whether his case would have had a different outcome if one of the variables had been altered. Suppose he identifies a material witness after the final decision. Normally that makes no difference. The law requires finality. Any attempt to "re-litigate" a case will be met with the plea of res judicata .

Conclusion

- [54] In my view taking these factors cumulatively, the equities lie with the defenders. To allow the action to proceed would be to grant the pursuer a second bite of the cherry. I shall therefore refuse this application. I wish to record my thanks to counsel on both sides for the helpful and expeditious manner in which they conducted this case. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/scot/cases/ScotCS/2013/2013CSOH17.html>

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Prepared on 28 October 2026 · Esheria