OUTER HOUSE, COURT OF SESSION

[2021] CSOH 128

PD443/20

OPINION OF LORD CLARK

In the cause

EG

Pursuer

against

THE GOVERNORS OF THE FETTES TRUST

Defender

Pursuer Mackenzie QC; Boni; Digby Brown LLP
Defender: Dean of Faculty; Clyde & Co (Scotland) LLP

22 December 2021

Introduction

[1] In this action, the pursuer claims that when he was a pupil at school in 1975 and 1976 he was physically and sexually assaulted on a number of occasions by a teacher. The pursuer seeks damages in the sum of £1,000,000, with interest at 8% a year, from 1 September 1975. The defender was the employer of the school-teacher. It denies the events that are alleged, although it accepts that if these are proved to have occurred it would be vicariously liable for the teacher's conduct.

[2] The pursuer avers (in Statement 4) that the teacher carried out similar physical and sexual assaults and abuse on three other pupils at the school, who are named. At the

hearing, the pursuer moved to have a Minute of Amendment allowed. That motion was unopposed and it was granted. As a result of the amendment, the pleadings in Statement 4 now set out further details of the alleged assaults on these other pupils.

[3] The pursuer's next motion was to allow issues and thus appoint the cause for a civil jury trial. The defender opposed that motion. In summary, on behalf of the defender it was submitted that there was special cause for not allowing issues and hence a civil jury trial, for three reasons: (i) the averments about assaults on other pupils were of doubtful relevancy; (ii) there had been substantial delay in bringing the proceedings; and (iii) there were difficulties in assessing damages. The pursuer contended that there was no special cause arising from those grounds. The court had the benefit of written submissions for each party and it suffices to give only a brief summary of their respective positions.

Submissions for the defender

[4] The occurrence and nature of the alleged abuse was not admitted and there was no relevant conviction referable to the pursuer's complaints. If there was such abuse, vicarious liability would apply. The averments of abuse of other children, as developed in the amendment, were at least of doubtful relevancy: *A* v *B* (1895) 22 R 402; *Inglis* v *The National Bank of Scotland Ltd (No.1)* 1909 SC 1038. Those cases had not been overruled and remained binding, causing the defender's reliance on *Moorov* v *HMA* 1930 JC 68 to be unsustainable. Mutual corroboration in a criminal context resulted from evidence of complainers who were all part of the libel. There would inevitably require to be a legal argument in the course of the jury trial as to the admissibility of such evidence. That amounted to special cause: *Higgins* v *DHL International (UK) Ltd* 2003 SLT 1301. Reference was also made to an unreported *ex tempore* decision in a case that involves facts with some similarity to the

present case, made earlier this year (*D* v *Denis Alexander and anr).* Lord Brailsford refused to allow recovery of documents that did not relate to the pursuer, but to other persons who were also pupils at the school, on the ground that the averments were not relevant in light of the Inner House decisions noted above.

[5] Another reason for special cause was the delay in raising or proceeding with the action: *Hunter* v *John Brown & Co Ltd* 1961 SC 231, 236 *per* the Lord President (Clyde) and Lord Guthrie. That could be seen in the statutory prohibition against trial by jury where a pursuer relies on section 19A of the 1973 Act, albeit legislative change meant that the pursuer in this case does not now require to rely on that section. Here, the allegations were of wrongs in 1975-6.

[6] In assessing damages, there would require to be a counter-factual approach, seeking to identify what the pursuer would have done if he had not been subjected to the averred abuse. This involved multiple and complex difficulties, standing the other significant events in his life that might be thought to have impacted on his earning potential, as set out in the defender's answers. There was also no explanation as to how the claims for wage loss, loss of employability and pension loss should interact. That again amounted to special cause: *Johnston* v *Clark* 1997 SLT 923. Given the lapse of time, interest would form a significant part of the claim, standing the approach taken in *JM* v *Fife Council* 2009 SC 163. The defender will argue that *JM* should be distinguished on the basis of actuarial evidence that will be led (as was not attempted in *JM*, noted at para [34] in that case). That created special cause: *Cooper* v *Pat Munro (Alness) Ltd* 1972 SLT (N) 20.

[7] The pursuer's contention that the Lord Ordinary presiding over the trial will make the decision on interest underlined the complexity involved in the case and did not fit with the established procedure that the jury deals with the facts. However viewed, special cause

on this issue existed: *Caldwell* v *Wright* 1970 SC 24, 28 *per* Lord Avonside; *Bygate* v *Edinburgh Corporation* 1967 SLT (Notes) 65; and *Moore* v *Alexander Stephen & Sons Ltd* 1954 SC 331, 334 *per* Lord Justice-Clerk Thomson.

[8] The fact that similar arguments might arise in other similar cases did not mean that special cause is not shown in this case: cf *Cooper* v *Pat Munro (Alness) Ltd.*

Submissions for the pursuer

[9] This was a relatively straightforward claim and special cause, such as to deprive the pursuer of his statutory right to a jury trial, had not been shown. The issues of whether the alleged abuse occurred, and of causation and quantum, were all matters on which a jury would be at least as well-placed as a judge to determine. The cause must be special to the particular case and not a general cause: *Taylor* v *Dumbarton Tramways Co Ltd* 1918 SC (HL) 96, 108, *per* Lord Shaw of Dunfermline. The fact that a legal question may arise is not generally a sufficient ground to amount to special cause: *Gardner* v *Hastie* 1928 SLT 497, *per* Lord Fleming at 499.

[10] The jury would be able to discriminate between expert medical opinions, including in respect of causation: *McKenna* v *Sharp* 1998 SC 297, *per* Lord MacLean at 304; see also *Higgins* v *DHL International (UK) Ltd 2003* SLT 1301, *per* Lady Paton at para [20]. Questions of causation and the assessment of damages in personal injury actions are classically considered to be jury questions: *Shaher* v *British Aerospace Flying College Ltd* 2003 SC 540, *per* Lord Marnoch (delivering the Opinion of the court) at 542-543. Reference was also made to *Andrews* v *Greater Glasgow Health Board* [2019] CSOH 31, *per* Lord Pentland, at para [162].

[11] In the present case, the pursuer's position was that the teacher's assault and abuse of pupils constituted a similar (by which is meant single) course of conduct, of which his

assaults and abuse of the pursuer formed part (Statement 4). Juries in criminal cases, of course, routinely consider complex evidence, with suitable directions from the judge on any points of law that arise. Some legal issues that arise in criminal law are complicated, requiring detailed and technical directions, and it was not obvious why a jury in the present case would not similarly be able to assess and come to a decision on the relatively straightforward matters that arise, with suitable directions in law.

[12] The averments about abuse of other pupils were relevant because of the doctrine of mutual corroboration, that is, the abuse of the various pupils was so closely linked by their character, circumstances and time as to bind them together as part of a course of criminal conduct systematically pursued by the teacher: *Moorov* v *HMA*; *Duthie* v *HMA* 2021 SLT 469. Cases such as *A* v *B* could be distinguished because the pursuer in the present case does not seek to prove that the alleged abuser was generally of a bad character or disposition, or had a propensity to commit abuse. It would be odd if juries in criminal cases were routinely allowed to hear such evidence but were not able to do so in a civil case. Applying the *Moorov* test, as recently articulated in *Adam* v *HMA* 2020 JC 141 at 150, the present averments were relevant and the resulting evidence would be admissible. Whether the alleged abuse of other pupils helps corroborate the alleged abuse of the pursuer will then be a matter of fact for the jury to determine.

[13] As to the alleged delay, the pursuer was, of course, a young child at the time of the abuse and could not reasonably be expected to have raised proceedings at the time. He would also have been unable to bring the action as an adult, because the previous provisions on time-bar meant that cases for historic abuse were almost never successful until the recent change in the law. In all of the circumstances, it could not be said that the delay in bringing proceedings in the present case was unusual or inordinate or has led to real prejudice to the

defenders in their defence of the action: cf *Conetta* v *Central SMT Co Ltd* 1966 SLT 302, *per* Lord Migdale at 304-305; *Hunter* v *John Brown & Co* 1961 SC 231, *per* Lord President (Clyde) at 235 and Lord Guthrie at 236-237. Standing the admission of vicarious liability, there was little or no prejudice to the defender in having to face these proceedings now.

[14] Turning to the alleged difficulties with causation and in assessing damages, juries routinely consider potentially complex medical evidence and consider and apply the Ogden tables when calculating future wage loss. The point about needing a counter-factual approach was because of the teacher's conduct and it would be unfair if the defender was able to pray that in aid in order to deprive the pursuer of his statutory right to a jury trial. The jury was well-placed (with suitable directions) to calculate wage loss and disadvantage on the labour market and would also have the benefit of parties' submissions on these matters. Pension loss would be a matter for expert evidence in due course. Interest will be a matter of law for the presiding judge who, at present, is bound by the Inner House decision in *JM* v *Fife Council*. While the defender has indicated an intention to lead actuarial evidence it was noteworthy that no accompanying expert report has been lodged and it is not obvious why, or in what way, this gives rise to undue difficulty. The apportionment of solatium (between past and future) was unlikely to give rise to any difficulty for a jury. Finally, if the defender's position was accepted then no case, or almost none, in which damages are sought for historic abuse will ever be suitable for a jury.

Decision and reasons

[15] In terms of section 11 of the Court of Session Act 1988, an action for personal injury shall be tried by a jury, but that is subject to section 9(b) which allows the Lord Ordinary to fix a proof if special cause is shown.

[16] In *Moore* v *Stephens*, the Lord Justice-Clerk (Thomson) stated (at 334-335):

> "It does not admit of doubt that in modern jury practice in the Court of Session there is no room for a trial before answer. The subsumption on which a jury trial proceeds is that all questions of relevancy have been disposed of and that the trial is to proceed on the basis of the record, which is looked on as conclusive of relevancy. This is shown by a number of considerations. No Judge could exclude evidence from the jury's consideration if the party leading it could show that he had a sufficient record for it. So, too, the Courts, when invited to send a case to proof rather than to jury trial, are frequently affected by the consideration of the doubtful relevancy of the record, and the Courts have frequently emphasised the desirability of records in cases going to juries being clearly stated so as to focus for the jury the points in controversy. Of the expediency of conducting a jury trial on the basis of a relevant record and of the chaos which would result if it were sought to conduct a jury trial before answer there can be little doubt. It is only on a relevant record that the proper respective functions of Judge and jury can satisfactorily be operated."

In *Boyle* v *Glasgow Corporation*, (referred to with approval by Lady Paton in *Higgins* v *DHK International (UK) Ltd* at [23]) the Lord Justice-Clerk (Thomson) noted (at 261G-H) that in a civil jury trial:

> "One wants to avoid wrangling as to the admissibility of evidence. That is undesirable in itself and sometimes operates prejudicially against the party taking objection."

[17] This was a hearing on an opposed motion. There was no suggestion that the pursuer's averments in relation to the alleged abuse of other pupils at the school should be excluded from probation. The court was not being asked to make any final or definitive ruling on the question of relevancy. Rather, the question at this stage is whether those averments are of doubtful relevancy, resulting in the test of special cause being met.

[18] There are decisions of the Inner House on the use of similar fact evidence in civil cases. In *A* v *B*, the pursuer sought damages for rape and also alleged that the defender was of a brutal and licentious disposition, and had on two other occasions "attempted to ravish" two other women. The defender contended that these averments were irrelevant. The Lord President (Robertson) stated (at 404):

> "Courts of law are not bound to admit the ascertainment of every disputed fact which may contribute, however slightly or indirectly, towards the solution of the issue to be tried. Regard must be had to the limitations which time and human liability to confusion impose upon the conduct of all trials. Experience shews that it is better to sacrifice the aid which might be got from the more or less uncertain solution of collateral issues, than to spend a great amount of time, and confuse the jury with what, in the end, even supposing it to be certain, has only an indirect bearing upon the matter in hand."

The Lord President went on to say that if the averments were excluded from probation that did not preclude the defender, if he gave evidence, from being cross-examined on the matters.

Lord McLaren said (at 404):

> "I am of the same opinion. If we were to hold that the statements as to indecent assaults on other women were relevant topics of proof it would necessarily follow that in an action of fraud it would be legitimate to allow the pursuer to prove that the defender had defrauded other persons under equivalent circumstances. So in an action of damages for negligence it would be competent for the pursuer to prove neglect of duty by the defender under similar circumstances, but affecting entirely different persons and interests. The proposal, therefore, involves a wide extension of the limits of investigation in actions of damages."

[19] That approach was adopted again by Lord McLaren in *Inglis* v *The National Bank of Scotland Ltd (No.1)* (1909 SC 1038, at 1040), a case alleging fraudulent misrepresentation by a bank agent. Lord McLaren held that the pursuer's reliance on evidence of similar conduct in respect of another person was "entirely ruled out" by *A* v *B*, which:

> "…it seems to me to be a good authority for the proposition that it is not evidence against a party of having committed a delict to shew that he has committed delicts of the like description against other persons on other occasions."

[20] These decisions have not been overruled and indeed have been referred to in other civil cases (see eg *Strathmore Group* v *Credit Lyonnais* 1994 SLT 1023, a case concerning a dispute as to the authenticity of a signature of one of a series of bills of exchange). That said, there has also been consideration of the issues by the Scottish Law Commission in its Report on Similar Fact Evidence and the *Moorov* Doctrine (Scot Law Com No 229, paragraph 5.9

et seq), where it was concluded that the approach of the Lord President in *A* v *B* was based upon considerations of case management and of expediency, rather than on relevance. Some difficulties with comments made by the Lord Ordinary in *Strathmore Group* v *Credit Lyonnais* are also noted. Reference is made by the authors of the Report to the decision of the House of Lords in the English case *O'Brien* v *Chief Constable of South Wales Police* [2005] UKHL 26; [2005] 2 AC 534, a civil action brought by a man who had been convicted of murder, that conviction having been quashed by the Court of Appeal. In the action, he sought to lead evidence about two police officers having allegedly acted in a similar way in the past. In the House of Lords, similar fact evidence was explored in some detail and the decision of the courts below that the evidence should be allowed was accepted. The Scottish Law Commission's Report goes on to discuss questions of the relevancy and admissibility of such evidence.

[21] In *Moorov* v *HMA*, decided some years after these Inner House cases, the concept of mutual corroboration was clearly established. It has gone on to play a very important part in the prosecution of sexual offences. Plainly, *Moorov* and the many cases that have followed thereon deal with its use and scope in a criminal context. While I see some force in the point made by the Dean of Faculty that the criminal cases commonly involve alleged crimes against several complainers, it must not be overlooked that mutual corroboration can arise even where there is only one complainer, such as where there is a docket appended to the indictment which gives rise to corroborative evidence in respect of another person (see eg *Penrice* v *Her Majesty's Advocate* [2020] HCJAC 32).

[22] While corroboration is not an evidential requirement in civil cases (Civil Evidence (Scotland) Act 1988, s 1), that does not of course disallow reliance upon it to support or strengthen a party's position. To take an obvious example, in a claim based upon a traffic

accident an eye-witness may be called to corroborate and thereby enhance the evidence of the injured driver. In civil cases involving sexual assault, the only source of evidence of that assault might well be the person making the allegation. If in civil proceedings it is proved that there has been a conviction for that assault, the offence will be taken to have been committed unless the contrary is proved (Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, s 10). However, if there has been no conviction, and mutual corroboration is not allowed, the pursuer's position is more difficult to prove. So, there is some force in the view that the *Moorov* doctrine on mutual corroboration should be available for use also in civil cases, particularly involving a sexual assault. But as I have noted the earlier Inner House cases to which I was referred have not been overruled and so, while the point may come to be reconsidered, those decisions currently remain binding upon me. As the Scottish Law Commission noted in its Discussion Paper on Similar Fact Evidence and the *Moorov* Doctrine (No 145, at paragraph 5.6 *et seq*) the principle that evidence on one charge could corroborate another charge on the same indictment was recognised long before *Moorov* and indeed before those Inner House cases. *Inglis* v *The National Bank of Scotland Ltd (No.1)* makes clear that in a delictual claim evidence of similar conduct with other persons is not admissible. It is perhaps open to argument that this is not a correct interpretation of what was said by the Lord President in *A* v *B*. However, the present case is a delictual claim, involving intentional harm. These earlier cases support the proposition advanced on behalf of the defender that there exists doubtful relevancy in this aspect of the pursuer's case. It is therefore appropriate for the case to go to a proof before answer, at which final determination can be made on the issues of relevancy.

[23] Practical issues also result in that conclusion. During submissions, I raised with senior counsel the point that in a civil jury trial there will be an introductory opening speech

to the jury, commonly by junior counsel for each side. If this case proceeded to a jury trial, in that speech, junior counsel for the pursuer would be strongly expected to refer to the pursuer's position (as averred) that the teacher engaged in physical and sexual abuse of other schoolchildren and that evidence would be led on that matter. When each one of the witnesses who speaks to such matters is called as witness, objection will only become possible when a question is asked about physical or sexual abuse, which is perceived by counsel for the defender to be irrelevant or inadmissible. The jury would then be asked to retire while the legal issue is dealt with. In this case, there would need to be fairly detailed submissions and resolution of the point could take some time. In light of what was said in *Boyle* v *Glasgow Corporation* that is an undesirable way of proceeding.

[24] On this first ground, for the reasons given, the motion to allow issues is refused.

[25] Turning next to delay, for a significant period of time the pursuer faced difficulty in being able as a matter of law to bring these proceedings. While there may well be dimmed recollection of the details, the key matters are likely to have remained in the minds of those involved. No sufficiently clear prejudice caused by any delay is identified, let alone anything that would affect the case being determined by a jury. Accordingly, I do not see any force in the point about alleged delay.

[26] The third point raised by the defender concerned damages and interest. In terms of section 17(4) of the Court of Session Act 1988, where the jury in an action which concludes for damages finds a verdict for the pursuer they shall also assess the amount of the damages. In relation to damages, it is averred that as a result of the assaults and abuse by the teacher the pursuer has suffered and continues to suffer loss, injury and damage. He is said to have dropped out of school, turned to take drugs, and suffered a wide range of various forms of psychological damage. In relation to wage loss, he is said to have performed less well at

school than he would have done but for the abuse. The pursuer avers that he is likely to have obtained at least average academic qualifications for pupils at the school, before obtaining a degree at university and finding and sustaining employment in a professional occupation. He is likely to have earned more than he has thus far. It is also averred that, in any event, he has been and continues to be at a material disadvantage in the open labour market because of his psychiatric injuries. It is said that he will suffer pension loss. He is likely to have been a member of an occupational pension scheme in professional employment. His claims are for: solatium; past and future loss of earnings; disadvantage in the labour market; pension loss; and treatment costs.

[27] In its defences, the defender raises issues about the pursuer's home life not being stable and denies that the pursuer has suffered clinically significant psychiatric symptoms. Even in the absence of the alleged abuse, it is said that the pursuer would have been vulnerable to the development of psychiatric illness. The pursuer is said to have reported to a consultant psychiatrist that he had been bullied at school by teachers and other pupils. He also reported that he had felt marginalised and excluded on account of being a day-pupil as opposed to a boarder. The pursuer was involved in a road traffic accident around 10 years ago. He suffered a leg injury necessitating the insertion of metalwork. He is said to have work issues unrelated to the alleged abuse. His career path is said to be his own choice and he would have pursued the same career even in the absence of the alleged abuse. He was never likely to pursue a career in a professional occupation. Various issues are raised about interest.

[28] I accept, of course, that a jury is able to discriminate between expert medical opinions, including in respect of causation: *McKenna* v *Sharp*, *per* Lord MacLean at 304; see also *Higgins* v *DHL International (UK) Ltd*, *per* Lady Paton at para [20]). It is also established

that questions of causation and the assessment of damages in personal injury actions are classically considered to be jury questions: *Shaher* v *British Aerospace Flying College*, *per* Lord Marnoch (delivering the Opinion of the court) at 542-543. However, it is clear that in the present case there are multiple and complex issues to be considered. There will be difficulties for the jury as to how the claims for past and future wage loss and loss of employability, along with pension loss should interact: see *Johnston* v *Clark*. Of itself, that suffices to create special cause. It also feeds into the issue of interest, which has other complications here, including the intention of the defender to lead actuarial evidence seeking to form a basis for distinguishing *JM* v *Fife Council*. While fixing interest will come to be a matter for the judge, there is room for material concern here about the interplay between the jury's views on the various matters that bear upon damages and interest (such as the actuarial evidence) and how the judge will come to decide upon the appropriate dates and rates of interest. It is difficult to see, in a case of this complexity, how the judge can fully and accurately understand the individual elements which in the jury's mind made up the sum awarded in damages. As held in *Cooper* v *Pat Munro (Alness) Ltd*, a difficulty in applying a jury's verdict can create special cause and in my view that could easily arise here. The suggestion for the pursuer that this conclusion would result in all cases of this kind not being able to be tried by a jury is unfounded. The issue is fact-specific.

Disposal

[29] For the reasons given, I accept the position for the defender that special cause exists and so the motion to allow issues is refused.