

OUTER HOUSE, COURT OF SESSION

[2011] CSOH NUMBER 13

OPINION OF LORD MATTHEWS

in the cause

ANN MOULDS

Pursuer;

A27/10

against

ALEXANDER REID

Defender:

Pursuer: Milligan, Q.C., Galbraith; Digby Brown LLP

Defender: Gallagher; A & WM Urquhart

24 January 2012

[1] In this case, the pursuer seeks payment by the defender of the sum of £50,000 Sterling with interest by way of damages. She avers that she suffered loss, injury and damage as a result of certain conduct by the defender which amounts to harassment in breach of the common law and Section 8 of the Protection from Harassment Act 1997. Subsections 1 to 4 of that section are in the following terms:

"8 - Harassment

(1) Every individual has a right to be free from harassment and, accordingly, a person must not pursue a course of conduct which amounts to harassment of another and -

(a) is intended to amount to harassment of that person; or

(b) occurs in circumstances where it would appear to a reasonable person that it would amount to harassment of that person

(2) An actual or apprehended breach of sub-section (1) may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question; and any such claim shall be known as an action of harassment.

(3) For the purposes of this section -

'conduct' includes speech; and

'harassment' of a person includes causing the person alarm or distress; and a course of conduct must involve conduct on at least two occasions.

(4) It shall be a defence to any action of harassment to show that the course of conduct complained of -

(a) was authorised by, under or by virtue of any enactment or rule of law;

(b) was pursued for the purpose of preventing or detecting crime; or

(c) was, in the particular circumstances, reasonable."

The case called before me at procedure roll for a debate on the defender's first three pleas-in-law which are as follows:

"1. The Pursuer's averments being irrelevant *et separatim* lacking in specification, the action should be dismissed.

2. The action being statute barred through lapse of time in terms of Section 17 *et separatim* Section 18B of the Prescription and Limitation (Scotland) Act 1973, should be dismissed.

3. It not being equitable to allow the action to proceed under the provisions of Section 19A of the Prescription and Limitation (Scotland) Act 1973 though statute barred, it should be dismissed."

Having heard counsel, I allowed a proof before answer and indicated that I would give my reasons in writing at a later date. This I now proceed to do.

[2] The pursuer, a podiatrist, avers that she was an acquaintance of the defender and that in or around September 2004 he began sending her indecent photographs, obscene and sexually explicit letters and poems and items of clothing. They were sent anonymously and she did not know who was sending them. Article 4 of condescendence goes into detail about the photographs and the letters. There is reference to photographs of a male from the waist down wearing various items of clothing, including female underwear. The correspondence and certain annotations on the photographs make sexual references. In addition items of underwear were also said to be sent to the pursuer by the defender. Reference is made to such items being sent on 24 September, 6 October, 27 October and 18 November 2004 and various dates in February, March May and June 2005. In particular, she avers that on 10 May 2005 she received a photograph of a male from the waist down wearing a pair of ladies tights and displaying an erect penis. The defender had written "Yours. Wish I had kept them." On 10 June 2005 he is said to have sent an obscene poem which made reference to choosing her underwear from her drawers and being in and around her house whilst dressed in her underwear. Further similar items are said to have been received by the pursuer on 27 October and 19 November 2005 and 8 March 2006. On the latter date, it is said that the defender had written fifteen verses of obscene poetry involving bondage fantasies relating to the pursuer. It also makes reference to items of underwear shown in the photographs which had been sent. The pursuer avers that she initially discarded one card and one photograph and gave all subsequent correspondence including photographs to the police. She avers that she was the victim of an armed robbery in her home in 1999 when the robbers wore ladies tights over their faces, carried knives and threatened to kill the pursuer and her daughter. They were both assaulted. As a result of this, the pursuer was scared of living on her own and she avers that the defender was aware of the robbery and knew that she had been traumatised by it. In particular she avers that he was aware that she was scared to stay on her own in the house and felt vulnerable. Some of the correspondence sent by the defender referred to the author as being in her house and it is said that he defender accordingly intended his conduct to cause the pursuer fear, worry and psychological harm.

[3] The pursuer also avers that the defender's course of conduct included making silent and anonymous telephone calls. She avers that she had a land line and a mobile phone. On 18 September 2004, she avers, a message was left on her answering machine at home saying the words "my bottom" followed by heavy breathing. She received several telephone calls of a similar nature, she avers, between September 2004 and 17 December 2005. These were made to her land line. When she answered the caller would sit in silence for around one minute and hang up. The caller would then call another five to six times repeating this procedure. She received another call on her land line on 17 December 2005, she avers, and complained to the police as a result of which was advised to contact BT and have a trace put on her land line. BT would not permit the trace to be placed on the line on a permanent basis and it was restricted in duration. The traces on her land line are said to have been unsuccessful in identifying the caller. The pursuer avers that she found the calls to

be intimidating and she became fearful and distressed as a result. She avers that after the trace was removed the calls began again and continued until around December 2006. During this time contact was also made with her via her mobile phone. On or around 22 June 2006 she avers that she received a text message from the defender from a particular mobile phone number ending in 410. The text ended with the name "Alex". The pursuer knew that this was the defender's mobile phone number. The text is in what is known as text speak and was interpreted by the pursuer as reading:

"Hi Ann long weekend. Shall valet car next time. Tired and heading to bed to wear your tights and put your panties over my head lick your shoes. Hope to catch up when you get home. X Alex".

The pursuer avers that she was shocked and upset by the text and by the suggestion that the sender, the defender, was in possession of personal items of underwear belonging to her. The text message was similar in nature to the previous correspondence she had received. As a result of this she avers that she suspected that the defender could be the person responsible for the obscene correspondence. It is averred that Ayr police had been involved in the case since September 2004 and on each occasion she received an offensive item she complained to them. After the pursuer received the text message on 22 June 2006, two named officers attended her home on 17 October 2006 and seized her mobile phone. It was sent for analysis. Subscriber checks were also carried out with telephone companies. The same two officers attended the defender's house on 16 December 2006 and carried out a search, as a result of which they recovered a number of items, including a sheet of paper with writing thereon and a pair of jodhpurs. These were significant because the pursuer averred that on 30 March 2005 the defender sent an obscene photograph, showing a male from the waist down and the words "your jodhpurs hold me nice and tight beneath your panties, lacy and white".

[4] It is averred that the defender made incriminating comments to police officer and was then interviewed on tape and charged with breach of the peace in relation to the campaign of harassment. The pursuer avers that she was still receiving silent phone calls until December 2006. She goes on to aver that a large stone, namely a broken slab, was moved around in her garden on a number of occasions including around April 2007. In the months leading up to the defender's trial diet, it is said that the stone in the garden was moved on three separate occasions. It was moved from the garden area and placed in front of her patio doors which allowed access into her home. It is averred that it was placed in such a way that it was obvious the person moving it had been in close proximity to the house.

[5] It is averred that the correspondence, the items sent through the post, the silent calls and the text message were all methods of communication whereby the defender would make repeated inappropriate and unwanted contact with the pursuer. His behaviour exhibited the defender's desire to force contact with the pursuer and to engage in a relationship with her regardless of her unwillingness and the inappropriate nature of the behaviour. It is said that the defender's behaviour was indicative of a man obsessed with the pursuer, that the moving of the stone involved his presence at her home and that his behaviour is typical of the behaviour known as stalking. It is averred that it is common for such behaviour to escalate over time and moving the stone was an escalation of the previous behaviour. All of the behaviour is said to have been of the same nature, character and quality. It is averred that until she received the text message from the defender on 22 June 2006, the pursuer was unaware and had no reason to suspect that the defender was responsible. She suspected him as a result of receiving the text and immediately sent him a text asking what he meant by his text. It is averred that on 25 June 2006 he replied apologising for the text and saying it was a joke. She complained to police on her return from holiday. The police noted at the time that she had mentioned the incidents to the defender some time ago, but as he was a friend who had access to her house to do painting, she did not think he would have anything to do with the inquiry. It is averred that a statement was taken for the pursuer by the police and arrangements were made for the defender to attend Ayr police office on a voluntary basis on 2 August 2006. He attended on that date and provided the police with samples of DNA and fingerprints. Police attempted to contact the pursuer on that date and on 13 August 2006 without success. On 1 September 2006 the police received notification from SCRO that a fingerprint impression belonging to the defender was found on an envelope addressed to the pursuer. They attended the pursuer's home on 17 October 2006 and seized her mobile phone for analysis. On 7 December 2006, two forensic scientists

produced a report in relation to the examination of the articles received by them from the police between 17 October and 31 August 2006. They concluded that DNA on ladies pants and stockings, which had been sent to the pursuer, matched that of the defender. DNA on blue tights which had been sent to the pursuer also matched that of the defender. It is averred that on around 17 December 2006 the police received a telephone call advising them that the defender's DNA had been identified and he was detained and interviewed on tape that same day, following which he was arrested. The police attended his house and found an obscene poem lying on his kitchen table which was of a similar nature to those he had previously sent to the pursuer. He pleaded not guilty to the charge at a first diet on or around 20 December 2007 and a trial diet was fixed for 7 January 2008 but did not proceed. He ultimately pled guilty and on 2 April 2008 he was placed on probation for a period of 3 years, was made subject to a non-harassment order for five years and "was placed on the Sex Offenders' Register "(sic).

[6] The pursuer goes on to make certain other averments in response to the answers but I will deal with them in due course. She also avers that the defender knew or ought to have known that sending such correspondence and engaging in this behaviour would have caused her alarm and distress. She avers that a business colleague was interviewed and DNA samples were taken from him as he had left a fingerprint on a photograph that she had showed him. This caused him considerable upset and his friendship with the pursuer broke down. She had to stop working at his practice. The pursuer goes on to make averments in connection with the defender's claim that the action is time barred but again, I will deal with them in due course. It is averred that it was not until 17 May 2010 that a consultant psychiatrist Mr C R Rodger diagnosed her as suffering from a chronic mild adjustment disorder with mixed anxiety and depressed mood. He was of the opinion that the defender's behaviour was a precipitating factor, leading to the development of this adjustment disorder.

[7] Answer 4 for the defender commences as follows:

"Admitted under the following explanation: The pursuer was an acquaintance of the defender; in February 2004 the defender sent the pursuer a Valentine card along with a pair of panties, tights, stockings and a pair of boxer shorts; the defender sent letters and a text message to the pursuer; the defender was arrested by the police."

Thereafter he avers that it is not known and not admitted that the pursuer received silent phone calls or if she did, who made them. It is said to be not known and not admitted that she had a large stone moved around in her garden or if she did, who moved. Her telephone numbers are not known and not admitted and it is not known and not admitted that a trace was placed on her telephone line for a period after 17 December 2005. It is not known and not admitted that Mr Rodger made the diagnosis averred in about May 2010 or that the pursuer handed in all correspondence to the police save for one card and one photograph. The access to the garden to her house is said to be not known and not admitted as is the content of any conversation between the pursuer and an Ann Galbraith, to whom I will refer later, the pursuer's state of knowledge and what action was taken by her solicitor prior to the raising of this action. The information she gave her solicitors is said to be not known and not admitted. *Quoad ultra* the pursuer's averments are denied. It is said that *esto* she was traumatised by the averred robbery in 1999 and she was scared to live alone, which is denied, it is averred that the defender was unaware of any such trauma. He avers that he saw the photographs condescended upon by the pursuer or at least photographs of a similar description on one occasion in about 2004 when he was cleaning her motor car. He avers that they were good friends from about 1996. They met regularly, played the guitar together on a weekly basis and sang each other's favourite songs. The first two poems which he sent to her were innocent ones based on songs. He avers that he understood that given the reference to the songs, the pursuer would have understood who had sent them. They telephoned and texted each other regularly as well as exchanging Christmas and birthday cards. He gave her bottles of wine. It is averred that she was flirtatious towards him and kept bondage and fetishist magazines and paraphernalia in full view at her home. The defender had hoped for something more than a platonic relationship with her and against that background sent her the Valentine card with underwear in February 2004. He sent her poetry of a sexual nature and in June 2006 texted her. He had been drinking alcohol and considered the text message from the pursuer to be

of a flirtatious nature. At no stage did the pursuer ever advise the defender to refrain from making contact with her or indicate that she had any problem with the nature or content of any of the gifts or correspondence he had sent openly to her. Had she done so, he would have refrained from sending her further correspondence of a similar nature. Accordingly his behaviour was reasonable. Reference is made to Section 8(4) of the 1997 Act. The only harassment that the pursuer mentioned to the defender, it is averred, was in about 2005 and related to the actions of the gentleman to whom I have referred, who was a friend and business colleague of the pursuer. It is averred that the pursuer and the defender fell out in or about June 2006 and the police contacted the defender thereafter. It is averred that in 2008 on the basis of legal advice tendered to him by his solicitors, he pleaded guilty at Ayr Sheriff Court to a charge libelling disorderly conduct on his part between 1 September 2004 and 30 June 2006 and which related to the sending by him to the pursuer of letters of sexual nature, items of underwear and the said text message. Certain calls are made upon the pursuer for further specification of dates. It is averred that if she received silent phone calls and the stone was moved in her garden, the calls and the movement of the stone were of a different nature to the correspondence and the sending of under garments. In sending the poems and the underwear, the defender had intended to invite the pursuer to participate in a form of sexual activity which he understood she enjoyed. He was aware from at least 1998 that she had an interest in bondage. Reference was made to certain magazines which were in her house, according to the defender. It is averred that as a result of a road traffic accident in 1993, the defender cannot climb ladders or walls. The pursuer's garden is bounded by a wall which is about 8 feet high and it would have been impossible for the defender to have gained access to the back garden in order to move the fragment of slab.

[8] The pursuer's averments in that regard were that from the wall around her garden access was possible through a staggered drop which did not require significant strength or agility and that it was possible to access her back garden from her neighbour's garden.

[9] In response to the averments of fact made by the defender, the pursuer avers that she first met him in mid-1997 at which time the defender was working with the pursuer's then partner. They lost touch in 1999 and the pursuer did not see him again until around 2003. They kept in touch via intermittent text messages but did not meet regularly. They met on around five occasions which are specified. They never met for coffee. Any telephone calls received by the pursuer where he identified himself were infrequent and for a specific purpose. He would occasionally phone to ask if she needed any work done. On one occasion, she called him to ask how best to advertise her car and how much it would be worth. Any gifts, cards, texts or poems he sent to her were not done so openly and she was accordingly unable to tell him to refrain from sending such correspondence.

[10] The pursuer avers that the defender is in breach of common law duties, having engaged in a deliberate course of conduct that was intended to cause the pursuer fear, alarm, distress and psychological harm. She avers that he knew that she had been the victim of a robbery in 1999 and was vulnerable and frightened to stay on her own. He persistently and anonymously contacted her at home using obscene correspondence and silent phone calls and the correspondence frequently referred to instances of bondage. It indicated he had been in and around the pursuer's house and had obtained items of her clothing and his behaviour caused her psychological distress. In answer, the defender admits that the pursuer told him that she had been the victim of a crime in about 1999 but explained that she had given no details of the averred robbery to him. He admits that he sent several sexual poems to her but *quoad ultra* the pursuer's averments are denied. He goes on to aver that *esto* he was in breach of any duties incumbent upon him at common law, which is denied, her claim for reparation is time barred by virtue of Section 17 of the Prescription and Limitation (Scotland) Act 1973. The latest date upon which she avers that she received a poem was 8 March 2006. The summons was served on 3 August 2009, nearly 3 years 5 months after the cessation of the correspondence.

[11] The pursuer also avers that the defender is in breach of his statutory duties under Section 8 of the Protection from Harassment Act 1997.

[12] That section is referred to in answer. It is averred that the defender's conduct in sending poems, underwear and the text message were reasonable under reference to Section 8(4) of the 1997 Act. It is also averred that the pursuer was aware that the defender was sending her poems, underwear and the text message at the latest by 22 June 2006 and the action is time barred under Section 18B of the 1973 Act.

[13] There are averments about the effect on the pursuer of the conduct in support of her claim for damages and counter averments by the defender but I need not go into them. The only matter which may have some bearing on the argument before me was an admission by the pursuer that she had made an application for criminal injuries compensation arising out of the defender's conduct.

Averments as to time bar

[14] Section 17 of the Prescription and Limitation (Scotland) Act 1973 is 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.

(3) In the computation of the period specified in subsection (2) above there shall be disregarded any time during which the person who sustained the injuries was under legal disability by reason of nonage or unsoundness of mind."

Section 18B of the Act is in the following terms:

"18B.- Actions of harassment.

(1) This section applies to actions of harassment (within the meaning of section 8 of the Protection from Harassment Act 1997) which include a claim for damages.

(2) Subject to subsection (3) below and to 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 alleged harassment ceased; or

(b) the date (if later than the 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 have become, aware that the defender was a person responsible for the alleged harassment or the employer or principal of such a person.

(3) In the computation of the period specified in subsection (2) above there shall be disregarded any time during which the person who is alleged to have suffered the harassment was under legal disability by reason of nonage or unsoundness of mind."

Section 19A of the 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.

(2) The provisions of subsection (1) above shall have effect not only as regards rights of action accruing after the commencement of this section but also as regards those, in respect of which a final judgment has not been pronounced, accruing before such commencement....."

[15] The defender avers in Answer 4 that the Summons was served by Messengers at Arms on 3 August 2009 and that the pursuer's right of action is accordingly time barred. In a matter which is linked to the time bar argument, *esto* she received silent phone calls, she is called upon to specify on what telephone numbers she received them, the dates and times thereof, whether or not any investigation was made in connection therewith, and if so, the results thereof. It is also averred that in a statement made to a named police office on 27 January 2007, the pursuer stated that the alleged silent calls ended in December 2005. *Esto* a stone was moved in her garden, which again is not known and not admitted, she is called upon to provide further specification as regards the dates upon which it is said to have occurred and in what circumstances. It is also averred in Answer 4, *inter alia*, that the pursuer will suffer no material prejudice if the time bar is applied and the action dismissed.

[16] In Answer 6, it is averred that the pursuer's claim for reparation is barred by lapse of time in terms of Section 17 of the Prescription and Limitation (Scotland) Act 1973. The latest date upon which the pursuer avers that she received a poem is 8 March 2006, nearly 3 years 5 months after the cessation of the correspondence. In Answer 7, it is averred that the pursuer was aware that the defender was responsible for sending poems, underwear and the text message at the latest by 22 June 2006 and since the Summons was served on 3 August 2009, the action, so far as based on the 1997 Act, is barred through lapse of time under Section 18B of the 1973 Act.

[17] The pursuer's position is, broadly speaking, that the removal of the stone and the silent telephone calls were all part of the same course of conduct. I have already set out the dates specified for this conduct according to the pursuer and her position is that the action is not time barred either under Section 17(2)(a) or Section 18B(2)(a) of the 1973 Act. She goes on to aver further that in the circumstances she was not aware and it was not reasonably practicable for her to be so aware that (i) her injuries were sufficiently serious to justify bringing an action against the defender, (ii) that they were attributable in whole or in part to the actions of the defender or that (iii) the defender was the person responsible for sending her the correspondence and items, making the calls or moving the stone in terms of Section 17(2)(b)(i) to (iii) inclusive of the 1973 Act. Furthermore, it is averred that she was not aware and it was not reasonably practicable for her to be aware that the defender was the person responsible for the harassment in terms of Section 18B(2)(b) of the Act. She did not appreciate that she would be able to claim compensation as a result of the defender's actions. She did not become aware that her injuries were sufficiently serious to justify bringing an action of damages until she discussed her situation with her friend and local councillor Ann Galbraith in or around May 2009. That lady discussed the situation with her daughter, an advocate, and the

latter advised her to tell the pursuer to speak to a solicitor as soon as possible, which she did. Until that time the pursuer avers that she was unaware that damages were potentially recoverable from individuals for damage as a result of stalking-type behaviour. She avers that she consulted a solicitor and advised the solicitor that the harassment had continued until at least December 2006. The proceedings were thereafter raised as soon as possible. It was not until around 17 May 2010, as I have indicated, that Mr C R Rodger, Consultant Psychiatrist, diagnosed her as suffering from a chronic mild adjustment disorder with mixed anxiety and depressed mood. His opinion was that the behaviour of the defender was the precipitating factor leading to the development of this disorder. It was only from that date that she received medical confirmation that her injuries were sufficiently serious to justify bringing an action against the defender and that her disorder was attributable in whole or in part to his actions. Furthermore, due to the anonymous nature of the activity, the pursuer was not aware that the defender was responsible. Only after his text message in June 2006 did she begin to suspect him. He initially pled not guilty to the charges and did not plead guilty until 7 April 2008. Only from that date was she aware that she was responsible for sending her the items and the correspondence and the text messages between 1 September 2004 and 30 June 2006. *Esto* she ought reasonably to have been aware that he was responsible for the behaviour prior to his plea of guilty, which is denied, she could only reasonably have been aware that he was responsible from the date of the identification of his fingerprint on one letter sent to the pursuer, namely after 1 September 2006. She only became aware of this after that date and having been advised of that by the police. The claim accordingly was not time barred. In support of her averments that she was not aware that she could make a claim against the defender, she avers that actions of this type are uncommon. She has suffered from an adjustment disorder, her life has been disrupted by the defender's behaviour and he has caused her considerable distress and upset. She acted promptly once she received the advice from her friend and discussed the case with her solicitor on 16 June 2009. On the same date, the pursuer's agent's wrote to Ayr Sheriff Court for the copy complaint and conviction and her medical records were requested on 24 June 2009. The Summons was drafted on 17 July 2009 and sent to Messenger at Arms for service on 24 July 2009. The extract conviction was received on 21 July 2009. It is averred that her solicitors acted promptly in light of the information provided by her in order to raise the action within the 3 year period. She advised that the defender's course of conduct had continued until December 2006. The defender's behaviour has had a significant impact on her life and she considers that this claim will allow her to regain some control of her life and some confidence. She would be seriously prejudiced if the claim was not allowed to proceed. *Esto* the claim is time barred, which is denied, she avers that it is equitable to allow it to proceed in terms of Section 19A of the 1973 Act. She could not reasonably be expected to have commenced litigation before she had consulted solicitors and was advised of the possibility of raising civil proceedings. The defender would not be prejudiced if the claim were allowed to proceed. He had had the opportunity to investigate fully in the circumstances of the alleged harassment in the course of defending the criminal proceedings and he was in receipt of Legal Aid. The public would pay for any legal expenses which he might incur and it is averred that he owns his own property.

Submissions for the Defender

[18] Mr Gallagher submitted that the thrust of his submissions would be to do with the relevancy of the averments about the course of conduct extending beyond the date of the conduct in respect of which the defender was convicted, that being the conduct which ended in June 2006. Furthermore, he would submit that the pursuer's case on the exceptions to Sections 17 and 18 of the 1973 Act was irrelevant.

[19] The pursuer made averments that she was scared of living on her own in her home as a result of an armed robbery and that the defender was aware of that and knew that she had been traumatised by the incident. There was, however, no specification as to how the defender was supposed to have been aware, from a knowledge of the fact that she had robbed, that she was vulnerable and scared. She had to set out how she said she was aware. It did seem to me, however, that this was a matter which could be inferred.

[20] Secondly, the end date of the defender's admitted conduct was June 2006. If the course of conduct ended on that date then the action was raised out of time. If however it continued until December 2006 as the pursuer averred, then it was timeous. There was no averment that any correspondence continued after March 2006. The pursuer, however, averred to two matters as being part of the course of conduct. One was the series

of silent telephone calls and the other was the moving around of a stone in the garden. These averments had to be taken at face value. It was suggested that the movement of the stone might have continued beyond December 2006 but nonetheless, at page 13B of the Record in Article 4 of Condescence it is said that the defender's behaviour continued until around December 2006. The averments about the moving of the stone being part of the course of conduct were therefore contradictory. I did not consider that this was a particularly good point. The averments had to be seen in their context and it was plain on a reading of the Record as a whole that the pursuer was averring that the conduct continued with the moving of the stone. However Mr Gallagher said that if the moving of the stone was not part of the behaviour then it was irrelevant. He went on to say that this behaviour could not properly be said to amount to a continuation of, or as being part of the course of conduct described as the sending of garments, photos and poems or letters. The pursuer linked those matters together in Article 4 from page 9E to page 10A as being all methods of communication. The moving of the stone could not be said to be that. Neither could the silent phone calls. I queried whether it could not be inferred that these were just manifestations of a course of conduct. Moving the stone could be a method of communicating that the mover had been in the garden and the silent phone calls with heavy breathing could also be in their own way a method of communication. In any event, could they not all be inferred as being different ways of harassing or stalking the pursuer? I understood Mr Gallagher to say that he was not suggesting that this could not be inferred. He said that he was forced into the concession that in the context, if this was all clearly the behaviour of the defender, then the inference might more readily be drawn. He referred to the case of *Marinello v City of Edinburgh Council* 2011 SLT 615. There were a number of distinguishing features in that case. There were averments about a regular course of conduct in 2004 and 2005 but there was a single specific incident in 2007. It was held that it could not be determined without hearing evidence whether or not that specific incident could be attributed to the course of conduct. In the instant case however, there was no later series of detailed incidents. There was no specification about the circumstances of the silent calls and no firm dates as to when the stone was moved. There were only generalised averments. The pursuer averred that the stone was moved around in her garden on a number of occasions including April 2007 and also averred that in the months leading to the trial diet it was moved on three separate occasions. It was difficult to reconcile the averments that it was moved three times before the trial diet with the reference to its being moved approximately three times and the fact that the defender pled guilty in April 2008. I have to say I have no real difficulty with this. The only question I have is whether April 2007 is one of the three separate occasions or not, but it seemed to me that that was not a matter which required the averments to be regarded as so lacking in specification as to require to be struck out. In the event, there was no specification, said Mr Gallagher, as to when the stone was moved other than a date in April 2007. Unless one made the generous reading that April was in the months leading up to the trial diet, there were no clear averments about a crucial matter. The defender was not being given fair notice of what was being said and he could not adequately prepare his defence. He could check his diary for April but he could not do so for the other occasions. The pursuer was possibly the only witness and the court should be slow to hold that these averments should be allowed to go to proof. I must say I could not understand what difference it made that the pursuer might be the only witness. Nonetheless, Mr Gallagher's submission was that the averments about the silent phone calls and the moving of the stone should be excluded. If I was not with him then his alternative motion was that, if these matters were to be considered after proof, there should be a preliminary proof. That could be restricted to determining the period during which the defender's alleged conduct occurred.

[21] As far as time bar was concerned, Mr Gallagher drew my attention to the relevant provisions of the 1973 Act, which I have already quoted. Section 18B (2) was simpler than Section 17(2), the only relevant consideration being the date the pursuer became, or the date when it was reasonably practical for her to become, aware that the defender was responsible for the harassment. Mr Gallagher criticised the averments made by the pursuer about the date when she became aware that her injury was attributable to the defender. They were to be found at pages 13B to 15B of the Record. They could not be taken at face value, said Mr Gallagher, given the pursuer's averments at page 10D-E about the fact that she suspected the defender on 22 June 2006 when she received the text message. What she called suspicion amounted to a relevant awareness for the purposes of Section 17(2)(b) that it was an act or omission of the defender. The real question was what state of mind was required to constitute sufficient awareness. In this connection Mr Gallagher referred

to *Johnston on Prescription and Limitation* at paragraphs 10.21 to 10.25, where, under reference to the cases of *Spargo v North Essex District Health Authority* [1997] PIQR 235 and *Comer v James Scott & Co (Electrical Engineers) Ltd* 1978 SLT 235, the following appears:

"Lack of Awareness of Facts

Two possible dates come into consideration here. The later of them is the date on which the pursuer had actual awareness of the statutory facts. The court may, however, take an earlier date as the starting date if satisfied that on that date it was reasonably practicable for the pursuer to have been aware of those facts.

What is awareness

There will be more to say about 'awareness' in connection with the specific facts referred to in Section 17(2) (b), but some general considerations can be raised here. A preliminary point arises. There is very little Scottish authority on the meaning of the word 'awareness' in this context. For that reason there is something to be gained from looking at the main issues which have arisen in relation to very similar English statutory provisions.

The equivalent provisions of the English legislation speak of 'knowledge' rather than 'awareness'. For these purposes even 'knowledge' - which seems to suggest a greater level of certainty - has been held not to mean 'know for certain and beyond possibility of contradiction' but to know with sufficient confidence to submit a claim to the defendant, take legal and other advice and collect evidence. Recently the Court of Appeal put it this way:

'A plaintiff has the requisite knowledge when she knows enough to make it reasonable for her to begin to investigate whether or not she has a case against the defendant. Another way of putting this is to say that she will have such knowledge if she so firmly believes that her condition is capable of being attributed to an act or omission which she can identify (in broad terms) that she goes to solicitor to seek advice about making a claim for compensation ... On the other hand she will not have the requisite knowledge if she thinks she knows the acts or omissions she should investigate but in fact is barking up the wrong tree; or if her knowledge of what the defendant did or did not do is so vague or general that she cannot fairly be expected to know what she should investigate; or if her state of mind is such that she thinks her condition is capable of being attributed to the act or omission alleged to constitute negligence, but she is not sure about this, and would need to check with an expert before she could be properly said to know that it was.'

This is line with Scottish authority on the pre-1984 Section 18 of the 1973 Act, which referred to 'knowledge' rather than 'awareness': 'whether a person' knows 'a fact' seems to me to involve a question of degree. I do not consider it advisable to attempt to define it, but at least I think it involves something approximating more to certainty than mere suspicion or guess. Moreover ... some information, suspicion or belief following short of knowledge is not transformed into knowledge if it happens to be correct.

It seems to make sense to take 'awareness' in the same sort of way. The point of Section 17(2)(b) is, after all, to fix the starting date for the limitation period, so it seems not unreasonable to require a relatively modest level of awareness, given that from that point on, there still remain three years to carry out necessary investigations, arrive at a clearer view of the cause or nature of the injuries, and raise an action. Equally, so far as awareness of the seriousness of injury and its causation is concerned, it makes no sense (except for an expert pursuer) to interpret a pursuer's 'awareness' as denoting any detailed knowledge about the prognosis or aetiology of his injuries or disease."

[22] Mr Gallagher looked more closely at the *Spargo* case where the plaintiff claimed that a negligent diagnosis led to her being wrongly detained in a psychiatric hospital. At page 242 of the report Brooke LJ, giving the leading judgment in the Court of Appeal, having considered a number of authorities, said the following:

"From these decisions I draw the following principles:

'(1) The knowledge required to satisfy Section 14(1)(b) is a broad knowledge of the essence of the causally relevant act or omission to which the injury is attributable:

(2) 'Attributable' in this context means 'capable of being attributed to' in the sense of being a real possibility;

(3) A plaintiff has the requisite knowledge when she knows enough to make it reasonable for her to begin to investigate whether or not she has a case against the defendant. Another way of putting this is to say that she will have such knowledge if she so firmly believes that her condition is capable of being attributed to an act or omission which she can identify (in broad terms) that she goes to a solicitor to seek advice about making a claim for compensation;

(4) On the other hand she will not have the requisite knowledge if she thinks she knows the acts or omissions she should investigate but is in fact barking up the wrong tree: or if her knowledge of what the defendant did or did not do is so vague or general that she cannot fairly be expected to know what she should investigate; or if her state of mind is such that she thinks her condition is capable of being attributed to the act or omission alleged to constitute negligence, but she is not sure about this, and would need to check with an expert before she could be properly said to know that it was.' "

Lord Maxwell in *Comer* had referred to knowledge of the fact involving a question of degree. He thought it involved something approximating more to certainty than near suspicion or guess. I pause to note that in this case the pursuer said that she suspected the defender following his text in June 2006.

[23] Mr Gallagher said that the pursuer could not excusably have been unaware that she had injuries. She said that she suffered immediate alarm and distress from the conduct although she did not say anything about the moving of the stone having that effect. There was no basis on Record for saying that her knowledge of her injury came at a later date. She obtained a diagnosis of an adjustment disorder, according to her, on 17 May 2010 but the action had already been raised. Of course her averment about that is that it was only from that date that she received medical confirmation that her injuries amounted to a psychiatric disorder and were sufficiently serious to justify bringing an action against the defender and that the disorder was attributable in whole or in part to his actions.

[24] Mr Gallagher said, though, that there were no relevant averments to show why she was not aware earlier than that. She need not know the detail of the prognosis of her injury. She said that she contacted the police and had the matter investigated after the second incident. The flavour of the pleadings was that the correspondence etc was having an immediate effect and she said nothing to suggest there was anything occult. The averment about the diagnosis indicated that it was at that time that she received medical confirmation. This meant that she was aware and just lacked confirmation. The suspicion she talked of was one upon which she acted. The fact that a clinical diagnosis was made in 2010 was not relevant since she was not unaware that the behaviour was having an effect upon her.

[25] Mr Gallagher referred to the case of *Halford v Brookes* [1991] WLR 428. I need not go into the facts of that case. Mr Gallagher quoted from the opinion of Lord Donaldson of Lymington MR from pages 442 to 443. That case dealt with the operation of the Limitation Act 1980 and the meaning of the word "knowledge" for the purpose of that Act. Amongst other things his Lordship said the following:

"It will be seen that what is meant by 'knowledge' in this context can be of crucial importance, although it is not so in this case. Guidance on the meaning of this word in this context is provided by Section 14(1) of the Act of 1980:

'references to a person's date of knowledge are references to the date on which he first had the knowledge of the following facts - (a) that the injury in question was significant; and (b) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty;

and (c) the identify of the defendant; and (d) if it is alleged that the act or omission was that of a person other than the defendant, the identify of that person and the additional facts supporting the bringing of an action against the defendant; and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.' "

His Lordship then went on to consider the case of *Davis v Ministry of Defence* (unreported) 26 July 1985 where the plaintiff at all times believed that the dermatitis from which he was suffering was attributable to an act or omission of his employers, The Ministry of Defence, and issued a writ on this footing. However, he then received medical and legal advice, which he accepted, that it could not be attributed to such an act or omission but was attributable to some defect in his own constitution and he agreed that the writ should not be served. The writ with which the court was concerned was issued much later after the plaintiff had had a severe attack of dermatitis and had been advised that, contrary to the previous advice, it was indeed attributable to his conditions of employment. Lord Donaldson went on as follows:

"It was in this context that May LJ, with the agreement of Sir Edward Eveleigh, expressed his view as to the meaning of the word 'knowledge,' the full quotation being:

'Knowledge' is an ordinary English word with a clear meaning to which one must give full effect: 'reasonable belief' or 'suspicion' is not enough. The relevant question merits repetition - 'When did the appellant first know that his dermatitis was capable of being attributed to his conditions at work?' "

To "attribute" means "to reckon as a consequence of." Mr Davis did not know that he could reckon his dermatitis as a consequence of the conditions of his employment until the expert's advice to the contrary was withdrawn, although all along he reasonably believed or suspected that it could.

[26] This leaves entirely open what is meant by having "knowledge" in the contexts of other paragraphs such as paragraph (c) which refers to the identity of the defendant. The word has to be construed in the context of the purpose of the section, which is to determine a period of time within which a plaintiff can be required to start any proceedings. In this context "knowledge" clearly does not mean "know for certain and beyond possibility of contradiction." It does, however, mean "know with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking legal and other advice and collecting evidence." Suspicion, particularly if it is vague and unsupported, will indeed not be enough, but reasonable belief will normally suffice. It is probably only in an exceptional case such as *Davis v Ministry of Defence* that it will not, because there is some other countervailing factor."

[27] Mr Gallagher submitted that these were only illustrations how the English courts dealt with the matter but in the instant case there was no countervailing factor to suggest that there was a discrepancy between the time the conduct occurred and the time the effect on the pursuer resulted. The averments were not relevant to establish any exception under any of the sub-paragraphs of Section 17(2)(b) of the 1973 Act. The position was clearer *quoad* Section 18B(2). The relevant factor was her awareness whether the act was that of the defender. She had such awareness from 22 June 2006. The averments about her becoming aware of the statutory facts as a result of a conversation in May 2009 should be struck out.

[28] Furthermore, the pursuer should have made fuller disclosure as to the date when she made her CICA application. Mr Gallagher submitted that if he was correct that the pursuer was aware of the relevant facts as at 22 June 2006 then the averments about her only having the requisite knowledge as at September 2006 in light of her being told about fingerprints were also irrelevant. The averment that she was unaware of the availability of damages as a remedy was excluded by Section 17. It was also irrelevant in terms of Section 22 although it might not be for the purposes of Section 19A.

[29] As far as Section 19A was concerned, Mr Gallagher submitted that, although the circumstances in which the action was raised were set out, the narration thereafter was of various facts which did not suggest an immediate attempt to raise an action. There was no explanation why the pursuer did not make enquiries about the possibility of taking proceedings before she did. She said that she did not know that the action sounded in

damages but she nothing to check. There was no reasonable excuse for failing to take proceedings sooner. This was all of course on the hypothetical basis that I was with him on relevancy and his submissions on Sections 17 and 18. He referred me to the case of *Fleming v Keiller* [2006] CSOH 163, a decision of Lord Drummond Young, as an example of a case where no grounds had been relevantly set out. His Lordship reviewed the authorities and in paragraph 12 of his opinion, summarised the averments for the pursuer. He said that he instructed his original solicitors in March 2002, less than 6 months after his accident. In July 2004, the advice of counsel was taken and 2 months after that the original solicitors advised they were not qualified to pursue an action and advised the pursuer to consult Quantum Claims. That delay was found to be quite extraordinary. Nonetheless, Quantum Claims were instructed on 22 October 2004 and they passed the instructions to Lefevre Litigation on 25 October, fifteen clear days before the expiry of the triennium. That ought to have been long enough to draft a Summons. The solicitor did not follow the normal practice of marking the firm's office diary and wall chart. Counsel was instructed but was absent from Parliament House until 11 November, the day after the triennium expired. There was no indication that any reminder was sent to counsel or his clerk. His Lordship held that the principle that a pursuer was answerable for the acts of his legal advisors was important. The pursuer was not personally liable for the failure to institute proceedings timeously but had to be held responsible for the failure of his legal advisors to do so. There was no good reason advanced for the failure to raise proceedings within the triennium and that was a factor to be taken into account. As far as prejudice was concerned, the pursuer stood to lose his claim against the defender but the defender stood to lose the defence which he would otherwise have had under Section 17. Since there was no good reason for the failure to raise proceedings timeously the court refused leave under Section 19A. Moreover, it seemed likely that there was a good case of negligence against the solicitors who ultimately acted for him. There was a complication in that a number of people had acted but in all the circumstances, the potential availability of such a claim was a factor which his Lordship took into account.

[30] Mr Gallagher said that the important point was that there was an alternative remedy in that case, namely an action against the solicitors. While that was not available in the instant case, there was an alternative remedy by way of a claim for criminal injuries compensation. In the instant case the agents were instructed shortly before the claim had expired but the action could have been raised timeously. The pursuer claimed that the course of conduct continued after the putative time bar suggested by Mr Gallagher but the averments about that would have been excluded on this hypothesis. What emerged from the pleadings was that there was no justification advanced other than a lack of enquiry on the pursuer's part. That was not a good reason and there were insufficient averments to allow a proof on the Section 19(a) question.

[31] As far as Section 17(2) were concerned, the averments about what she knew of the identity of the defender related only to her actual knowledge. It was averred that it was not reasonably practicable for her to be aware of the facts but there was no explanation why that should be so. Reference was made to the case of *Coll v Derrick Russel* and *Victoria Infirmary NHS Trust* 1999 SCLR 862. In that case the pursuer had raised an action of damages for personal injuries said to have resulted from oral surgery carried out in September 1992. He had been referred to the second defenders by his dentist. The pursuer averred that he inquired of the first defender whether there were any likely side effects of such surgery and was told that there were none so he consented. He averred that there were in fact likely side effects and that he suffered certain consequences as a result of the surgery. The Summons was signetted on 10 December 1996 and thereafter served on the defenders. They argued that the pursuer's right of action was extinguished by virtue of Section 17 of the 1973 Act. The pursuer averred that he had not realised that the symptoms he had suffered after the operation were permanent until he was told they were by the first defender in November 1995. He argued in terms of Section 17(2)(b)(i) that his right of action had not been extinguished and, alternatively, if it was, that it was equitable that he should be allowed to proceed in terms of Section 19A. The defenders argued that the pursuer's averments in relation to his knowledge of the injuries were irrelevant because they dealt with actual knowledge and not with whether it was reasonably practicable for him to have known about the seriousness of his injuries. They also argued that the averments relating to Section 19A were irrelevant.

[32] Lord Osborne, in the Outer House, held that although a reference to the question of reasonable practicability by inference might be sufficient, the averments appeared to have been framed only with the

issue of the pursuer's actual knowledge in mind with nothing to suggest that it would not have been reasonably practicable for him to have become aware of the relevant facts at any time following his operation had he sought information from an appropriate source and thus he had not averred a relevant case under Section 17(2)(b). The first question in relation to the pursuer's case under Section 19A was to decide whether he had averred a relevant case and it was clear that he had not. There was no basis for the exercise of the court's discretion under Section 19A and the action was dismissed. His Lordship quoted a number of authorities, the last of these being *Cowan v Toffolo Jackson & Co Ltd* 1998 SLT 1000 and went on as follows:

"In the passage which I have quoted, Lord Nimmo Smith appears to accept that it might be sufficient if a pursuer, in a situation such as this, made reference to the question of reasonable practicability by inference. I am prepared to accept that such a reference might be considered sufficient.

An issue arises, in the light of the arguments, as to what is meant, in the present context, by the words 'reasonably practicable'. Counsel for the pursuer relied upon the observations of Lord Sutherland in *Elliot v J & C Finney*. In relation to those words, in the context of Section 17(2) of the Act of 1973, Lord Sutherland said [at p.210L]:

'The question that has to be decided is not whether the pursuer had a reasonable excuse for not asking the material questions but whether it would have been reasonably practicable for him to do so. In my opinion it would be reasonably practicable for a pursuer to become aware of necessary information if he would be able to do so without excessive expenditure of time, effort or money. I do not consider that the mere fact that he did not feel like asking these questions can in any way render the acquiring of the information not reasonably practicable.

I respectfully accept that approach to the language used in Section 17(2)(a). I was not impressed by counsel for the pursuer's attempt to argue that that approach was inappropriate in the context of what might be described as medical facts.

In the light of these authorities, the question for me is whether there are to be found in the pursuer's pleadings averments, either direct or by inference, as to reasonable practicability in the context of the pursuer's situation. I have come to the conclusion that there are not. I agree with the contention made by counsel for the pursuer that the pleadings in this case relating to this aspect of the litigation appear to have been framed only with the issue of the pursuer's actual knowledge in mind. I can find nothing in the pursuer's averments to suggest that it would not have been reasonably practicable for him to have become aware of the relevant facts at any time following his operation as he sought information from an appropriate source.' "

[33] I pause to observe that in this case it is in fact averred in the circumstances condescended upon that the pursuer was not aware and that it was not reasonably practicable for her to be aware of the various factors set out in Section 17(2)(b)(i) to (iii) and to Section 18B(2)(b) of the 1973 Act.

[34] Mr Gallagher submitted that there was no explanation why the pursuer did not take expert advice about her condition. There was no reason given why she was not aware of all the statutory facts. She said that she was told of her condition in May 2010 but we were not told when the request for the diagnosis was made or why it could not have been made sooner.

[35] Mr Gallagher then invited me to exclude from probation the averments that had been discussed as to the basis upon which the defender might have been aware that the pursuer was afraid to stay in the house alone, and the averments about the moving of the stone and the silent phone calls. If I excluded those then the case was time barred. As to time bar, he invited me to exclude as irrelevant and unspecific the averments relative to Section 19A. I was invited to sustain the first, second and third pleas-in-law for the defenders and dismiss the action.

[36] Alternatively, I was invited to fix a preliminary proof on the averments anent time bar.

Submissions for the Pursuer

[37] Mr Milligan submitted that he could deal with the matter very briefly. He reminded me that this was a procedure roll debate and not a proof. There were three basic propositions to bear in mind. In the first place the averments had to be taken *pro veritate*. In the second place the defender's averments had to be discounted unless accepted by the pursuer. In the third place the defender had to show that the pursuer was bound to fail. In this connection Mr Milligan referred to the case of *Miller v SSEB* 1958 SC (HL) 20.

[38] The defender had averred that the pleadings about the moving of the stone were too vague. That sat uncomfortably with his averments that it would have been physically impossible for him to do it. Since that was his answer, there was no prejudice if there was any lack of specification. As far as his knowledge of her fear was concerned, in Answer 6 at page 24C of the Record the defender admitted that the pursuer told him that she had been the victim of crime in or about 1999 and he also averred that he was friendly with her. It could be inferred that he knew or ought to have known of her position.

[39] The pursuer's averments at page 14B of the Record in Condescendence 4 were that the harassment continued until around December 2006. If that were true, then no issue of time bar arose. Reference had been made by Mr Gallagher to the case of *Marinello* but at paragraph 12 of the Opinion of the Court it was said that the final question was whether the averments were sufficient to enable the court to infer that the course of conduct was intended to amount to harassment of the reclaimer or occurred in circumstances where it would appear to a reasonable person that it would amount to harassment of the reclaimer. The answer to that question was clearly a matter of inference. In the circumstances the necessary inference could be drawn. Thus the case could not be dismissed. The question of damages related to what the pursuer had suffered and when and what caused it. These matters were all bound up inextricably with the question of time bar. If the defender was not responsible for the silent phone calls or the moving of the stone, the only alternative was that there was a second stalker. If I asked the question whether the pursuer was bound to fail the answer was obvious.

[40] As far as the question of time bar was concerned, Mr Milligan dealt with Sections 17 and 18 together. Mr Gallagher had submitted that as at 22 June 2006, the pursuer knew that the text was from the defender and everything should then have become apparent. All that was known however, was the sending of the text. She did not know anything about the photographs and to this day, the defender denied sending them. The text was the start of the pursuer having an inkling that it was the defender who was responsible. While reference had been made to the case of *Coll* that case was very helpful for the pursuer. Mr Milligan was counsel for the defender in that case and the pursuer's pleadings made no reference even in passing to constructive knowledge. The pleadings in the instance case referred to the relevant statutory test and one could not say that the pursuer was bound to fail. Mr Milligan did not dispute Mr Gallagher's exposition of the law on Section 19A but he did dispute how it should be applied. He made reference to the Scottish Law Commission report on Personal Injury Actions: Limitation and Prescribed Claims. Paragraph 3.36 referred to a number of factors which the Commission considered were potentially relevant to the exercise of judicial discretion and should be included in the statutory list of factors that might be taken into account by a court. Head (b) related to the question why it was that the action had not been brought timeously. In this connection Mr Milligan said that a lot of the defender's criminal conduct was only now accepted. Head (c) considered what effect, if any, the length of time that had passed since the right of action accrued was likely to have had on the defender's ability to defend the action and generally on the availability and quality of evidence. If the instant case was time barred at all, it was only by a few weeks. The claim was thoroughly investigated for criminal proceedings. Head (d) related to the conduct of the pursuer and in particular how expeditious she was in seeking legal and (where appropriate) medical or other expert advice and intimating a claim for damages. This was an unusual action, not just a road traffic accident. The action progressed rapidly once the pursuer had consulted agents. Head (f) related to the conduct of the defender and in particular how he had responded

if at all to any relevant request for information made to him by the pursuer. In the instant case the defender had denied everything at first. He only pleaded guilty in 2008 to charges which were incontrovertible.

[41] As far as another remedy was concerned, no claim lay against the agents in the instant case. The CICA claim was unlikely to succeed and in any event it was a claim of last resort and could not proceed until the instant claim was determined one way or another. Furthermore, the defender had Legal Aid.

[42] In the circumstances, more than enough had been averred for a relevant case under Section 19A.

[43] As far as further procedure was concerned, Mr Milligan referred to page 49 of the SLC report and submitted that there was not sufficient agreement between the parties on the relevant facts to allow a preliminary proof on time bar. It was impossible to separate out the various factors and I should allow a proof before answer with all the preliminary pleas standing.

Reply for the Defender

[44] Mr Gallagher said that the conduct of the defender must relate to his conduct in the present action rather than the fact that he pled guilty in April 2008. Furthermore, as far the CICA claim was concerned; his information was that it had already succeeded to some extent and that some payment had been made.

Reply for the Pursuer

[45] In response to the last point, Mr Milligan said that he did not know about it.

Discussion

[46] The broad proposition for the defender is that the action is time barred since the alleged course of conduct on the averments ceased more than 3 years before the Summons was served. Mr Gallagher's position was that the averments as to the silent phone calls continuing until December 2006 and the moving of the stone in the garden were irrelevant or at least so lacking in specification as to be irrelevant. If I were with him in that regard, then the pursuer would require to persuade the court to exercise its equitable jurisdiction to allow the case to proceed and his submission was that the averments anent Section 19A were irrelevant.

[47] In my opinion, having regard to the case of *Marinello* in my opinion, it could not be said that the pursuer was bound to fail in attempting to establish that the silent phone calls and the moving of the stone were all parts of the same course of conduct. Whether or not they could all be described as methods of communication, I could not hold that the court would be bound to take the view that it could not be inferred that they were all different manifestations of stalking behaviour and that the same person was involved. If the averments were true, the alternative would be that another individual or individuals had engaged in this type of behaviour as well and it seemed to me that I could not say that a court would not hold that that was unrealistic.

[48] Mr Gallagher, of course, raised issues of specification. I prefer the submissions of Mr Milligan in this regard. A specific date, April 2007, was given in relation to one instance of the stones being moved. Other instances, whether two or three, on the pleadings seemed to me to have occurred between that date and January 2008. Moreover, while the defender might not be able to check his diary for alibis etc, his position was that he was physically incapable of entering the garden and moving the stone. In the circumstances it did not seem to me that any further specification was necessary and that the matter fell to be tested at proof.

[49] The same goes for the silent phone calls. It is said that they continued until December 2006. Mr Gallagher complained that there was a lack of specification as to where, when and using which phone these calls were made. However, the averments about the calls continuing until December 2006 seemed to me to fall to be considered in their context. In *Condescence* 4 at page 7 of the Record, the pursuer provided her mobile and home phone numbers. She referred to a message being received on her answering machine at

home on 18 September 2004 at around 1037 hours. A male had left a message followed by heavy breathing. Between September 2004 and 17 December 2005, it is averred that she received several telephone calls of a similar nature. It is averred that they were made to her landline and would be made in the early evening or the middle of the night. When she answered the calls the caller would sit in silence for around one minute and then hang up. He would then call another five or six times repeating this procedure and the calls would last for about 30 seconds. There was no set pattern as to when she received the calls. On 17 December 2005 she received another call on her landline and complained to the police as a result of which she was advised to contact BT and have a trace on her landline. The trace was however restricted in duration. Traces were unsuccessful in identifying the caller. After the trace was removed and this line of investigation ended, the calls began again and continued until December 2006. It seemed to me that one could infer that the calls were of a similar nature to those which had been specifically set out earlier. I did not think it necessary for any further specification to be given. No question of alibi or anything of the like could arise because the defender, if he made the calls, could have made them from anywhere. Once again it seemed to me that the relevancy of these averments had to be tested after hearing the evidence.

[50] In all these circumstances, I took the view that the question of time bar could not be dealt with without hearing evidence. That being so, it was not necessary for me to consider the averments relating to Section 19A.

[51] However, Mr Milligan's submissions on this matter were to be preferred, in my opinion. The pursuer had set out a number of circumstances not only dealing with her actual awareness but dealing with why it was not reasonably practicable for her to be aware of the various factors set out in Section 17(2)(b) and Section 18B(2)(b) of the 1973 Act. I could not say at this stage that the court would not exercise its discretion in favour of the pursuer, having heard evidence on these matters. It was plain that the pursuer had taken steps to consult a solicitor before the triennium had expired and she had taken steps to consult the police as to who it was who had been responsible. It seemed to me that one could infer that it was not reasonably practicable for her to do anything else. On her averments she had caused a traced to be placed on her telephone and she had contacted the police on each occasion she received an offensive item. Although she suspected the defender after the text on 22 June 2006, she had nothing further to go on until the results of the scientific examination were made known to her. It was not until 1 September 2006 that the police received notification from SCRO that a fingerprint impression belonging to the defender was found on an envelope addressed to the pursuer and the DNA report was not produced until 7 December 2006.

[52] In the circumstances, it seemed to me that the pursuer was not bound to fail in her assertions that she was not aware nor was it reasonably practicable for her to be aware of the identity of her stalker. If I am right in that then even if she could have consulted an expert earlier, which again seemed to me to be a matter of proof, her averments would have been sufficient to bring her within both 17(2)(b) and 18B(2)(b) of the 1973 Act.

[53] I was not attracted to the idea of a preliminary proof since the pursuer's averments as to what happened and her knowledge of them were inextricably bound up with her case as a whole and it would be pointless to attempt to separate them out.

I took the view however that it would be premature at this stage to repel the preliminary pleas and that they should be dealt with after enquiry.

Decision

[54] In all the circumstances I decided that I should appoint the case to a proof before answer with all pleas standing. Mr Gallagher was unable to resist Mr Milligan's motion for the expenses of the debate.