

SHERIFFDOM OF LoTHIAN AND BORDERS AT LIVINGSTON

[2025] SC LIV 87

LIV-F107-21

EX TEMPORE JUDGMENT OF SHERIFF SUSAN A CRAIG

in the cause

ABC

Pursuer

against

DEF

Defender

Pursuer: Aitken, advocate; Freeland's Solicitors, Wishaw
Defender: Barbour, Advocate; K W Law Solicitors, Livingston

LIVINGSTON, 12 August 2025

Explanatory note

This records an ex tempore judgment delivered following a 3 day preliminary proof. It concerns allegations of sexual abuse of the parties' child and contains information of a sensitive nature. The identities of those involved have been anonymised to prevent jigsaw identification.

The pursuer's witness is referred to as PC, and the defender's as DP, DC and DF. The child's gender is given as neutral throughout. The body part alleged to have been assaulted is referred to as "X" (the child's word for it) or "Y" (the correct anatomical word).

The sheriff, having resumed consideration of the cause, makes the following

Findings in fact

The sexual assault

1. The pursuer is the father, and the defender is the mother of the child [] born [].
2. The parties were previously in a relationship but separated in August 2020. Prior to separating they were cohabiting at the defender's home along with the child and the defender's older child, DC.
3. In August 2020 the pursuer touched the child in a sexual way by touching their Y.
4. The child told the defender that had happened. They used the language of a young child, saying that the pursuer had touched their "X". The child had been taught to use that expression to refer to their Y.
5. The defender challenged the pursuer saying words to the effect of: "What they [the child] have just told me better not be fucking true."
6. The pursuer replied: "I never touched [them]."
7. The defender had not told the pursuer the child said he touched them.
8. The defender told the pursuer to leave and he did.
9. The parties have not lived together since.
10. Following separation it was agreed the pursuer would have some contact with the child on condition it was supervised by the pursuer's adult child, PC. Contact commenced on 26 December 2020 and took place each Saturday until 27 March 2021.
11. During a contact visit on 27 March 2021 the pursuer again touched the child in a sexual manner. The child told the defender what had happened. The defender told the pursuer there was to be no further contact.
12. The pursuer raised these proceedings.

13. In May 2021 the court ordered fortnightly interim supervised contact at a contact centre, increased to weekly contact in September 2022. The court appointed a child welfare reporter, David Johnstone, solicitor, to report on the progress of contact.

14. In March 2023 Mr Johnstone reported that contact did not appear to be positive for the child; that they had a deep rooted fear and anxiety that only manifested itself around the time of attending the contact centre; that it did not affect their life at other times; and that a number of independent witnesses had observed that fear and anxiety.

15. The report concluded that continuing interim contact would cause the child ongoing upset and distress and there were no feasible alternative options.

16. On 29 March 2023 parties agreed contact be suspended until further orders of court. No contact has operated since.

17. The child has said they were sexually touched by the pursuer, using more or less the same language, on a number of occasions, to a number of different people including independent third parties.

Finds in fact and law

1. That in August 2020 the pursuer sexually assaulted the child by touching their Y.
2. That the pursuer again sexually assaulted the child on 27 March 2021.

NOTE

Introduction

[1] This is a family action in which the pursuer seeks contact with a child. He is their father, and the defender is their mother. At the heart of the dispute are allegations - which are denied - that the pursuer sexually assaulted the child.

[2] The action was raised in January 2021. It had a lengthy procedural history, largely taken up with attempts to establish, and then maintain, interim contact with the child.

Those had not been successful with the child showing a reluctance to attend. By March 2023 contact ceased altogether.

[3] By 2024 parties' common position was that the action could not progress, one way or the other, until the court resolved the question of whether the sexual assaults had in fact occurred. A preliminary proof was allowed on the question: "Has the pursuer acted, at any time, in a sexually inappropriate manner towards the child?"

The preliminary proof

[4] I heard the preliminary proof on 8 April, 13 May and 12 August 2025. It was agreed the defender would lead. Affidavits were lodged for all witnesses, and a two comprehensive joint minutes were produced. That allowed evidence to focus on the core question posed.

[5] There were two components to that question. First, (i) in August 2020 did the child tell the defender the pursuer had touched them sexually; and/or (ii) in March 2021 did they tell the defender that the pursuer had again touched them sexually? Second, did the pursuer in fact touch the child sexually on either or both occasions?

[6] Quite properly the child was not called to speak to these matters. The pursuer denied the allegations. There were no eyewitnesses to the assaults and ultimately determination of the question turned on issues of credibility and reliability.

[7] I heard from the defender; from her parent, DP; her older child, DC; and from a friend, DF.

[8] I also heard, in full, from the pursuer. His adult child, PC, started giving evidence by adopting their affidavit as evidence in chief. However, they were not fully cross-examined. After a few innocuous preliminary questions in cross, PC became visibly distressed, crying and shaking, and rushed out of the court room. Although attempts were made to encourage them to return, they refused. Mr Aitken told me he did not insist on calling PC to complete their evidence. He accepted that in the absence of cross-examination, the court, at best, could only have regard to their evidence, in effect, for as much as it was worth.

[9] In brief, I found the defender and her witnesses credible and reliable on any issues in dispute. Specifically, I was satisfied I could place reliance on the defender's evidence that in August 2020 the child told her the pursuer touched their "X" when they were in a bedroom with him alone.

[10] I was also satisfied I could place reliance on the defender's evidence that the child told her the pursuer again touched them sexually during a period of contact on 27 March 2021.

[11] There was ample credible evidence supporting the defender's evidence, including that of her older child, DC, who was present in the house in August 2020. They spoke of the defender being in the kitchen preparing breakfast when the pursuer and the child were upstairs. They said that the defender went upstairs to get the child dressed, but then shouted to them, asking that they to take the child downstairs, which they did.

[12] DC spoke of hearing a commotion and shouting coming from upstairs, describing it as an argument between the pursuer and defender. The defender told DC the child said the pursuer had touched them sexually and spoke of the pursuer leaving the house with his belongings.

[13] It was also DC's evidence that shortly after the child was interviewed by the police that day, they told DC the pursuer had touched their "X" and said: "I'm not lying".

[14] In a similar vein, the defender's parent's evidence was that the defender called them the same day and told them about the child's allegation. DP said they had gone to the defender's home to sit with the child while they were interviewed by the police. They described the child as "out of sorts" but had not said anything untoward to them.

[15] DP also spoke of having accompanied the child (their grandchild) to hospital for a forensic examination. They described that when it came time for the child to take off their trousers, they "went ballistic" and were hysterical.

[16] There was also evidence from DP that a few weeks later, out of the blue and entirely unprompted, the child told them that the pursuer had touched their "X".

[17] The defender's friend, DF, gave evidence that a few weeks after August 2020 the defender told them about the child's allegations, saying she had immediately confronted the pursuer, who had moved out that day. DF also said that once contact resumed the child's demeanour change for the worse.

[18] All that evidence was consistent with the defender's position that the child disclosed they had been sexually assaulted by the pursuer. It was also consistent with the evidence that it was that, rather than anything else, which brought their relationship to an end. Each of those witness said there were no particular difficulties in the relationship prior to the allegations but that, once made, the relationship ended immediately.

[19] In contrast, I found that the pursuer's evidence on crucial matters lacked credibility and reliability. In particular, I found his explanation about the reasons why the defender made up the allegations (which was his position) unconvincing and self-serving.

[20] The pursuer said the allegations were malicious and made up by the defender as a ruse to end their relationship. However, he was unable to explain why she would do that instead of just telling him to leave. He accepted she could have "put him out" at any stage and did not require an excuse. The pursuer agreed he had his own accommodation, they were not married, and, other than the child, there were no particular ties that would have been difficult to cut. He could not explain why, if they had not been made, the defender would go to such elaborate lengths to make up the allegations, nor why the child would repeat them to others.

[21] While that was the pursuer's position in relation to the defender, he did not make similar criticisms of DC, DP and DF. It was not suggested to them in cross-examination that they were party to, as the pursuer would have it, the defender's malicious plan to lie.

[22] The pursuer's position was that the relationship was already in trouble, and the defender was seeking to bring it to an end. That was not accepted by the defender nor consistent with the other evidence. However, had the child not made an allegation about the pursuer (which was his position), he offered no explanation why, unprompted, the defender would confront him with it on what was an otherwise unremarkable morning. There was no evidence of a tipping point in their relationship, or reason why the defender would have chosen that day to lie in that way. Even on the pursuer's own evidence it was perfectly normal morning with the household just getting ready to go to school or work.

[23] The pursuer also did not explain why he responded - "I never touched [them]" - when the detail of the allegation - that he had sexually assaulted the child - was not put to him until later.

[24] In my view the pursuer's version of events was inherently unlikely and lacked credibility. His dislike and antipathy towards the defender were evident from his evidence, criticising her approach to Covid measures, the lockdown generally and requirements for social distancing. None of that was directly relevant to the issue in dispute but gave some colour to how he viewed their relationship in the lead up to the separation. The tenor of the pursuer's evidence was that he did not like the defender and thought she was hard work.

[25] I found the pursuer's explanation in submissions - that the child heard the defender say the words: "he touched my X" and was, in effect, parroting her - implausible. I did not accept that as a credible explanation and it was rejected.

[26] Instead, on the evidence I was satisfied that in August 2020 the child told the defender that the pursuer had "touched" their "X". I also accepted the defender's evidence (supported by DP) that the child had been taught to use that term to refer to their Y. I was therefore satisfied that in August 2020 the child told the defender they had been sexually assaulted by the pursuer.

[27] Further, I was satisfied that in March 2021 the child told the defender that the pursuer had again sexually assaulted them during a period of contact. While that contact should have been supervised by PC, they had refused to be cross-examined on the point.

[28] On one view I could simply take PC's affidavit evidence at face value. However, their demeanour in court was startling, bursting into tears and being oppositional before questioning really got underway and certainly before any firm challenges were made. I saw

enough of PC to conclude they were an unimpressive, unreliable witness whose evidence could not be relied on in matters in dispute. It is rejected.

[29] Having concluded the child did tell their mother that the pursuer had sexually assaulted them, I turned to consider whether, in fact, he had done so. I heard detailed submissions on this point. Despite their length, parties agreed what I could take from the authorities was that the matter was to be determined on the balance of probabilities. While these were allegations of a crime, in a civil proof the civil standard applied.

[30] Applying that to the facts in the case, I was satisfied on the balance of probabilities that the pursuer did act in a sexually inappropriate manner towards the child on two occasions, in August 2020 and again in March 2021.

[31] There was nothing inherently unlikely or improbable about those allegations. The pursuer had access to the child on both occasions. On the first occasion it was agreed the child was in the family bed with the pursuer while the defender was downstairs organising breakfast. On the second occasion they were at the pursuer's home. While contact was supposed to be supervised, for the reasons given I reject PC's evidence on that matter. There was instead evidence from others that the child told them the pursuer had touched them sexually during that contact.

[32] Taken together with the other evidence in the case, including the agreed evidence that, by January 2023 at least, the child was reluctant to attend for contact, as well as the child's fear and anxiety recorded in Mr Johnston's report, it was reasonable to conclude, on the balance of probabilities, that the pursuer sexually assaulted the child on the occasions in question.

[33] Much was made in submissions to the effect that the defender was manipulating the child and it was that, rather than any abuse, that caused the child's reluctance to attend

contact. I did not accept that analysis was consistent with the body of evidence. There may have been some embellishment of the evidence, on both sides, but that did not take away from the core issues – was the defender lying about the child telling her they had been abused by the pursuer and had he, in fact, done so?

[34] For the reasons given I was satisfied, on the balance of probabilities, the defender was not lying and, further, the pursuer did, in fact, sexually abuse the child.

[35] That was as far as I was asked to go and ordered the case to call on the procedure roll on 19 November 2025 so the court could be addressed on further procedure. In the event, and prior to the calling, parties lodged a joint minute, and the action has now been dismissed.

¹ Children (Scotland) Act 1995, section 11(7)

Sexual Offences (Scotland) Act 2009, sections 20 and 60

NJDB v JEG [2012] SC (UKSC) 293

Re B (Children) (Care Proceedings: Standard of Proof), [2008] UKHL 35, (2009) 1 AC 117

A v A, [2013] CSIH 7, 2013 SLT 355 35

White v White 2001 SC 689

B v Scottish Ministers 2010 SC 472

CM v M-EM, (2019) SAC Civ 30, 2019 Fam LR 125 42

T v T 2000 Fam LR 125

A v A 2013 SLT 355

McVinnie v McVinnie, 1995 SLT (Sh Ct) 81 2

Wilkinson and Norrie, *the Law Relating to Parent and Child in Scotland*, 3rd Edition, 2013, Chapter 9,

paragraphs 9.04 – 9.42

The Physical Signs of Sexual Abuse, the Royal College of Paediatrics and Child Health, Good Practice, Chapter 11