SHERIFF APPEAL COURT

[2025] SAC (Civ) 12
PIC-PN3751-22

Sheriff Principal D C W Pyle
Sheriff Principal G A Wade KC
Appeal Sheriff P A Hughes

OPINION OF THE COURT

delivered by APPEAL SHERIFF PATRICK HUGHES

in the appeal in the cause

(FIRST) MARLENE SIMPSON AND (SECOND) FAYE ANNE CAMPBELL

Pursuers and Appellants

against

DUMFRIES AND GALLOWAY HEALTH BOARD

Defender and Respondent

Pursuers and Appellants: Mackay KC, Markie; Allan MacDougall Solicitors
Defender and Respondent: Clair; NHS Scotland Central Legal Office

28 April 2025

Introduction

[1] The pursuers and appellants ("the appellants") are the mother and sister of the late Michael Crossan, who tragically died by suicide on 20 August 2019. On 20 December 2022 they raised an action against the defender and respondent ("the respondent") on the basis that its failure to provide appropriate care to Mr Crossan had caused his suicide. The respondent argued that the action was time-barred, having been brought outwith the three-year period prescribed by section 18(2) of the Prescription and Limitation (Scotland) Act

1973. Following a preliminary proof the sheriff upheld this plea, and declined to extend the time period in terms of section 19A of the 1973 Act. The appellants now appeal both decisions.

Legislation

[2] The provisions of the Prescription and Limitation (Scotland) Act 1973 Act relevant to this appeal are:

> **"18.— Actions where death has resulted from personal injuries.**
>
> (1) This section applies to any action in which, following the death of any person from personal injuries, damages are claimed in respect of the injuries or the death.
> …
> (2) Subject to subsections (3) and (4) 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—
> …
> (b) the date (if later than the date of death) 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 both of the following facts—
> (i) that the injuries of the deceased were attributable in whole or in part to an act or omission; and
> (ii) 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.
> …
> **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).
> …
> **22.— Interpretation of Part II and supplementary provisions.**
> …
> (3) For the purposes of the said subsection (2)(b) knowledge that any act or omission was or was not, as a matter of law, actionable, is irrelevant."

The sheriff's judgment

[3] It was not disputed that the appellants learned of Mr Crossan's death on the day it happened. On 4 September 2019 the first appellant gave an interview to *The Sun* newspaper in which she expressed concerns over the circumstances of her son's death. Within around two weeks of that interview the appellants sought legal advice from Irwin Mitchell solicitors regarding a medical negligence claim against the respondent. On the advice of these solicitors, the appellants made a "Stage 2 complaint" to the respondent on 21 September 2019, which resulted in a Serious Adverse Event Review ("SAER") being issued on 6 February 2020. Having reviewed the latter document, Irwin Mitchell confirmed to the appellants on 21 February 2020 that they could not act for them, as the prospects of success were considered to be less than 70%. Between 15 October 2019 and 2 February 2020 Irwin Mitchell sent the appellants six items of correspondence which included advice to the effect that in Scotland personal injury claims – including medical negligence claims – were subject to a three-year time limit; and that whilst this limit could be waived in exceptional circumstances, "we do not assess that will be likely in this case". The first appellant proceeded on 6 July 2020 to complain to the Scottish Public Services Ombudsman ("SPSO") about the outcome of the SAER. On 28 October 2022 the SPSO issued a Final Decision Notice upholding this complaint; the second appellant passed a copy of this to her union solicitors, and on 20 December 2022 the appellants raised the present action.

[4] The sheriff found that by the time the appellants consulted Irwin Mitchell they had formed a belief that the respondent, as employer of two identified nurses, was negligent and responsible for Mr Crossan's death. He considered that in terms of section 18(2)(b) of the Act, 21 September 2019 was, for both appellants, the date by which they would have been aware that the death was due, in whole or in part, to an act or omission on the part of the

respondent. He identified this date because it was when the appellants made their Stage 2 complaint to the respondent. Consequently he found that the appellants' claim was barred by passage of time by 21 September 2022.

[5] In then considering whether the court should exercise its equitable power in terms of section 19A of the Act the sheriff first addressed the conduct of the appellants after they were or ought reasonably to have been aware that they had a medical negligence claim against the respondent. They had repeatedly been advised of the three-year limitation period, but had "paid no heed" to that advice and "closed their minds to raising any proceedings until after the SPSO issued their final decision on 28 October 2022". Between the issue of the SAER on 6 February 2020 and the complaint to the SPSO on 6 July 2020 there was no action. Between 6 July 2020 and 10 October 2022, when the SPSO issued its draft Decision Notice, the only action taken was "the second pursuer repeatedly chasing the SPSO for a decision". Even after that decision was available, proceedings were not raised promptly, but only after a further delay of around six weeks on 20 December 2022.

[6] The sheriff then sought to balance the prejudice caused to each party. If extension were not granted the appellants would lose their right to pursue their claim against the respondent. Conversely, if extension were granted the respondent would be prejudiced by deterioration in the quality of evidence caused by the passage of time. It was a "finely balanced decision" but the sheriff concluded that the balance lay in favour of the respondent. Consequently, he granted decree of absolvitor.

Submissions for the appellants

[7] The appellants argued that the sheriff had erred in two respects. First, he had erred in identifying the commencement of the limitation period as being 21 September 2019; and

second, *esto* he had not so erred, he had failed to exercise his discretion properly by refusing to allow the time-barred action to proceed in terms of section 19A of the Act.

[8] For the first ground of appeal, it was submitted that, in terms of the joint minute of admissions, the date of the making of the Stage 2 complaint had actually been 17 September 2019; and more importantly, the date at which the appellants had knowledge of the statutory facts in terms of section 18(2)(b) was 28 October 2022, that being the date on which the SPSO issued its final decision.

[9] It was submitted that the sheriff's decision did not make clear whether he had applied a subjective test, to identify the date when the appellants were actually aware of the statutory facts, or an objective test, identifying the date on which it was reasonably practicable for them to be so aware. This lack of clarity was enough to vitiate his decision, but in any event the evidence did not support his conclusion on either basis. The evidence from the appellants showed that when the SPSO issued its final decision they had suspected negligence on the part of the respondent but had not been convinced of it. Reference was made to the Scottish Law Commission Report on Personal Injury Actions 2007 that awareness was:

> "a belief or understanding held with a certain degree of confidence or conviction, sufficient to prompt the initiation of proceedings to claim damages. In so far as there has been a semantic difference between 'knowledge' and 'awareness', we believe that the term awareness better expresses the notions which the judicial observations on knowledge were seeking to convey. 'Knowledge' by itself is apt to suggest a degree of certainty, which we think should not be necessary. Rather what is involved is a belief held with a degree of conviction, and that seems to us to be broadly speaking what is inherent in the notion of awareness."

[10] The appellants had taken legal advice which was to the effect that they should complain to the respondent in what amounted to a fact-finding exercise. This produced a decision that there had been no failings in the treatment or care of Mr Crossan; in

consequence of which Irwin Mitchell advised the appellants that their claim had poor prospects of success. For the sheriff to conclude that, notwithstanding this advice, the appellants ought to have commenced litigation was "contrary to the evidence and contrary to common sense". It was not until the SPSO upheld their complaints regarding Mr Crossan's care that they were sufficiently aware of the statutory facts as to commence the running of time, within the meaning of section 18 of the Act.

[11] For the second ground of appeal, if the action were indeed time-barred as found by the sheriff he had erred in failing to allow it to proceed by means of section 19A, a provision enacted to remedy injustices of this very kind – *McIntyre* v *Armitage Shanks Ltd* 1980 SC (HL) 46. The court's discretion whether or not to allow the action to proceed was unfettered, but had to be exercised having regard to the interests and conduct of the parties and their advisors, as well as the nature, circumstances and prospects of success in pursuit of the claim – *Donald* v *Rutherford* 1984 SLT 70 at 75. In balancing the equities, the court should consider: (i) the conduct of the appellants; (ii) prejudice to the appellants; and (iii) prejudice to the respondent – *Carson* v *Howard Doris Ltd* 1981 SC 278.

[12] With regard to the appellants' conduct, the sheriff had failed to take account of the fact that they had followed the advice given to them by Irwin Mitchell that their case had little chance of success; and therefore erred in stating that "there was no obstacle to them raising proceedings within the limitation period". He had left out of consideration the delay caused by the Covid pandemic to the issuing of the SPSO decision. He had failed to take account of the significant prejudice to the appellants in refusing to allow the action to proceed, when it had strong prospects and was supported by the evidence of skilled witnesses. Furthermore, he had failed to take into account that, on the hypothesis that the action time barred on 21 September 2022, the application of section 19A would involve

excusing only a relatively short period of thirteen weeks. Once the SPSO decision was available it had taken only nine weeks before proceedings were raised; such a period was neither excessive nor unexplained and the sheriff had mischaracterised it as being so. His finding that the respondent would be prejudiced by allowing the action to proceed, due to the passage of time, was uninformed by any evidence from the respondent to that, or any other, effect. As a result of the SAER process instigated by the appellants, a full investigation had been conducted by the respondent within weeks of the death, and consequently it would not be prejudiced by the application of section 19A.

Submissions for the respondent

[13] In the first instance it was submitted that there was no requirement for the sheriff to make a finding as to whether the appellants were objectively or subjectively aware of the statutory facts by 21 September 2019, but, in any event, it was clear from his judgment that he had found them to be objectively aware from that date.

[14] The focus of the preliminary proof was on the appellants' awareness of the statutory facts. That awareness could be actual or constructive, i.e. the awareness that it would have been reasonably practicable for them in all the circumstances to acquire. The statutory facts were whether Mr Crossan's injuries were attributable in whole or in part to an omission, and that the respondent was a person to whose act or omission the injuries were attributable in whole or in part. The trigger was the "attributability" of negligence, not certainty. Only a modest level of awareness was required to commence the limitation period, since from that point on there would remain three years to conduct investigations and commence an action - Johnston, *Prescription and Limitation of Actions* (2nd Ed.) at paragraphs 10.24 and 10.57. The sheriff had had ample evidence to allow him to conclude that both appellants possessed the

requisite awareness as at 21 September 2019. On that date the second appellant had, on behalf of the first appellant, submitted a letter seeking the SAER, which contained statements to the effect that "negligence aggravated [Mr Crossan's] poor mental state"; that there had been "a failure to assess the risk [Mr Crossan] was to himself on the day of his death"; that Mr Crossan "died due to [the respondent's] failures"; and that the first appellant held " the mental health CATS team and [Nurse B.] responsible for [Mr Crossan's] suicide that day". The respondent submitted that the wording of this letter was "strikingly similar to the case of fault now pled". Furthermore, the first appellant had accepted in cross-examination that at the time of giving her interview to *The Sun* on or before 4 September 2019 she had attributed her son's death to the failures of the nurses who saw him on the day of his death.

[15] In relation to the application of section 19A the circumstances which would justify the exercise of the equitable discretion required to be "sufficiently cogent to merit depriving a defender of what will have become a complete defence to the action. The interests of both parties and all the relevant circumstances must be considered" (*J* v *C* [2017] CSIH 8 at paragraph [16]).

[16] There was an onus on the appellants to "fill the gap" but they had made no effort to explain any of the delay that had elapsed between 28 October 2022 - when the matter was passed to the second appellant's trade union - until the raising of proceedings on 20 December 2022. It was not within judicial knowledge that steps such as the obtaining of an expert report were presumably being conducted during this period. The appellants had also given evidence that although this action was for damages, its meaning for them was to obtain answers; the litigation had already served that purpose and to further expend public funds on the appellants' claim would not be equitable. Having received the answers which

they had sought, they could not be prejudiced by the refusal to allow further litigation. The appellants' evidence had shown them to be aware of the fact that they had a claim, albeit it did not meet the prospects of success threshold applied by Irwin Mitchell, but they had repeatedly ignored advice given to them about how long they had to raise it. The sheriff had taken into account all relevant factors; in particular, it was axiomatic that a defender who required to face a time-barred claim would be prejudiced and that the nurses who were blamed for purported negligence would have to give evidence about matters which had occurred over six years previously.

Decision

[17] We do not consider that the sheriff erred in concluding that the appellants ought reasonably to have been aware of the statutory facts on 21 September 2019. The time period set down in section 18(2)(b) begins to run when a pursuer becomes aware – whether actually or constructively – that injuries are capable of being attributed to the acts or omissions of an identified person. In determining this start point, it does not matter if a pursuer knows whether or not the acts or omissions involved are legally actionable – section 22(3) of the Act. What is required is not knowledge that the defender's acts or omissions caused the injuries, but rather awareness that the injuries are capable of being attributed to those acts or omissions; that such attribution is a real possibility, not a fanciful one, a possible rather than a probable cause – Johnston, *supra*, at paragraph 10.57; *AH* v *Greater Glasgow Health Board* 2018 SLT 535 at paragraph [158].

[18] In selecting 21 September 2019, the sheriff has clearly accepted that such awareness was demonstrated by the appellants' lodging of their Stage 2 Complaint on that date,

prepared by the second appellant on behalf of the first appellant. That letter includes the following passages:

> "The months prior to [Mr Crossan's] death I feel there were problems with the care he received and I feel this all contributed to his mental health deterioration, resulting in his committing suicide. He was seen by a psychiatrist, drug and alcohol nurse, his own GP, CATS team in the weeks and months prior to his death, and endured a 10 day stay in Midpark in July for a failed suicide attempt. I feel negligence aggravated his poor mental state […] there was a failure to assess the risk he was to himself on the day of his death […] I hold the mental health CATS team and [Nurse B.] responsible for my son's suicide that day. Had he been listened to and the family listened to he should've been admitted to Midpark as he was an obvious danger to himself […] I believe situations such as Michael's could have been prevented, if he had received the correct care".

[19] In Article 6 of condescendence it is averred:

> "[The appellants'] loss, injury and damage was caused by the fault and negligence of [the respondent]'s employee for whose fault and negligence [the respondent] is vicariously liable. Nurses [R.] and [B.] failed to display the standards of skill and competence to be expected of reasonably skilled nurses. In particular, no nurse of ordinary skill exercising reasonable care would have (i) failed to have undertaken a formal or structured risk assessment of [Mr Crossan], (ii) failed to have spoken to [the appellants] outwith [Mr Crossan]'s presence and (iii) failed to have the Psychiatrist on call assess [Mr Crossan]. In each and all of these duties Nurses [R.] and [B.] failed. [Mr Crossan]'s medical history and his presentation on 20 August 2019 made his suicide reasonably foreseeable. In the event that Nurses [B.] and [R.] had fulfilled the duties incumbent upon them, a different care plan would have been implemented. The formal or structured risk assessment would have included and identified [Mr Crossan]'s history of self-harm, current presentation and family history. The risk of [Mr Crossan] committing suicide would have been properly identified and categorised. [Mr Crossan] would have been assessed by the psychiatrist. Had [the respondent] fulfilled the duties incumbent on it [Mr Crossan] would not have died when he did."

[20] Comparison of the Stage 2 Complaint with the Record shows that the appellants have consistently held the same position: that Mr Crossan committed suicide due to the defective care with which the respondent and its employees had treated him. That is their position today, and that was their position on 21 September 2019. They were, on that date, aware that Mr Crossan's death was capable of being attributed to the acts or omissions of the respondent. They themselves attributed it to those acts and omissions. Any assessment that

they or their legal advisers made as to the strength of such a case is immaterial; their awareness of the statutory facts was sufficiently firm to allow them to take legal advice and investigate whether there was a case against the respondent. The statute allows three years for such investigations to be conducted and for a case to be built; but the starting point for that period of investigation need only be "a relatively modest level of awareness" - Johnston, *supra* paragraph 10.24. On the basis of the evidence before him the sheriff was well entitled to conclude that that threshold was met when the Stage 2 Complaint was submitted. As to the date of that letter, the joint minute of admissions before the sheriff unhelpfully referred to it as being submitted on both 17 September 2019 and 21 September 2019. There appear to have been two copies of the letter lodged, similar though not completely identical to each other, each bearing one of these dates. In deciding the issue of time-bar we do not consider that the sheriff prejudiced the appellants by selecting the later of the two possible dates. Nor do we consider that he required to clarify whether he found there to be actual or constructive awareness as at that date; the letter, and the evidence given before the sheriff regarding it, supports either conclusion.

[21] Consequently the sheriff did not err in finding the action to have been time-barred at the point of being raised, and we refuse the first ground of appeal.

[22] Turning to the appellants' second ground of appeal, directed at the sheriff's refusal to exercise his discretion in terms of section 19A, a pursuer who seeks to rely on this provision bears the onus of satisfying the court that it should grant the remedy, and must provide an explanation for the delay that has occurred which is sufficiently cogent to justify depriving a defender of what would otherwise have become a complete defence to the cause. The interests of both parties and all the relevant circumstances must be considered, and in particular the interests of defenders in having reparation claims intimated to them

within the period that the legislature has set as a reasonable one – *J* v *C* [2017] CSIH 8 per Lord President (Carloway) at paragraphs [16] and [19]. A pursuer seeking to rely on this provision must provide an explanation that covers all, not merely part, of the period of delay – Johnston, *supra* at paragraph 13.11; *Young* v *Borders Health Board* [2016] CSOH 13 per Temporary Judge Arthurson at paragraph [25].

[23] In the present case the sheriff found that the appellants had not discharged the onus on them to justify exercise of the section 19A power. We consider that such a finding fell within his discretion. The explanation advanced by the appellants to explain the delay lacks cogency. Irwin Mitchell's refusal to act on their behalf based on their assessment of the prospects of success as less than 70% is irrelevant to the statutory test. That was no more than a matter of the policy applied by one particular law firm. The appellants were not told that they could not sue nor that the claim was not actionable. They were advised repeatedly that they had a three year period within which to raise litigation; advice which appears to have been ignored. There was no evidence before the sheriff that they ever received advice from a solicitor that they had to await the outcome of an ombudsman's investigation before raising an action. Insofar as they had formed such a view, it could not provide a reasonable explanation for the delay. In *B* v *Murray (No 2)* 2005 SLT 982 Lord Drummond Young noted at paragraph [30] that ignorance of the legal right to claim damages – as opposed to ignorance of facts material to a claim – was a material circumstance that a court required to take account of when considering exercise of the section 19A power; but there appeared to have been only one case, *Comber* v *Greater Glasgow Health Board* 1989 SLT 639, where it had been decisive in allowing an action to proceed. That case was a "fairly extreme" and "exceptional" one in which the pursuer had been extraordinarily unworldly and unaware until a late stage of the right to claim compensation. Those factors are not present here. In

our view, the lack of a cogent explanation for the appellants allowing a limitation period they knew of to expire, without raising proceedings, was sufficient reason for the sheriff to refuse to exercise the section 19A power in their favour. It is compounded by the lack of explanation for the subsequent delay, albeit relatively short, between receiving the SPSO decision and commencing proceedings. As to the balancing of equities, they are equally balanced; the appellants' prejudice in losing the right of action is balanced by the prejudice to the respondent in losing the protection of the time bar provision granted to them by Parliament. This ground of appeal is refused.

Disposal

[24] We refuse the appeal and adhere to the sheriff's interlocutors of 26 June and 22 July 2024. With regard to the issue of expenses, parties should seek to come to an agreement. If they are unable to do so within 21 days of this decision, a hearing will be fixed.