SHERIFFDOM OF LOTHIAN AND BORDERS
IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2022] SC EDIN 29

PIC/PG54/19

JUDGMENT OF SHERIFF K J CAMPBELL QC

in the cause

THOMAS O'GRADY

Pursuer

against

NHS GREATER GLASGOW AND CLYDE

First defender

FORTH VALLEY NHS BOARD

Second defender

NHS LANARKSHIRE

Third defender

and

KILLEARN HEALTH CENTRE

Fourth defender

Pursuer: Beynon, adv, & L Kennedy, adv (Reubens solicitors)
1st Defender: McConnell, adv (NHS Central Legal Office)
3rd Defender: N Mackenzie QC (NHS Central Legal Office)

Edinburgh 5 May 2022

Findings in fact

1. On 25 August 2009, the pursuer was diagnosed with a pituitary tumour. An MRI scan of his pituitary gland was carried out on 12 August 2011.

2. On 28 March 2013, the pursuer attended an endocrine clinic at the Southern General Hospital, Glasgow with Dr Hall. Dr Hall told the pursuer he should be reviewed in clinic in six months' time, and asked him to arrange an appointment. The pursuer did not do so. On

29 May 2013, test results carried out at the Southern General Hospital, Glasgow indicated that the pursuer's pituitary gland was working satisfactorily. On 3 June 2013, Dr Hall wrote to the pursuer advising that he would be reviewed again at clinic later in the year. The pursuer received that letter.

3. On 27 January 2014, the pursuer was reviewed by Dr Williams, Consultant Ophthalmologist for pituitary incidentaloma; there was no evidence of any progressive change or deterioration in his condition.

4. On 24 April 2014, Dr Schmautz at Killearn Health Centre noted that the pursuer remained convinced that he has Lyme disease and has made an appointment at a specialist clinic in Hemel Hempstead.

5. On 9 May 2014, Dr Schmautz noted that the pursuer was not well, aching all over, and had bouts of joint pain. He discussed Lyme disease with the pursuer. He considered on balance the pursuer might benefit from further course of doxycycline as this had previously worked to control symptoms. The pursuer was keen on this and did not wish to go to hospital.

6. On 30 May 2014, Dr Schmautz noted that "all tests back now and apparently positive; I will need to see all the paperwork and recommendation and critically appraise this before making [a] decision what to do next".

7. On 1 July 2014, Dr Schmautz referred the pursuer to the Infectious Disease Centre at Monklands Hospital.

8. On 24 July 2014 Dr Todd, Locum Consultant Physician at Monklands Hospital, wrote to Dr Schmautz at Killearn Health Centre, advising that he had seen the pursuer, taken a history from him, examined him, and identified various investigations (including lumbar

puncture, which the pursuer refused). Dr Todd incorporated the pursuer's routine test results as a PS to the clinic letter on 31 July 2014.

9. On 28 August 2014, Dr Todd wrote to Dr Schmautz advising that he had reviewed the pursuer, who remained on antibiotics, and under review.

10. On 11 September 2014, Dr Todd wrote to Dr Schmautz advising that results from the Rare and Imported Pathogens Laboratory at Porton Down were negative for both Dengue and Chikungunya virus serology. As the pursuer's thyroid tests (both T4 and Thyroid Stimulating Hormone) suggested a non-thyroid illness, Dr Todd considered other possibilities. Although the pursuer was receiving Doxycycline for possible Lyme Disease, Dr Todd thought this diagnosis was doubtful and intended to continue to review the pursuer.

11. On 2 October 2014, Dr Todd wrote to Dr Schmautz giving an update on the pursuer's present symptomatology and advising that, to rule out *inter alia* neurological Lyme Disease, the pursuer ought to have a lumbar puncture.

12. On 7 October 2014, the pursuer failed to attend for Lumbar Puncture, advising that he did not intend to attend Dr Todd's outpatient clinic.

13. On 9 October 2014 Dr Schmautz noted that while the pursuer felt better,

> "unfortunately seems to have fallen out with the [infectious diseases] consultant at [Monklands District General Hospital], apparently because he was rubbishing all results; feels like he does not want to go back there but overall remains positive that most of his symptoms have improved."

14. On 6 November 2014, Dr Todd wrote to Dr Schmautz advising that samples from Porton Down Specialist Virology Unit revealed no evidence of past infection with Dengue or Chikungunya viruses. As the pursuer had not accepted further investigation, he would not be sent further appointments.

15. On 12 December 2014, Dr Schmautz referred the pursuer to the infectious diseases department at Gartnavel General Hospital. Having reviewed the correspondence from Dr Todd, Dr Seaton, Consultant Physician in infectious diseases, declined to see the pursuer.

16. On 16 January 2015, Dr Schmautz referred the pursuer to the infectious diseases department at Raigmore Hospital, Inverness. On 26 March 2015, Dr Schmautz referred the pursuer to the infectious diseases department at University Hospital Crosshouse, Kilmarnock. On 30 April 2015, the pursuer consulted Dr Schmautz at Killearn Health Centre regarding the impact of Lyme Disease on his life and business. On 14 May 2015 the pursuer consulted Dr Woods at Killearn Health Centre regarding chest tightness, sweatiness, nausea, palpitations. The pursuer wondered if these symptoms were "to do with lymes". On 28 May 2015 the pursuer advised Dr Schmautz at Killearn Health Centre, in the context of Lyme Disease, that he "has now involved MSPs, BBC and also medicolegal experts."

17. On 10 June 2015, Isla Craig (now Bowen), of Simpson & Marwick solicitors, emailed the pursuer with legal advice including a section headed "action we can assist with". On 13 June 2015, the pursuer prepared a timeline, which was sent to Simpson & Marwick.

18. On 18 June 2015, the pursuer advised Dr Cheema at Killearn Health Centre that NHS had misdiagnosed him, and he had a legal case going on.

19. On 1 July 2015, Simpson & Marwick sent a client engagement letter to the pursuer. On 15 July 2015, Isla Craig, Simpson & Marwick emailed the pursuer acknowledging that the pursuer had returned the signed letter of engagement. On 22 July 2015, there was a telephone conversation between Isla Craig, Simpson & Marwick, and the pursuer in the course of which the financial requirements of civil legal aid were discussed.

20. On 28 December 2015, Dr Irvine, ST3 in Medical Ophthalmology at Queen Elizabeth University Hospital, referred the pursuer to endocrinology due to his pituitary tumour.

21. On 5 January 2016, the pursuer advised Dr Andy Lennox at Killearn Health Centre, regarding suspected Lyme Disease diagnosis, that he has had over 10 years of problems and says that he has been misdiagnosed and mistreated by NHS, and is currently pursuing legal action against the NHS with regard to this.

22. On 28 May 2016 Dr Kernohan, Consultant Physician at Queen Elizabeth University Hospital, arranged for an MRI of the pursuer's pituitary gland. The MRI was carried out on 17 June 2016. On 28 June 2016, Dr Kernohan wrote to the pursuer advising that there had been a slight increase in the size of his pituitary gland. He was referred to neurosurgery.

23. On 26 July 2016, a synachthen test was carried out. Dr Kernohan wrote to the pursuer on 9 August 2016 advising him of results of synacthen test and recommending he commence on hydrocortisone treatment. Dr Kernohan wrote to the pursuer's GP on 17 August 2016. On 25 August 2016, the pursuer attended the endocrine clinic with Dr Kernohan and the pursuer. On 26 August 2016, Dr Kernohan wrote to Dr Lennox at Killearn Health Centre, noting *inter alia* that the pursuer was rather concerned that he appeared to have fallen through the net with regards to his pituitary follow up. He was regularly attending neuroophthalmology but appears to have been lost to follow up from endocrinology back in 2013.

24. Dr Darzy's draft report was provided to agents dated 3 August 2018.

25. On 28 August 2018, the pursuer underwent trans-sphenoidal debulking surgery.

26. Dr Darzy's final report was made available to agents dated 8 May 2019.

27. On 9 July 2019, the Initial Writ in the present action was served on the defenders.

Findings in fact and law

1. The action, insofar as directed against the first defender, is time-barred in terms of section 17(2)(b) of the Prescription and Limitation (Scotland) Act 1973.

2. The action, insofar as directed against the third defender, is time-barred in terms of section 17(2)(b) of the Prescription and Limitation (Scotland) Act 1973.

3. It would not be equitable to make an order in terms of section 19A of the Prescription and Limitation (Scotland) Act 1973 in respect of the case against either the first defender or the third defender.

Introduction

1. In this action, the pursuer claims damages for what he says were negligent failures of diagnosis and management by clinicians employed by of the first and third defenders. The second and forth defenders are no longer parties to the action. Both defenders submit the action is time-barred. The pursuer does not accept, but argues if it is, the court should exercise its discretion in terms of section 19A of the Prescription and Limitation (Scotland) Act 1973. By interlocutor of 15 January 2021, the court appointed the action to a preliminary proof on time-bar. Following a lengthy amendment procedure, by interlocutor of 18 October 2021, of consent, the defenders were ordained to lead at proof. A diet of proof assigned for 8 and 9 December 2021 was unable to proceed because of lack of court time, and the diet was re-assigned for 20 and 21 April 2022. I heard a preliminary proof on the defenders' pleas of time-bar in this matter by webex video-conferencing on 20 April 2022.

2. I heard no oral evidence. Counsel for each of the defenders indicated in turn that he would not be leading any witnesses, and proposed to rely on the Joint Minute of Agreement for Parties (No 46) and the documentary productions, and to make submissions. Counsel

for the pursuer sought to lead evidence from three witnesses: the pursuer, the pursuer's partner, Margaret Bolzicco, and Mr Atul Tyagi, consultant neurosurgeon. Counsel for the defenders objected to the leading of evidence from these witnesses, and having heard submissions, I sustained those objections. My reasons are set out below. Counsel thereafter closed their respective cases on the documents, and tendered written submissions. I then heard oral submissions in supplement of the written submissions, and made avizandum. In the discussion which follows, I refer to documents by reference to the pages of the Joint Bundle ("JB").

Evidence and objections

The defenders' objections to witnesses – prior notice

3. As long ago as 10 November 2021, the first defender gave notice of intention to object to the leading of oral evidence from the witnesses proposed by the pursuer at the preliminary proof. This was in the form of a note, which was before the court at a procedural hearing on 15 November 2021, when the presiding sheriff added a note to the interlocutor referring to the defenders' concerns, and the pursuer's assurances that any evidence would be relevant to time bar, and made the observation that the matter would be one for the sheriff hearing the proof.

Objection to oral evidence from the pursuer and Ms Bolzicco

4. The objection to leading oral evidence from the pursuer and Ms Bolzicco was made on identical grounds. Counsel for the first defender began by referring to paragraph 6 the Joint Minute of Agreement (No 46), which is in the following terms:

> "The pursuer has sought to lodge in process affidavits of himself and his partner. For the purposes of the preliminary proof the parties agree that: (a) the affidavits constitute the evidence of the pursuer and his partner; (b) the defenders do not accept that the evidence contained in the affidavits is accurate, simply that it is the evidence of those witnesses; and (c) no inference can be drawn from the absence of cross examination of the pursuer and his partner on the contents of the affidavits."

5. The affidavits are each dated 2 December 2021, and were lodged on an eighth Inventory of Productions ahead of the diet of proof fixed for December 2021. Counsel for the first defender submitted the affidavits were the entire and complete evidence of these witnesses for the purpose of the preliminary proof. That was clear from reference in the Joint Minute to "the evidence" of the witnesses; if further oral evidence was envisaged, "the" was superfluous. The matter was put beyond doubt by sub-paragraph (c), which would be entirely unnecessary if oral evidence was to be led in addition. No substantive response had been received from an invitation to the pursuer's representatives to spell out what matters would be covered in oral evidence which was not in the affidavits. In short, parties had agreed to matters in the Joint Minute, which should not be set aside. Senior counsel for the third defender adopted the first defender's submissions, and submitted the pursuer had agreed to proof on the documents alone. Counsel for the pursuer accepted the Joint Minute was contractual in effect. He submitted contracts require to be given their natural meaning, and there was nothing in paragraph 6 to exclude further oral evidence.

6. I consider that paragraph 6 of the Joint Minute is indeed the key to this issue. It was common ground that the Joint Minute is contractual in effect. That is well established, and is an essential tool for the efficient conduct of litigation. In this case, the Joint Minute was entered into with the benefit of counsel on all sides. I have had regard to paragraph 6 in its entirety as well as the individual phrases to which I was referred. There is force in the submission that "the evidence" in sub-paragraph (a) infers the affidavits contain the totality

of the evidence of the pursuer and of his partner. I agree with counsel for the first defender, that, as a matter of language, use of "the" in paragraph 6(a) carries with it the sense of totality. This might equally be said of paragraph 6(b): "…simply that it is the evidence of those witnesses."

7. I consider the point is put beyond doubt by sub-paragraph (c), which would be unnecessary if oral evidence was to be led, since ex hypothesi, the defenders would have the right to cross-examine in that event. Accordingly, I held that the only construction that made sense was that paragraph 6 is an agreement that there is to be no oral evidence from the pursuer or Ms Bolzicco at the preliminary proof. I therefore sustained the objection.

Objection to evidence from Mr Tyagi

8. Mr Atul Tyagi, is a consultant neurosurgeon, who has produced a report for the pursuer (JB267). In the pre-poof Appendix (45 of Process), the pursuer proposes three areas where it is said Mr Tyagi would give evidence relevant to the issues in the preliminary proof:

> (a) "Evidence on the relevant medical chronology and will suitably inform or instruct the court's decision as to confirm when the attributable act or omission on the part of the defenders ceased."
>
> (b) "he can inform the court's decision in identifying the relevant triggering date – as to when it was reasonably practicable for the Pursuer to reason that the injury was sufficiently serious to justify raising an action. Mr Tyagi can, by referencing the medical records, confirm the extent to which the Pursuer would not have originally been aware (and could not reasonably have been so aware) of the nature of what subsequently transpired to be his misdiagnosis and mistreatment until August 2016 at the earliest, and possibly later."
>
> (c) "Further, insofar as the equitable remedy under section 19A of the 1973 Act is invoked, Mr Tyagi can opine on medical negligence issues relevant to the court's assessment of the unrebutted strength of the Pursuer's case."

9. Counsel for the first defender addressed five areas of objection to the relevance of Mr Tyagi as a witness. First, Mr Tyagi is a neurosurgeon; whereas the pursuer's case against the first defender avers breach of duty by an endocrinologist, and the case against the third defender avers breach of duty by a microbiologist. Mr Tyagi might have relevant evidence about causation, but that is not an issue in this preliminary proof. Secondly, Mr Tyagi has never met nor spoken to the pursuer. His report is prepared on the basis of analysis of the records and other documents listed at JB268. Thirdly, the relevant medical chronology, point (a) in the pre-proof Appendix, is agreed in the Joint Minute, and it was not relevant to lead oral evidence to put a gloss on that. The question of when an act or omission ceased was one for the court. Fourthly, the question of the 'relevant triggering date' was one for the court, and, further, as Mr Tyagi had not met the pursuer nor seen his affidavit, it was not clear what information he usefully had that the court did not have. Finally, the suggestion Mr Tyagi could assist with s19A was misconceived both because he could not give relevant evidence about breach of duty for the reason already given, and because the assertion that the breach of duty was 'unrebutted' by the defenders was incorrect, as a matter of fact, as Answer 6 for the first defender demonstrated.

10. Senior counsel for the third defender associated himself with the first defender's submissions. He observed that, as a matter of fact, the third defender's employee impugned in the action was a consultant physician specialising in infectious disease, not a microbiologist. That did not alter the position today because the pursuer had no report from either a consultant infectious diseases physician or a microbiologist. Senior counsel submitted the attempt to lead Mr Tyagi was an improper use of an expert witness who was not relevantly qualified.

11. Counsel for the pursuer invited me to repel the objection. He submitted the pursuer's case was a failure of clinical management and a system case. There had been a failure of a multi-disciplinary team. Mr Tyagi's position was that where there was a pituitary gland problem such as the pursuer's, a referral should be made from the endocrinologist to a neurosurgeon. It was artificial to say the case was against the endocrinologist only. Counsel accepted Mr Tyagi had not met the pursuer, and his report was based on the medical records; however, his evidence was the best way of interpreting those records. *Kennedy v Cordia* indicated the admissibility and relevance of expert evidence was determined by whether it would assist on technical matters, and, counsel submitted, Mr Tyagi was in a very good position to do that.

12. I have no doubt that Mr Tyagi's evidence is irrelevant at this preliminary proof. The pursuer's case at pp22-23 of the record is clearly directed against an endocrinologist on the first defender's staff, and against a microbiologist on the third defender's staff. There is no averment of breach of duty by a neurologist or neurosurgeon. There is no focussed averment about a multidisciplinary team, and in any event, in my view the court would consider the conduct of individual members of such a team by reference to the professional standards of their particular clinical specialism. For that reason alone, Mr Tyagi's evidence is irrelevant, however well qualified he is as a neurosurgeon. Separately, I agree with the first defender's submission that the notion Mr Tyagi might somehow assist with determining the 'trigger' date would be in danger of usurping the task of the court in this preliminary proof. I am also not persuaded that Mr Tyagi has anything to add to the s19A issue, both because he is not from the appropriate clinical discipline, and, to the extent it is relevant, the pursuer's position that breach of duty is 'unrebutted' is simply misconceived.

Mr Tyagi's evidence would not make it any less so. I therefore sustained the objection to the leading of Mr Tyagi as a witness at this preliminary proof.

The pursuer's cases of fault

13. Regrettably, some effort is required to interrogate the pursuer's pleadings in order to establish what is the basis of his case of fault, because his pleadings are prolix and diffuse, and at pages 20-21, they also commit the solecism the court warned against in *Eadie Cairns* v *Programmed Maintenance Painting Ltd* 1987 SLT 777. However, the following averments seem to me to be the essence of the pursuer's case:

> "As a result of his negligent treatment and care Mr O'Grady has sustained loss, injury, and damage. Because of the failure of the endocrine department operated by the first defenders (and, by that, the first defenders) in April 2013 – and the failure by the microbiology consultant in September 2014 – to diagnose hypopituitarism – Mr O'Grady needlessly suffered from the above-mentioned multiple symptoms of untreated hypopituitarism for a period of three years to 2016. Because of the failure to diagnose pan-hypopituitarism in September 2014 (and not diagnose it until July/August 2016), Mr O'Grady continued to suffer these symptoms, which would have been avoided with earlier treatment."
> Cond 5 (closed record pp15-16)
>
> "Mr O'Grady's loss, injury and damage were caused by the fault and negligence of the defenders at common law – specifically, by their delayed diagnosis and treatment of hypopituitarism, which had been caused by the pituitary tumour."
> Cond 6 (closed record p21)
>
> "The failure of the endocrinologist (or endocrine department) (and, by that, the first defenders) to diagnose and treat hypopituitarism in (and from) April 2013 was an error, which no competent endocrinologist (or endocrine department) (and competent hospital operating an endocrine department) would have made. The failure of the microbiology consultant to diagnose and treat hypopituitarism in (and from) September 2014 to mid-2016 was an error, which no competent microbiology consultant would have made."
> Cond 6 (closed record p23)
>
> "The endocrinologist at the Southern General Hospital should have repeated the MRI scan in 2013. Mr O'Grady should have had a repeat pituitary MRI scan in 2013 – as initially suggested by Dr Gallacher. On balance of probabilities, this would have shown some tumour enlargement. The inadequate care or treatment on this occasion

> was attributable to the endocrinologist then responsible for Mr O'Grady's medical care. This was an oversight (or, more specifically, an error), which no competent endocrinologist would have made."
> Cond 6 (closed record p22)
>
> "There was a diagnostic failure by the microbiology consultant Dr Todd, who diagnosed very low T4 in September 2014. Dr Todd wrongly attributed this to a non-thyroidal illness. The inadequate care or treatment on this occasion was attributable to the microbiology consultant (Dr Todd) then responsible for Mr O'Grady's medical care. The diagnostic failure by the microbiology consultant was an error, which no competent microbiology consultant would have made. There was a failure to refer Mr O'Grady for an endocrine assessment – even in the absence of knowledge of the presence of a pituitary tumour."
> Cond 6 (closed record pp22-23)

14. It will immediately be evident that these averments speak of events in 2013 and 2014 which, the pursuer avers, amounted to a failure timeously to diagnose hypopituitarism. The pursuer avers (cond 6, closed record p28) that he only became aware of clinical negligence on receipt of a report from Dr Darzy, consultant diabetologist and endocrinologist, in draft in July 2018, and in final form in May 2019. The action was warranted on 4 July 2019, and was served on 9 July 2019.

Case against the first defender

15. The pursuer's case against the first defender relates to his endocrinology treatment from Dr Hall. The pursuer avers (cond 6, p22) that there was a failure to organise a further pituitary MRI scan in 2013; a failure to consider secondary hypothyroidism in April 2013; a failure to commence the pursuer on Thyroxine; and a failure to organise a follow up appointment within six months of March/April 2013.

16. On 28 March 2013, the pursuer attended the endocrine clinic at the Southern General Hospital, Glasgow with Dr Hall (JB707). The pursuer's thyroid hormone levels were noted to be normal. Dr Hall arranged for the pursuer to have further blood tests. Dr Hall told the

pursuer he should be reviewed in clinic in six months. She asked him to arrange an appointment at the endocrine clinic by giving him an appointment slip to take to clinic reception. The pursuer did not do so. The pursuer did attend the Southern General Hospital for the blood tests. On 3 June 2013, Dr Hall wrote to the pursuer to advise the blood tests were normal. She also reminded him that he was to be reviewed in clinic later in the year (JB706). The pursuer received that letter. In paragraph 4 of his affidavit, the pursuer says that despite Dr Hall's reassurance, he felt his health "continued to deteriorate at an alarming rate" by the end of 2013. At that point, the pursuer felt there was no clarity about what was wrong with him despite the input of doctors, presumably including Dr Hall. By 2014, the pursuer says he spent most of his time sleeping, feeling unrefreshed and very weak (affidavit, paragraph 5).

17. Thus on the pursuer's account, he had been treated at Dr Hall's clinic in 2013, and despite being told his test results were normal in June, he was feeling very unwell by the end of 2013. He had not been seen in the endocrine clinic again. That was because he did not make an appointment, but on his analysis, it was for the clinic to call him back for review. By the end of 2013, the pursuer knew he was unwell, he knew he had been treated by Dr Hall, and he had concerns about not being followed up. He started to look for alternative diagnoses, because he considered that Dr Hall had not provided an adequate diagnosis and treatment (affidavit paragraphs 4&5).

Case against the third defender

18. The pursuer's case against the third defender is that there was a diagnostic failure by Dr Todd, consultant physician, erroneously described as a microbiologist consultant by the pursuer. Dr Todd was in fact a locum consultant physician specialising in infectious

diseases. At the material time in 2014, he was employed by the third defender at Monklands Hospital. It is averred that in September 2014 Dr Todd diagnosed very low T4 and wrongly attributed this to a non-thyroidal illness. It is further averred he should then have made a referral for endocrine assessment, even in the absence of knowledge of the presence of a pituitary tumour. Such a referral, it is averred, would have resulted in a further MRI scan and the diagnosis of pan-hypopituitarism.

19. The pursuer saw Dr Todd on 24 July 2014. Dr Todd recommended the pursuer have a lumbar puncture to exclude, inter alia, neurological Lyme disease (JB653-4). The pursuer was scheduled to attend for lumbar puncture on 7 October 2014, but declined to do so (JB645). Between 24 July 2014 – 6 November 2014, Dr Todd wrote to the pursuer's GP on a number of occasions, noting the results of examination and a series of tests (chronologically JB650, 649, 644-5, 646). On 6 November 2014, Dr Todd wrote to Dr Schmautz advising that samples from Porton Down Specialist Virology Unit revealed no evidence of past infection with Dengue or Chikungunya viruses (JB646). As the pursuer had not accepted further investigation, he would not be sent further appointments (JB646). That was Dr Todd's final involvement in the pursuer's care. In his affidavit, the pursuer says endocrine issues were not raised by Dr Todd, and that he did not disengage from treatment, nor did he receive a letter from Monklands saying that his treatment had stopped. The last point sits uneasily with the correspondence to the pursuer's GP, and the pursuer's own evidence that he then sought a referral to a different hospital (affidavit paragraph 8).

20. It is clear from the 'timeline of a Lyme disease victim' document produced by the pursuer in June 2015 (JB1947-1969) that he was unhappy at the time of the appointments with Dr Todd, both with what he perceived to be Dr Todd's response to his presentation, and the absence of a clear diagnosis (JB1961-1965, particularly at 1965). On the pursuer's

evidence, whilst there was some improvement in his condition whilst on medication prescribed by Dr Todd, he continued to be quite unwell.

Analysis and decision

21. Counsel for each party tendered written submissions. They are 47, 48 and 49 of process. I need not repeat them at length, but I have had regard to them and to the oral submissions made during the proof. I will refer to appropriate parts of the submissions on a number of points arising.

22. The defenders' time-bar pleas are founded on section 17(2) of the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act"). The material parts of section 17 are in the following terms:

> "**17. Actions in respect of personal injuries not resulting in death.**
> (1) This section applies to an action of damages where the damages claimed consist of or include damages in respect of personal injuries, being an action (other than an action to which section 18 of this Act applies) brought by the person who sustained the injuries or any other person.
>
> …
>
> (2) Subject to subsection (3) below and section 19A of this Act, no action to which this section applies shall be brought unless it is commenced within a period of 3 years after—
>
> (a) the date on which the injuries were sustained or, where the act or omission to which the injuries were attributable was a continuing one, that date or the date on which the act or omission ceased, whichever is the later; or
>
> (b) the date (if later than any date mentioned in paragraph (a) above) on which the pursuer in the action became, or on which, in the opinion of the court, it would have been reasonably practicable for him in all the circumstances to become, aware of all the following facts—
>
> (i) that the injuries in question were sufficiently serious to justify his bringing an action of damages on the assumption that the person against whom the action was brought did not dispute liability and was able to satisfy a decree;

(ii) that the injuries were attributable in whole or in part to an act or omission; and

(iii) that the defender was a person to whose act or omission the injuries were attributable in whole or in part or the employer or principal of such a person.

…"

The pursuer's consultation with Simpson & Marwick

23. The pursuer took legal advice from Simpson & Marwick, solicitors, in June 2015. The pursuer says he consulted them "to explore legal remedies by which they could facilitate proper diagnostics and treatment for me from the NHS." Counsel for the pursuer submitted that, in effect, he was seeking advice about whether there might be remedies ad factum praestandum. Even if that was the pursuer's principal thought when he arranged to see Simpson & Marwick, it is clear that he received advice about a wider range of processes and remedies when he met Ms Craig of that firm.

24. Ms Craig's email of 10 June 2015 (JB264-265) is of critical importance, and the pursuer accepts it is an accurate account of their meeting (affidavit paragraph 12). It begins "I have summarised our meeting below and the options we can assist with", and continues with a summary of the pursuer's clinical history, with his then-current focus on the possibility of Lyme disease, including reference to tests at the Southern General Hospital, and attendance at Dr Todd's clinic amongst others. Ms Craig's email continues under the heading "action we can assist with" to list and discuss three discrete matters: (1) complaint; (2) medical negligence claim for damages; (3) raising awareness and/or contribution to the Land Reform Bill. Point (1) envisaged use of the NHS complaint process, and Ms Craig indicated she could assist with framing a letter of complaint. Point (3) concerned raising public awareness

of Lyme disease, and engagement with Scottish Government, something with which Ms Craig advised she could not assist.

25. As to point (2), Ms Craig advised both about claims against individual practitioners and secondly "a claim that there was a systematic failure in the NHS". She provided a succinct summary of the key elements of a successful claim, viz. (a) the claim being raised within three years of the action complained of; (b) breach of duty; (c) causation; (d) quantum, with an explanation of (b)-(d). The ambiguity of the pursuer's initial thoughts in seeking advice are indicated by Ms Craig's concluding observation that it was not apparent to her whether the pursuer was initially interested in a complaint or a claim, and she had (quite properly, in my view), provided outline advice about what those would involve.

26. Ms Craig also made clear that the basis on which further work was to be funded would require to be agreed. On 6 May 2015, Ms Craig had emailed the pursuer seeking information to support an application for civil legal aid (JB1944-1945). On 1 July 2015, Ms Craig sent the pursuer a client engagement letter (JB1940-1943). In that letter, the scope of work was described thus:

> "your instructions are to apply for legal aid for advice and assistance with a view to recovering your medical records and reviewing them and thereafter obtaining a report on breach of duty in respect of a potential systemic failure within the NHS."

27. In my view, that is clear evidence of intent to raise proceedings for breach of duty, rather than for remedies ad factum praestandum. It follows that by this point (and by that I mean 10 June 2015), at the latest, the pursuer knew or it was reasonably practicable for him to know the matters in section 17(2)(b) of the 1973 Act. The pursuer phoned Ms Craig on 22 July 2015 to say he was ingathering documents (JB1946). In fact, he did not follow this up (affidavit paragraph 13). Nonetheless, in June 2015 and January 2016, the pursuer was

recorded as telling GPs at Killearn Health Centre that he had been misdiagnosed and was pursuing legal action against the NHS (JB378 and 377 respectively). The fact that he was not, at that point, pursuing such action is less important in this context than the fact that he considered he had been misdiagnosed such as to contemplate legal action in consequence.

Relevant knowledge and section 17(2)

28. On the pursuer's hypothesis in relation to the first defender, the date injury was suffered for the purpose of section 17(2)(a) of the 1973 Act was April 2013. On the pursuer's hypothesis in relation to the third defender, the date injury was suffered for the purpose of section 17(2)(a) of the 1973 Act is therefore 6 November 2014. Counsel for the pursuer accepted the relevant date was when it was reasonably practicable for the pursuer to be on notice. That, he submitted, was at the time the action was raised in June/July 2019, when Dr Darzy's final report was available; the pursuer's medical records had only been recovered in 2018.

29. On the evidence before me, I am unable to determine whether the pursuer had knowledge of all the relevant matters in section 17(2) in 2013. I consider it is likely that he did by November 2014. I am satisfied that he certainly had relevant knowledge, or that it was reasonably practicable for him to have such, by the end of May 2015. In my view, that is the only conclusion that can be drawn from the pursuer's contact with Simpson & Marwick in early June 2015. That conclusion is fortified by his reported comments to GPs in June 2015 and January 2016.

30. I hold that on receipt of Ms Craig's email on 10 June 2015, the pursuer knew or ought to have known that any claim must be brought within 3 years, and what matters required to be addressed in evidence. By that point, the pursuer attributed his problems to a failure of

diagnosis and treatment, inter alia by Dr Hall and Dr Todd, albeit in 2014 and 2015, his focus was on the possibility of Lyme disease, not on his pituitary problems. Nonetheless the clear wording of the 'scope of work' section of the client engagement letter (JB1941) indicates a claim from failure in management of care. The pursuer describes both in his affidavit and the timeline document of July 2015, symptoms and effect, including costs incurred. Accordingly, I hold that by 10 June 2015, at the latest, the conditions set out in section 17(2)(b) of the 1973 Act were met in respect of the first and third defenders. The pursuer had until 9 June 2018 to raise any proceedings, and he knew or ought to have known that. I will therefore sustain the first and third defenders' pleas of time-bar.

31. The pursuer's averment at page 28 of the record that he only had the requisite knowledge when Dr Darzy's report was circulated is misconceived, and that for two reasons. First, it is not consistent with the pursuer's document 'Timeline of a Lyme disease victim', dated 13 July 2015 (JB1947), which sets out at some length the pursuer's complaints about alleged diagnostic failures on the part of staff of each of the defenders, and consequences which the pursuer suffered as a result. Secondly, I consider the first defender's submission that such a position is precluded by *Forbes* v *Wandsworth Health Authority* [1997] QB 402 to be well made (see Stuart-Smith LJ, p 412C-H). I consider that the approach of the Court of Appeal in *Forbes* is consistent with the decision of the Inner House in *Agnew* v *Scott Lithgow (No 2)* 2003 SC 448, to which I was also directed by the first defender, particularly in the opinion of the court (per Lady Cosgrove) at p454, paragraph 23. In my opinion, the essence of both decisions on this point is that it is incumbent on a pursuer to take all reasonably practicable steps to inform himself of *all* the material facts as soon as he is put on notice of *any* of them. I consider he did not do so. In my view, the pursuer was on notice of relevant facts, given his complaint about (mis)diagnosis and identified

symptoms which were a recurrent feature of his dealings with clinicians in 2014, and which had motivated him to consult Simpson & Marwick. In that important respect this case is very different from *Kelman* v *Moray Council* [2021] CSOH 131 to which I was referred in the course of submissions.

Section 19A

32. In the event that the time-bar pleas are sustained, as I have done, the pursuer seeks to invoke the court's equitable power to extend the time limit for raising an action of this kind. The material part of section 19A of the 1973 Act is in the following terms:

> **"19A.— Power of court to override time-limits etc.**
> (1) Where a person would be entitled, but for any of the provisions of section 17, 18, 18A or 18B of this Act, to bring an action, the court may, if it seems to it equitable to do so, allow him to bring the action notwithstanding that provision [(but see section 19AA)]."

Section 19AA is not relevant in this case.

33. It was common ground that the onus is on the pursuer to satisfy the court that the power in section 19A should be exercised. All parties approached the question as one of balancing prejudice to the respective interests in the action.

34. The first defender submitted the prejudice to the pursuer if the action was dismissed was modest at best. He would loss the chance of pursuing the claim, but the first defender submitted the merits of the pursuer's action in relation to breach of duty are extremely weak. Dr Hall plainly told him that he was to be followed up in 2013, and confirmed this to him in writing. The pursuer accepts that he received that letter, yet took no action when no review took place. He offers no explanation for that failure. The defenders hold a supportive report from Professor Strachan, a consultant endocrinologist. He points out that the system that the defenders had in place (namely, that the pursuer was tasked with

making an appointment, but that Dr Hall - very sensibly some might think - followed up with correspondence anyway) is (a) one that existed in other hospitals in Scotland and (b) a reasonable one. Dr Darzy is not in a position to contradict Professor Strachan in relation to (a) and accordingly, particularly standing that the court will require to apply the *Hunter* v *Hanley* test, the pursuer's prospects of success in the litigation are poor.

35. The endocrinologist impugned, Dr Hall, continues in practice, and as the merits of the claim are unlikely to be resolved before the second half of 2022 at the earliest, the matters complained of have been hanging over her for almost a decade. The first defender would require to continue to fund the defence of the action out of public funds, and even if there was the possibility of recovering expenses from the pursuer, there would be irrecoverable expense.

36. The third defender took a similar line, noting the absence of explanation on record or in the pursuer's affidavit of why proceedings were not raised within three years of October 2014, or at the latest three years from 10 June 2015. The pursuer has not produced a liability report indicating that Dr Todd, the consultant infectious disease physician, was negligent. Without such the pursuer could not succeed against the third defender, and the court could not speculate what such a report might contain. The defenders would be prejudiced by the revival of a stale claim, particularly given the large sum claimed. The third defender's impugned clinician, Dr Todd, has retired and has had this matter hanging over him for a number of years. If the action were to proceed, he would be subject to further stress and inconvenience in preparing for and giving evidence.

37. The pursuer submitted that as the full medical records are produced and lodged and there was no reason the medical witnesses could not give evidence, the court's equitable power should be exercised. It was accepted Dr Todd had retired, but there was no

suggestion he could not give evidence. The pursuer's clinical history was complex. The defenders had resources to defend the action.

38. In my view, the pursuer's position falls some way short of what is required to satisfy the court that the power in section 19A should be exercised. I consider the defenders' submission that onus on the pursuer includes offering an explanation for not raising an action earlier to be well-founded. This is not a case where the pursuer has overshot by a few days or weeks; on the defenders' primary position the action time-barred either in January or October 2017, or 9 June 2018 at the latest; the latter being 13 months before the action was in fact served. I have already explained why I consider the pursuer's argument that he was entitled to wait for an expert report is misconceived.

39. While the pursuer pleads an *esto* case on the premise that the operative date from which the time bar runs is 23 June 2016, being the date the pursuer was told the result of an MRI scan showing an increase in the size of his existing tumour (cond 6, p30), and that the Initial Writ was lodged timeously within three years of that date, as a matter of fact the Initial Writ was received at court on 28 June and warranted on 4 July 2019. Perhaps more importantly, no argument is presented on an *esto* basis to meet the defenders' case that the time-barred started to run in 2014, or at the latest on 10 June 2015, and what was done within three years of those points. The pursuer's evidence on affidavit is of focus on seeking a diagnosis of Lyme disease (see paragraphs 7, 8, 9, 11, 12, 14, 15).

40. The pursuer is dismissive of his contact with Simpson & Marwick, saying "there was probably little they could do to expedite medical treatment… so I decided not to pursue it further." (affidavit paragraph 13). That is not consistent with either the advice tendered by Ms Craig, nor with what the pursuer himself is noted as saying to GPs in June 2015 and

January 2016. In short, in my view, his explanation for not raising proceedings earlier is unsatisfactory, given the remedy in section 19A is an equitable one.

41. Nor do the pursuer's submissions sufficiently address the prejudice identified by the defenders, particularly the absence of any evidence from an appropriately qualified clinician, let alone compelling evidence, of breach of duty by Dr Hall or Dr Todd specifically. The availability of records, and witnesses including Dr Hall and Dr Todd are necessary, but not sufficient, conditions for the action proceeding.

42. For all of those reasons, I am not satisfied that the pursuer has set out a sufficient basis for me to exercise the court's power under section 19A.

Conclusion

43. I will therefore sustain the first defender's second plea in law, and the third defender's first plea in law. I will repel the pursuer's fourth, fifth and ninth pleas in law. I will dismiss the action. A hearing will be fixed on all questions of expenses.