OUTER HOUSE, COURT OF SESSION

[2018] CSOH 37

A200/07

OPINION OF LORD TYRE

In the cause

BRIAN ALEXANDER GRACIE (AP)

Pursuer

against

CITY OF EDINBURGH COUNCIL

Defender

Pursuer: Grahame QC, L Thomson; Thorley Stephenson SSC
Defender: N Mackenzie; City of Edinburgh Council, Legal Services Division

10 April 2018

Introduction

[1] The pursuer is aged 58. In this action he avers that on about 19 May 1965, when he was five years old and a pupil at Sciennes Primary School, Edinburgh, he suffered serious injury when he ran out through the school gates and was struck by a motor vehicle. The pursuer has no recollection of the accident. He claims that it was caused by the fault of the defender's employees, the staff of the school, who allowed children to play in the playground unsupervised and failed to keep the school gates closed. He avers that he sustained head injuries that had life-changing adverse effects on his personality. The sum sued for is £650,000.

[2] The present action was raised in 1997 in Edinburgh Sheriff Court. There was a lengthy sist to enable the pursuer to apply for legal aid, following which a specification of documents was approved for recovery of the pursuer's medical records. Nothing further happened for almost ten years. On 9 March 2007 the case was remitted to the Court of Session and the defenders were appointed to lodge defences. Adjustments were made to the pursuer's pleadings and further attempts were made to recover medical records. Legal aid was subsequently withdrawn, and in October 2007, the pursuer's agents withdrew from acting. The case was sisted on 16 November 2007.

[3] Nothing then happened in the court proceedings for a further ten years. The pursuer made sporadic attempts to obtain legal representation, without success until about 2015. An affidavit was obtained from the pursuer's mother. In June 2017 a draft minute of amendment was intimated to the defender. The minute includes averments addressing the issue of whether the court should exercise its discretion in terms of section 19A of the Prescription and Limitation (Scotland) Act 1973 to allow the action to proceed. On 20 February 2018 I heard a motion to allow the minute of amendment to be received and to allow the record to be amended in terms thereof. The motion was opposed by the defender on the ground that the action was time-barred. It was a matter of agreement between parties that it was appropriate to deal with the time bar issue at the stage of receipt of the proposed minute of amendment.

The proposed amendment

[4] The minute of amendment seeks to add an averment that "the normal practice of the school was to lock the school gates after 9 am after the children arrived for class". Otherwise, it contains (i) detailed averments relevant to causation and quantum of damages;

and (ii) a lengthy account of the difficulties that the pursuer has experienced in progressing the present action, including problems encountered in obtaining expert support on causation. Very little of this relates to the period prior to the pursuer's 21st birthday in 1980 when the action became time-barred in terms of section 17 of the 1973 Act. It is not contended that the pursuer lacked legal capacity at any time after he reached full age. So far as the period prior to 1980 is concerned, all that is said in the current pleadings is that

> "The pursuer was unaware of this accident until June 1994. After he had been released from his last prison sentence the pursuer started investigating his past and it was only following those investigations that a relative informed him of the accident."

To these averments it is proposed to add:

> "He spoke to his mother. He asked her why he was different from his brother and sister. She believed it was for the best not to tell the pursuer about the accident. His family hid the accident from the pursuer. They were reluctant to tell him about it until around 1994…"

[5] The current pleadings contain no averments explaining, pursuant to section 19A, why it would be equitable to allow the action to proceed. I understood it to be accepted by the pursuer that if receipt of a minute of amendment inserting such averments were to be refused, the action could not continue.

Argument for the pursuer

[6] On behalf of the pursuer, it was submitted that the court, in exercise of its discretion, should allow the action to proceed. The pursuer now had two expert opinions supporting, on the balance of probabilities, his case on causation. Refusals of legal aid had been on the ground of time bar; the pursuer was now represented without the need for legal aid. The pursuer had attempted over many years to investigate the circumstances of his accident, which had blighted his life and continued to be a source of anxiety and distress. This had

proved very difficult: neither the driver of the vehicle nor any of the school staff could be traced. No contemporaneous report existed. The only evidence available came from the pursuer's mother, who was told of the occurrence of the accident by a female member of staff whose identity is unknown. In the interests of justice, the claim should be allowed to proceed.

Argument for the defender

[7] On behalf of the defender it was submitted that the court should not exercise its discretion under section 19A to allow the action to proceed, and that receipt of the minute should be refused. In the first place, no satisfactory explanation had been provided as to why the action had not been raised timeously. The pursuer required to focus on the period prior to expiry of the triennium in 1980 rather than on difficulties encountered more recently, long after expiry. The explanation that family members were reluctant to tell him about the accident sat uneasily with the pursuer's averments of personality change during childhood caused by his injury. In the second place, there would be serious prejudice to the defender in allowing the action to proceed. The accident occurred more than 50 years ago when safety practices were very different. There was almost no evidence of what happened, and no way of knowing what evidence had been lost over the years. Even when the action was first raised in 1997 it had been impossible to investigate because more than 30 years had passed. The defender and its current taxpayers and ratepayers should not be put to the expense of defending a very large claim arising out of events so long ago. Reference was made to the opinion of the Lord Ordinary (Drummond Young) in *B* v *Murray (No 2)* 2005 SLT 982 (affd 2008 SC (HL) 146), and in particular to passages cited therein from the judgment of McHugh J in the High Court of Australia in *Brisbane Regional Health Authority* v

Taylor [1996] 186 CLR 541. There had, moreover, been a failure to prosecute the action after it had been raised.

Decision

[8] Like Lord Drummond Young, I have derived considerable assistance from the passage cited by him from the judgment of McHugh J in *Brisbane Regional Health Authority* v *Taylor*. The following observations seem to me to be particularly apposite to the circumstances of the present case:

> "The discretion to extend time must be exercised in the context of the rationales for the existence of limitation periods. For nearly 400 years, the policy of the law has been to fix definite time limits… for prosecuting civil claims. The enactment of time limitations has been driven by the general perception that '[w]here there is delay the whole quality of justice deteriorates': *R v Lawrence,* [1982] AC 510 at 517 , per Lord Hailsham of St Marylebone LC. Sometimes the deterioration in quality is palpable, as in the case where a crucial witness is dead or an important document has been destroyed. But sometimes, perhaps more often than we realize, the deterioration in quality is not recognizable even by the parties.
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> Prejudice may exist without the parties or anybody else realizing that it exists. As the United States Supreme Court pointed out in *Barker v Wingo* 407 US 514 at 532 (1972), 'what has been forgotten can rarely be shown'. So, it must often happen that important, perhaps decisive, evidence has disappeared without anybody 'knowing' that it ever existed. Similarly, it must often happen that time will diminish the significance of a known fact or circumstance because its relationship to the cause of action is no longer as apparent as it was when the cause of action arose…
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> The effect of delay on the quality of justice is no doubt one of the most important influences motivating a legislature to enact limitation periods for commencing actions. But it is not the only one. Courts and commentators have perceived four broad rationales for the enactment of limitation periods. First, as time goes by, relevant evidence is likely to be lost. Second, it is oppressive, even 'cruel', to a defendant to allow an action to be brought long after the circumstances which gave rise to it have passed. Third, people should be able to arrange their affairs and utilize their resources on the basis that claims can no longer be made against them. Insurers, public institutions and businesses, particularly limited liability companies, have a significant interest in knowing that they have no liabilities beyond a definite period. As the New South Wales Law Reform Commission has pointed out (Limitation of Actions for Personal Injury Claims (1986) LRC 50, page 3):

> 'The potential defendant is thus able to make the most productive use of his or her resources and the disruptive effect of unsettled claims on commercial intercourse is thereby avoided. To that extent the public interest is also served.'
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> Even where the cause of action relates to personal injuries, it will be often just as unfair to make the shareholders, ratepayers or taxpayers of today ultimately liable for wrongs of the distant past, as it is to refuse a plaintiff the right to reinstate a spent action arising from that wrong. The final rationale for limitation periods is that the public interest requires that disputes be settled as quickly as possible.
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> In enacting limitation periods, legislatures have regard to all these rationales. A limitation period should not be seen therefore as an arbitrary cut off point unrelated to the demands of justice or the general welfare of society. It represents the legislature's judgment that the welfare of society is best served by causes of action being litigated within the limitation period, notwithstanding that the enactment of that period may often result in a good cause of action being defeated…"

I have had regard to these observations when addressing the question whether I should, in the exercise of the discretion conferred upon the court by section 19A, allow an amendment to be made 28 years after expiry of the three-year limitation period imposed by the legislature.

[9] I agree with the defender's submission that in assessing whether it would be equitable to allow the amendment which would have the effect of enabling the action to proceed, it is necessary to focus primarily on the period prior to expiry of the triennium in order to ascertain why the action was not raised timeously. The explanation offered by the pursuer is that his family, and in particular his mother, concealed from him until after the triennium expired that the accident had occurred. I do not regard that as a compelling reason to allow the action to proceed now. Clearly it implies no criticism of the defender. Nor does it explain why the pursuer who, as already mentioned, had full legal capacity during the period when time was running against him, was unable to find out for himself about the accident from the medical practitioners responsible for his care at that time. It is noteworthy that according to the averments in the minute of amendment the pursuer had at

that time already been diagnosed with various mental disorders including dementia due to head trauma, personality change, and closed head injury.

[10] I am also satisfied that if the action were allowed to proceed, the defender would suffer irremediable prejudice. I refer to the observations of McHugh J set out above. It would be impossible for the defender to carry out any realistic investigation of the circumstances of the accident, as indeed it probably already was when the action was raised in 1997. Evidence that would have existed at one time has been lost. Establishing the level of supervision required according to the standards applicable at the time of the accident would be equally problematic. The sum sued for is very large. It is contrary to the public interest to expose the defender and its taxpayers and ratepayers to a liability arising out of a claim which expired without intimation many years ago; the defender has been entitled to order its affairs on the basis that it would not require to meet such a claim. The passage of time since expiry of the triennium has only exacerbated these concerns.

[11] For these reasons I conclude that it would not be equitable to allow the pursuer's pleadings to be amended with a view to enabling the action to proceed. My view is reinforced by a consideration of the pursuer's prospects of succeeding in the action, were it allowed to proceed, which seem to me to be virtually non-existent. The only evidence on the merits would be that of the pursuer's mother, who could speak only to what she was told, some hours after the incident occurred, by an unidentified member of staff. It is not stated that this member of staff witnessed the incident, or that she received her information from someone who witnessed it, or indeed that anybody in the school saw what happened. The driver cannot be traced and it was not suggested that relevant evidence is available from any child present. I find it very hard indeed to see how the pursuer could satisfy the court, on balance of probabilities, that the accident occurred as averred or, if it did, how it came about

that he was able to run on to the road in front of a vehicle, or, if indeed a school gate was left open, whether this occurred in circumstances implying breach by the defender's employees of whatever standard of reasonable care might be found to have been applicable in 1965. The averment which the minute of amendment seeks to insert regarding the normal practice of the school would seem, if established, to make the pursuer's task even more difficult.

[12] For these reasons, the pursuer's motion is refused. As I have said, my understanding is that the action will now fall to be dismissed but I shall put the case out by order to hear parties before pronouncing an interlocutor.