

SCOTLAND / JUDGMENT

# E.A., AGAINST G.N. [2015]

## ScotCS CSIH\_26 (07 April 2015)

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[2015] CSIH 26 [ New search ] [ Help ] EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2015] CSIH 26 A677/04 Lord Menzies Lord Brodie Lady Dorrian OPINION OF THE COURT delivered by LADY DORRIAN in the cause by E A Pursuer and respondent ; against G N Defender and reclaimer : Defender and reclaimer: Hanretty QC, Ennis; Aitken Nairn WS Pursuer and respondent: Gale QC, Barne; Drummond Miller LLP 7 April 2015

- [1] In this action the pursuer and respondent sought reparation for loss, injury and damage as a result of sexual “abuse” by her uncle, the defender and reclaimer. The reclaimer denied liability and averred that the action was time-barred. The respondent relied upon section 19A of the Prescription and Limitation (Scotland) Act 1973 (“the 1973 Act”), claiming that although the limitation period had passed it was nevertheless equitable to allow her claim to proceed. The allegation was that the reclaimer had inflicted upon the respondent a serious course of sexual abuse from the age of seven, which became penetrative when she was 10, and which continued until she was 30, in 1997, at which point, according to her pleadings, she “was able finally to break away from the control of the defender and bring an end to sexual relations between them”. Her sixteenth birthday had been on 10 December 1983. In the face of competing arguments as to the date upon which the claim became time-barred, the Lord Ordinary proceeded on the basis of the earliest date, namely December 1986. Having heard the evidence the Lord Ordinary decided that it was equitable to allow the respondent to bring and proceed with the action, though time-barred; that the respondent was entitled to reparation in respect of a period up to her sixteenth birthday, but that he was not satisfied that a delict extending beyond that date had been established; and that damages should be awarded in the sum of £70,000.

- [2] The defender has reclaimed against that decision, and the pursuer has lodged a cross-appeal. Submissions for reclaimer
- [3] The grounds of appeal for the defender and reclaimer are that in allowing the case to proceed under section 19A, the Lord Ordinary erred (i) in concluding that the nature of the delict itself was a factor to take into account in deciding whether to allow to proceed; (ii) in taking into account his view that the reclaimer had exploited the respondent, since, having found that the exploitation continued only until 1997, the Lord Ordinary could not rely on the exploitation in explanation of any delay after that date; (iii) in concluding that a claim against the respondent's former solicitors was "fraught" with difficulty; and (iv) in concluding that the action was raised expeditiously once the respondent had consulted her present solicitors. The third of these was factually incorrect and it was not insisted upon. It was accepted that in considering his discretion under section 19A the Lord Ordinary would have been entitled to take into account the consequences of the reclaimer's behaviour, and its effect upon the respondent. However, it was argued that what the Lord Ordinary did was take into account as a factor in itself the fact that the delict was one of a particularly morally repugnant kind.
- [4] The grounds of appeal also asserted that the Lord Ordinary erred in his consideration of a number of factors which demonstrably operated against the exercise of a section 19 discretion in favour of the respondent. The nature of the alleged error is not identified in the grounds of appeal, but it was suggested in the note of argument that the error consisted of a complete failure to consider these factors. These were, in short, that she had disclosed conduct to several people on several occasions; that she perjured herself at trial (it transpired that this was not a fact; rather it was a submission made by counsel); that in certain aspects her evidence was evasive and unsatisfactory; that she lied to an expert instructed on her behalf; that she sold her story to the press; the evidence regarding the respondent's familiarity with legal proceedings in other contexts. Submissions for the respondent
- [5] In answer the respondent maintained that: (i) the Lord Ordinary was entitled to take into account the nature of the delict; (ii) the exploitation was relevant also to the question of whether the respondent would have been able to take proceedings within three years of 1997; (iii) that the Lord Ordinary was entitled to conclude that the action had been raised expeditiously; and (iv) that the Lord Ordinary did not fail to consider any relevant factor. The respondent's cross-reclaiming motion related to the Lord Ordinary's finding in favour of the respondent only up to the age of 16. The conduct engaged in by the reclaimer, and the nature of the relationship which the respondent had with him was one in which the consent was an accepted part of the relationship by both parties, but it was important to recognise that it came about because of the feelings that the reclaimer engendered in the respondent, and but for that would not otherwise have come about. It was submitted that (i) there had been one single course of delictual conduct throughout; (ii) any "consent" after the age of 16 was vitiated because of the extent to which the respondent had become habituated to the

abuse from a young age, her emotional dependence on the claimer, and the control exercised by him; and (iii) the Lord Ordinary erred in finding that the respondent had not shown a causal connection between the conduct towards her prior to the age of 16 and conduct after she reached that age.

- [6] Having accepted the evidence of expert witnesses to the effect that the abuse perpetrated against her when she was a child had resulted in the respondent suffering a severe limitation of functioning, that she had been exploited by him as an adult and that she had difficulties in the areas of social perception and interaction, it was illogical and perverse for the Lord Ordinary not to find that any apparent consent on the part of the respondent was vitiated. Answer to cross-reclaiming motion
- [7] The claimer's answer to the cross appeal was that the Lord Ordinary had been entitled on the evidence to reach the conclusion which he did, taking into account his assessment of the respondent as a "not wholly satisfactory" witness. The nature of any delictual wrong alleged by the respondent after her sixteenth birthday, in circumstances in which she did not maintain an absence of consent, or an inability to do so, was obscure. Decision Reclaiming Motion
- [8] We are not persuaded by the claimer's argument that the nature of a delict can never be a relevant factor in considering the exercise of discretion under section 19A. However, we need make no further comment on the matter because we are satisfied that the Lord Ordinary did not in fact take this into account as a factor per se, as opposed to taking account of the effect of the delict. The claimer's argument to the contrary relied in particular on paragraphs 158 and 164 of the Lord Ordinary's opinion. Paragraph 164 occurs in the Lord Ordinary's consideration of whether other remedies might be open to the respondent and all that can be taken from it is that the Lord Ordinary considered it preferable for the perpetrator of a delict such as this to be held responsible for his actions, rather than a third party, and that this was a relevant factor for his consideration.
- [9] In paragraph 158, the Lord Ordinary does indeed refer to the conduct as reprehensible, but that is a precursor to his setting out the core elements of the abuse with a view to explaining the consequence thereof, and the effect the conduct had upon the respondent as a child. He concludes the paragraph by saying: "The defender preyed on the pursuer's vulnerability. He sexualised the pursuer when she was still a young child. She became habituated to his sexual conduct and emotionally dependent on him." It is reasonably clear that what the Lord Ordinary is reflecting as a relevant factor is not the reprehensible nature of the conduct per se, but the effect of the conduct in making the respondent sexualised, habituated to his sexual conduct and emotionally dependent on him, all at a time when she was only a child. It is nothing to the point that time would not be running against the respondent whilst she was a child: the effects on her during childhood are capable of explaining her actions, or lack of them, as she grew older.

- [10] Having considered the effect of the conduct on the respondent as a child, the Lord Ordinary went on in paragraph 159 to consider the effect on her as an adult. He considered that as an adult the respondent was exploited by the reclaimer, that he produced a state akin to dependency and used controlling behaviour which was liable to confuse and perplex. He traumatised her by his conduct. It is made clear within the paragraph that the Lord Ordinary recognises that this exploitation ceased in 1997. It was suggested that the Lord Ordinary could have no regard to the effect of exploitation in consideration of any period of delay after 1997. We disagree with that submission. The fact that she had become emotionally dependent upon the reclaimer as a child, and that he continued to exploit her throughout her adult life are both factors which may be relevant to explain the delay in raising proceedings. The Lord Ordinary went on to examine the respondent's dealing with lawyers, all of which occurred after 1997, and concluded that the first person to tell her in any meaningful way that she had a possible right of action was the solicitor she instructed in 2003. There was evidence from the solicitor about the actions he took thereafter upon which the Lord Ordinary was entitled to conclude that the action was raised expeditiously. The Lord Ordinary accepted expert evidence which indicated that the respondent has suffered a severe limitation of functioning as a result of childhood sexual abuse. He also accepted evidence that she has difficulties in the areas of social perception and social interaction.
- [11] The factors which the reclaimer alleges the Lord Ordinary did not take into account are referred to in the reclaimer's third ground of appeal. Examination of the Lord Ordinary's opinion indicates that he did take these factors into account. He has recorded in full a timeline supplied by and relied upon by the reclaimer, in which, for example, the occasions upon which the respondent had made disclosures of abuse to various individuals, her dealings with lawyers in various circumstances, and the selling of her story to the press, are all highlighted. The assertion by counsel that the respondent had committed perjury was specifically noted by the Lord Ordinary, under reference to the passages of evidence referred to. The shortcomings of the respondent as a witness were dealt with by the Lord Ordinary at paragraph 129 of his opinion as follows: "The pursuer was subjected to skilful, robust and rigorous cross-examination by Mr Hanretty as can be seen from the transcripts of her evidence and from factors highlighted in the timeline for the defender. However, in my opinion, the pursuer came through cross-examination relatively unscathed in relation to what happened to her when she was a child. It was accepted by the pursuer's counsel that there were a number of issues highlighted in cross examination in respect of which the pursuer's evidence was "not wholly satisfactory". That is an understatement. There were some serious concerns expressed by Mr Hanretty about the pursuer's credibility and reliability. The pursuer lied to Dr Crean. There were also inconsistencies in the pursuer's evidence (some described as "chalk and cheese") and she was at best a poor historian. Those criticisms, however, did not detract materially from the pursuer's clear evidence to the effect that the defender had carried out the sexual acts referred to by the pursuer when she was a child." It is clear that in making his assessment, the Lord Ordinary has taken account of the deficiencies of the respondent as a witness. Nevertheless, so far as her evidence relating to

what happened to her as child is concerned, the Lord Ordinary was satisfied that she was credible and reliable. I should emphasise, since it is a matter of some relevance to the cross-appeal, that the Lord Ordinary is making it very clear indeed that his certification of the respondent as credible and reliable is restricted to the evidence she gave in respect of what happened to her as a child. In the passage we have just quoted he makes this clear on two occasions. The point was made by him in terms in paragraph 128: “Clearly the pursuer was [an] essential witness in the case. In order to succeed to any extent the pursuer required to satisfy me that her evidence, so far as material, was both credible and reliable. Having seen and heard the witnesses, I was so satisfied in relation to events while the pursuer was a child and the consequences thereof. “ and again in paragraph 133: “I accept the pursuer’s evidence about what happened to her as a child - as contained in the transcript of her evidence.” He found the reclaimer to be arrogant and unconvincing, lacking in both credibility and reliability. However in paragraph 131 he records that: “In sharp contrast, I accepted and preferred the evidence of pursuer and her younger sister (AN) in relation to the defender’s offending while they were children. The pursuer’s account has been consistent over the years. Her evidence gains support from her sister. The evidence of those two witnesses was destructive of the defender’s case on the merits.” Contrary to what is asserted in the grounds of appeal, the Lord Ordinary was careful to address all factors which might weigh in his consideration of the discretion available to him under section 19A, whether they were factors in favour of allowing the action to proceed, or against it. Cross reclaiming motion

- [12] The respondent’s central contention is that there was one course of action which was delictual throughout. The note of argument states that “The defender’s conduct after the pursuer reached the age of 16, which was, in all material respects, the same as that which occurred before her 16<sup>th</sup> birthday, demonstrated sufficient culpa for it to be delictual.” It was argued that the respondent’s apparent consent was not true consent, being “brought about by an abuse by the defender of his relationship with the pursuer and the control he exercised over her”. These factors created a causal connection between the abuse as a child and what happened when the respondent was an adult, and the Lord Ordinary’s conclusion to the contrary was wrong.
- [13] Before examining the matter further, it is necessary to say a little more about the actual findings of the Lord Ordinary. Having made the findings in relation to credibility which we have just mentioned, he was satisfied that the respondent had suffered loss, injury and damage as a result of the reclaimer’s conduct towards her as a child. He noted that actings of this sort against a child are unlawful and clearly delictual. However, for the period after December 1983 the situation was different, and it was in this regard that the respondent faced what the Lord Ordinary referred to as “...evidential difficulties”. Whilst accepting (paragraph 137) that: “There may well be other cases where a defender’s liability for sexual conduct towards a child continues into later adult years, and can be shown to give rise to civil liability based on analogy with “seduction”. I do not exclude the possibility of such an argument succeeding in a suitable case in the future.” the Lord Ordinary nevertheless

concluded that “I was not satisfied that a basis for such a case had been proved in the present case. There were too many uncertainties and imponderables.”

- [14] The Lord Ordinary was not satisfied that there was no free agreement on the part of the respondent when she was an adult. She had not established a causal link between the actionable abuse as a child and subsequent actions involving her as an adult sufficient to establish delictual liability for the latter. These were central matters upon which the respondent’s claim for the period after 1983 rested, and she required to prove them. She failed to do so. As the Lord Ordinary put it (paragraph 139) “...her claim in respect of later acts of alleged sexual abuse has not been proved”. That this was a situation where the respondent had failed to prove her case was repeated at paragraph 148: “It was for the pursuer to establish her case based on a continuing “act or omission” or on analogy with “seduction” and she failed to do so. However, the factors relied upon by the pursuer in support of those arguments may also be relevant to the question of time bar and the exercise of my discretion.” He had already noted that these matters may have a bearing on the question of time-bar (paragraph 138): “Questions of sexualisation, habituation to sexual conduct, vulnerability, emotional dependency on the perpetrator, and controlling behaviour may however have a bearing on the question of time bar – but that is a different issue (which I will deal with below).”
- [15] Clearly, these matters may have a bearing on the reasons for any delay in prosecuting a claim, and the Lord Ordinary proceeded to consider them in that context. It was his consideration of them in that context which led to the submission for the respondent that there was an illogicality in the findings made in paragraph 158 and 159, to which we have referred above, and the Lord Ordinary’s conclusion that the respondent had nevertheless failed to establish her case on the merits in relation to any period after 1983, when she continued to be exploited and emotionally dependent upon the reclamer. We do not agree that there is necessarily any illogicality in this approach. It is not illogical for the Lord Ordinary to consider these matters in relation to the merits, and to conclude, on the basis of all the evidence, there was a degree of exploitation and dependence, which remained relevant to delay, but that he was not satisfied that it was of such a degree and type that it had procured consent to sexual intercourse where otherwise none would have been given.
- [16] Effectively the conclusions of the Lord Ordinary were that (i) the nature of a delict, and the fact of its commission, is easy to see and identify re a child; (ii) not so with an adult, where different considerations may arise; (iii) one of those may be consent, and the argument was that any consent was vitiated as having been procured by exploitation and dependence in circumstances which were wrongful; (iv) that whilst accepting there was emotional dependence created when the respondent was a child; and that there was exploitation when she was an adult, he was not on the evidence persuaded that it was of such a degree and effect that it vitiated what was apparent consent, but that it might nevertheless remain relevant to the question of delay for the purposes of section 19A.

- [17] It is important to bear in mind that when the Lord Ordinary made his observations in paragraph 158 and 159, he was no longer concerned with the merits, which had already been determined. He was dealing purely with the extent to which exploitation and dependence might be relevant to delay. It is inappropriate to take those observations out of context and seek to apply them to a consideration of the merits of the action.
- [18] In the course of the hearing, senior counsel for the respondent acknowledged that the nature of the abuse suffered by the respondent in childhood differed in a “nuanced” or “subtle” way from the delict she was alleging as an adult. Nevertheless he maintained that the evidence of exploitation and dependency was sufficient to render delictual the reclaimer’s conduct after December 1983.
- [19] Counsel referred us to various passages in the evidence of expert witnesses who spoke to the effect of child sexual abuse which was continued into adulthood, indicating that those caught up in such abuse tend to feel they cannot break away from it, that the situation has become outwith their control, that an interdependency tends to develop the younger the abuse begins, and that the abused person, having become used to the abnormal as normal, starts to identify not only negative elements of the relationship but positive aspects of it. Several passages were highlighted, indicating the ambivalence often felt by those who have been subjected to this kind of abuse, and the way in which they accustom themselves to “lock away all the negatives”.
- [20] However, in none of the passages to which we were referred were any of the experts asked about the effects of abuse, their diagnosis of PTSD, matters relating to delayed disclosure, the delay in raising an action and the respondent’s ability to do so: they were not asked about the potential effect on consent of prior abuse as a child, the effect on any ability to give consent, or the potential effect on understanding of what it means to consent.
- [21] This is perhaps not so surprising when one looks at the way in which the respondent’s claim is presented in the pleadings, in which no distinction is made between that aspect of the claim which relates to the period prior to 1983 and that which relates to the period after 1983. In art III of condescendence it is averred that the reclaimer “began sexually abusing” the respondent when she was about seven years old. Some specification of the nature of the abuse, only too familiar to the courts, is given. It is then averred that “The sexual abuse continued.....until approximately 1997.” The averments about the respondent becoming habituated “to the defender and the sexual abuse perpetrated by him” appear in art VI. The averments of loss relate simply to “the sexual abuse”.
- [22] There is therefore, in the pleadings, no recognition of the difference, nuanced or otherwise, between the delict of sexual abuse of a child and any claim for delict based upon an allegation of wrongful sexual conduct against an adult.
- [23] We accept that there is in the law of Scotland no defined list of named delicts. We can understand that where a severe and systematic campaign of abuse had been perpetrated against a child it may have the consequence that any consent to sexual activity given by that

person as an adult to the perpetrator of the earlier abuse is not in fact free and voluntary consent, and has in fact been procured by the perpetrator deliberately exploiting the control, dependency and habituation which had been established by his earlier wrongful conduct. However, before a court would be entitled to conclude that apparently consensual activity between such parties was not in fact consensual there would require to be evidence about the way in which the earlier abuse might impact upon the question of subsequent consent, or a pursuer's understanding of what consent means, not simply evidence that there was exploitation and dependence. Moreover, there would require to be evidence that the defender was aware of, and utilised to his benefit, the dependence and control, to procure consent in circumstances in which it would otherwise have been withheld. In the present case, the Lord Ordinary was not satisfied that the evidence established either the degree of control nor the degree of calculation on the part of the reclaimer sufficient to a causal connection between the earlier abuse and the respondent's consent to subsequent sexual activity as an adult. It should be remembered that the Lord Ordinary had to make his decision on all the evidence before him, and that he clearly had serious reservations over the credibility and reliability of the respondent in respect of those actings which constituted her claim after December 1983. Unless these matters can be established to the satisfaction of the court it cannot be shown that apparently consenting sexual activity between adults is delictual. This is in sharp contrast to the position relating to sexual abuse of children. As Lord Drummond Young put it in *B v Murray* 2005 SLT 982 paragraph 41 "Sexual contact with children is always wrong, and always has been. No qualification of that statement is necessary, or indeed possible. Consequently the only question is whether such contact occurred; if it did, there is a civil wrong, and the only questions are the extent of the consequences of the wrong and the assessment of appropriate compensation." In the present case, this distinction was recognised by the Lord Ordinary at paragraph 148 where he noted that: "I accept that there is a certain artificiality in drawing a line at a particular date but in a case of this nature that is inevitable. The duties owed to a child under 16 are more onerous and compelling and properly so. It was for the pursuer to establish her case based on a continuing 'act or omission' or on analogy with 'seduction' and she failed to do so. However, the factors relied upon by the pursuer in support of those arguments may also be relevant to the question of time bar and the exercise of my discretion." The nature of a claim based on conduct against a child and one based on conduct against an adult is so different that they must be viewed as separate claims, even though there may be an evidential link between one and the other, and the drawing of a line at December 1983 is not only logical, but necessary in a case where the delictual nature of any activity against the respondent after that date has not been established.

- [24] The discretion conferred upon the Lord Ordinary by section 19A is an unfettered one. The test for this court in considering whether to interfere with an exercise of discretion is well-known: "[T]his House would not overrule the discretion of a lower court merely because we might think that we would have exercised it differently.... We might do so if some irrelevant factor had been taken into account, or some important relevant factor left out of account, or

if the decision was unreasonable, and we would not doubt do so if the decision could be said to be unjustified.” ( Thomson v Glasgow Corporation 1962 SC (HL) 36 Lord Reid, page 66

[25] The test to be applied before an appellate court can properly interfere with the determination of fact by a lower court is equally stringent. ( Thomas v Thomas 1947 SC (HL) 45; McGraddie v McGraddie 2014 SC (UKSC) 12 )

[26] In this case, the Lord Ordinary exercised the discretion which was open to him after determining the facts which bore upon the exercise of that discretion. We can find no error in the approach of the Lord Ordinary and we shall therefore refuse both the reclaiming motion and the cross-reclaiming motion. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/scot/cases/ScotCS/2015/2015CSIH26.html>

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