OUTER HOUSE, COURT OF SESSION

[2024] CSOH 32

PD371/19

OPINION OF LORD HARROWER

In the cause

FIONA DROUET AND OTHERS

Pursuers

against

ANGUS MILLIGAN

Defender

Pursuers: Ellis KC; Jones Whyte LLP
Defender: Primrose KC, L Thomson; Balfour + Manson LLP

20 March 2024

Introduction

[1] In September 2015, Emily Drouet went up to Aberdeen University to study law. She moved in to a student flat owned by the University. In her first term she met and entered into a relationship with Angus Milligan, also a student at the University. On 18 March 2016, Emily was found dead in her flat, having taken her own life. She was just 18. The pursuers seek damages as members of Emily's immediate family pursuant to the Damages (Scotland) Act 2011 ("the 2011 Act"). They hold Mr Milligan responsible for her death. They describe his behaviour towards Emily as coercive and controlling. They say he deliberately carried out a course of conduct in which he inflicted physical assaults on Emily, verbal abuse and

displays of anger towards her, all with the intention of causing her physical harm and severe mental and emotional distress. Her resulting psychiatric illness, the pursuers say, caused her to take her own life.

[2] The first pursuer is Emily's mother, Fiona Drouet. She sues in her own right but also as parent and guardian of Emily's brother, Calvin, and her sister, Rachel. The second pursuer is Emily's step-father, and Mrs Drouet's husband, Germain Drouet. The third and fourth pursuers are Emily's maternal grandparents, Eileen and Iain Scott Campbell. The fifth and sixth pursuers are Mr Drouet's parents, Monique and Jacky Drouet. They seek damages to compensate them for the distress and anxiety endured by them in contemplation of Emily's suffering before her death, for their grief and sorrow caused by Emily's death, and for such loss of society and guidance as they might have been expected to derive from Emily had she not died.

[3] An earlier version of the summons passed signet on 11 March 2019. It was served on Mr Milligan within three years of Emily's death. However, the summons was not called within three months and a day after the date of signeting. In such circumstances, the rules of court required the summons to be treated as if it had never existed. A fresh summons, the summons in the present action, was not served until 3 September 2019. The action called before me at a preliminary proof before answer restricted to time bar. It was not disputed that the claim brought by the first pursuer as parent and guardian of Rachel and Calvin must be allowed to proceed to a full proof before answer, since time did not run against Emily's siblings while they were still under 16. The sole questions at this stage are whether the remaining claims have been brought too late, and if so whether, notwithstanding their lateness, the court should exercise its equitable power to allow them to proceed.

Mr Milligan denies responsibility for Emily's death. The question of where that responsibility lies must therefore be one for another day.

The law

[4] The narrow scope of a proof of this nature can be appreciated at the outset by reference to the relevant statutory provisions.

[5] Section 3 of the 2011 Act provides that sections 4 to 6 of that Act apply,

> "where a person ('A') dies in consequence of suffering personal injuries as the result of the act or omission of another person ('B') and the act omission-
>
> (a) gives rise to liability to pay damages to A (or to A's executor), or
> (b) would have given rise to such liability but for A's death."

Section 14(1) of the 2011 Act defines "personal injuries" as meaning "(a) any disease, and (b) any impairment of a person's physical or mental condition". Section 4 of the 2011 Act provides that, in the above circumstances, B is liable to pay damages to A's immediate family. The question of whether the pursuers are "immediate family", as that term is defined by the 2011 Act, and of whether they are entitled to the damages they seek are not within the scope of the current proof.

[6] Section 18 of the Prescription and Limitation (Scotland) Act 1973 applies to:

> "any action in which, following the death of any person from personal injuries, damages are claimed in respect of the injuries or the death".

Section 22(1) of the 1973 Act defines "personal injuries" as including "any disease and any impairment of a person's physical or mental condition". Section 18(2) of the 1973 Act provides that, subject to section 19A, no action to which section 18(2) applies shall be brought unless it is commenced within a period of three years after-

> "(a) the date of death of the deceased; or

> (b) the date (if later than the date of death) in which the pursuer in the action became, or on which, in the opinion of the court, it would have been reasonably practicable for him in all the circumstances to become, aware of both of the following facts –
>
> > (i) that the injuries of the deceased were attributable in whole or in part to an act or omission; and
> >
> > (ii) that the defender was a person to whose act or omission the injuries were attributable in whole or in part or the employer or principal of such a person."

Section 22(3) of the 1973 Act provides that, for the purposes of section 18(2)(b) knowledge that any act or omission was or was not, as a matter of law, actionable, is irrelevant.

[7] Section 18(3) of the 1973 Act provides there shall be disregarded in the computation of the period specified in section 18(2) any time during which the relative was under legal disability by reason of nonage. Section 1(2) of the Age of Legal Capacity (Scotland) Act 1991 provides that reference in any enactment to "disability … by reason of nonage" shall be construed as a reference to a person under the age of 16 years.

[8] Section 19A of the 1973 Act provides that, where a person would be entitled, but for section 18, 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.

The evidence

[9] Mr Ellis KC, senior counsel for the pursuers, called the following witnesses to give evidence: Fiona and Germain Drouet, Dr Timothy Brow, consultant general adult psychiatrist (who gave evidence remotely by webex), Alastair Gillies, solicitor, BTO Solicitors LLP, and Dominic Ritchie, solicitor, Jones Whyte LLP. Mr Primrose KC, senior counsel for Mr Milligan, called Gordon Dalyell, solicitor, Digby Brown. In addition, parties agreed that the witness statement of Mr Steven Love, KC, who was on Mr Primrose's

witness list, could be treated as his evidence, without the need for him to be called. Subject to any reservations I have noted in what follows, I found all the witnesses to be generally credible and reliable. They were all doing their best to assist the court.

[10] I should make the following preliminary observations.

[11] Firstly, it will be clear from the terms of section 18 of the 1973 Act that, insofar as the question of time bar is concerned, the focus is entirely on the "awareness" of the pursuers of certain matters. That is so whether it be the awareness the pursuers actually had, or the awareness that it would have been reasonably practicable for them in all the circumstances to acquire (sometimes referred to as "constructive" awareness).

[12] Secondly, parties were agreed that the awareness of the third to sixth pursuers should be treated as being the same as that of the first two pursuers, Fiona and Germain Drouet (whom I shall refer to as Mr and Mrs Drouet, or simply, the Drouets). Implicit in that agreement was an assumption that the Drouets themselves were consistent with each other in their level of awareness. That assumption may not have been entirely borne out by the evidence they in fact gave, but it does at least suggest an intention that their evidence should be interpreted as being mutually consistent wherever possible. Certainly, they sent emails in their joint names, and they attended meetings with the police or the procurator fiscal together.

[13] Thirdly, while Dr Timothy Brow had been asked to provide a retrospective view regarding any psychiatric disorder suffered by Emily, the purpose of his giving evidence at this hearing was not to explore the substantive merits of that view. Rather he was examined primarily in relation to the information which, in his opinion, would be required to make a post mortem diagnosis, as well as the question of when, as a matter of fact, he was put in possession of the information he received. Dr Brow's evidence on these matters was

relevant to the pursuers' actual and constructive awareness of the psychiatric disorder or condition that Dr Brow considered Emily to be suffering from. In addition, Dr Brow was cross-examined in relation to the Drouets' factual presentation at consultation with him, and in particular, with regard to the degree of awareness that the Drouets reported themselves to him as having in the weeks and months following Emily's death.

[14] Finally, as I have explained, the focus of the hearing on time bar was on the pursuers' awareness, actual or constructive, of the so-called statutory facts, that is, that Emily's injuries were attributable in whole or in part to an act or omission, and that Mr Milligan was a person to whose act or omission the injuries were attributable in whole or in part. It is no part of this hearing to consider or make findings as to whether these statements of fact were true. Rather, the court assumes that they are true solely for the purpose of discovering when the pursuers were aware of them, or when it would have been reasonably practicable, in all the circumstances, for them to have become aware of them.

Timeline

Prior to Emily's death

[15] Mr and Mrs Drouet referred to Emily as happy and with no significant history of mental ill health. Dr Brow interviewed them on 2 May 2021 in connection with the preparation of his report. His report recorded the Drouets as saying they were "fearful" for Emily, having met Mr Milligan once. When Emily returned home from university in January 2016, she was "head over heels" in love with Mr Milligan, but her heart was broken after discovering he had had sex with other girls. They split up and then got back together again. They had an "open" relationship, though Mrs Drouet said in evidence that this was not a term she would have used. The Drouets were worried about "someone getting hurt".

They described the situation as "toxic". Dr Brow went on to record that their "concern grew for Emily's wellbeing and they planned to visit her". Mrs Drouet received a telephone call from Emily on 12 March 2016. Dr Brow recorded her as saying that her speech during this call was "very rapid and difficult to follow". "Looking back", she felt her daughter was unwell at this point. The Drouets believed Emily was aware that they disliked Mr Milligan, which meant that she didn't tell them about his "controlling/abusive behaviour".

[16] Mr and Mrs Drouet were cross-examined on the basis that these reports indicated an awareness on their part, already before Emily's death, of the harm that Mr Milligan had been inflicting on her. However, I accept the Drouets' evidence that their concern at that stage was primarily with the nature of the relationship, and its effect on their daughter, rather than specifically with the behaviour of Mr Milligan within that relationship. I also accept their evidence that they had planned a visit to Aberdeen out of concern primarily over Emily's commitment to her studies. She had received a "C6", effectively a warning from the university. Mrs Drouet's comments on Emily's presentation during the March telephone call were clearly made with the benefit of hindsight. As a generality, it would have been natural for the Drouets, in the light of the information they received after Emily's death, to look for clues in what they already knew about Mr Milligan's behaviour towards Emily prior to her death. Relatively little can be taken from that as to their level of awareness of the statutory facts during this earlier period.

Immediately following Emily's death

[17] At approximately 01:30am on 18 March 2016, the police informed Mrs Drouet of the death of her daughter. Her first reaction was one of shock. Her world imploded. At about 2 or 3 in the morning, she phoned a close friend of Emily's, who told her that there

were "things [Mrs Drouet didn't] know", about Mr Milligan "treating [Emily] badly". Mrs Drouet had a "bad feeling" about Mr Milligan, but did not suspect any abuse. Mr Drouet said that by the time they were driving up to Aberdeen the next morning, "Fiona was receiving messages and communicating with Emily's friends". She either showed him the messages or read them out loud.

Emails to procurator fiscal, 22-23 March 2016

[18] On 22 March 2016, four days after Emily's death, Mr and Mrs Drouet emailed the procurator fiscal, in the following terms:

> "We are contacting you as we have reasons to believe the evidence presented to you by the DASU [Divisional Administration Support Unit] is incomplete as to the circumstances of our Daughter's death.
>
> We have been sent copies of text messages from Emily's friends/flat mates showing her boyfriend, Angus Milligan, was involved in psychological abuse and other evidence showing he was in her room only minutes before she died.
>
> The attached screenshots are but a few of many communications pointing to his involvement in Emily's state of mind at the time of the incident.
>
> We would insist on your urgent acknowledgement and response to this email."

[19] It is unnecessary to set out the detailed content of these texts. Mrs Drouet conceded that they would have been very difficult for Emily to take. She thought Emily would have been "absolutely petrified". She could see from the texts that Mr Milligan was "psychologically demeaning [her] daughter."

[20] On 23 March 2016, Mr and Mrs Drouet sent an email to the police and procurator fiscal, advising them that they "[kept] finding new evidence supporting the case of psychological control and abuse from AM".

First contact with a solicitor, 24 March 2016

[21] On 24 March 2016, Mr and Mrs Drouet contacted a solicitor, Mr Gillies, "regarding their concerns about Mr Milligan's conduct and behaviour towards the deceased". At this stage the Drouets' principal concern was whether Mr Milligan had "any direct involvement in her death". They asked Mr Gillies to check the post mortem. Asked what she said to Mr Gillies about the effect of Mr Milligan's behaviour on Emily's health, she replied that she told him that "somehow [Mr Milligan] had harmed Emily psychologically", and that she would "have to [have been] harmed psychologically to take her own life."

Email to procurator fiscal, 25 March 2016

[22] On 25 March 2016, Mr and Mrs Drouet sent an email to the Scottish Fatalities Investigation Unit (North) of the Crown Office and Procurator Fiscal Service ("COPFS"), enclosing contact details of friends in whom they believed Emily would have confided. The Drouets commented that Emily would have been "reserved and ashamed to disclose too much". They mentioned that Emily's friends had told them that Emily had started to go out with other boys to show Mr Milligan that he "couldn't control her". Their relationship had become more intense. Mr Milligan would freely go with other girls but intervene if Emily flirted with other boys. Emily had started to drink more, and her drinking peaked after Mr Milligan found out that she had participated in a "threesome" on or around 3 March 2016. Emily had been deeply ashamed of herself as this behaviour was not like her. The Drouets said they believed that it would have been at this point that Mr Milligan's "persistent and verbal cyber persecution began". Mr Milligan had threatened to divulge Emily's sexual activity to her parents. Among the social media messages copied to the Drouets, there was one from Emily to a friend dated 10 March 2016, saying, "He's ready to

email my mum". Mrs Drouet believed this would have panicked Emily. The evening before Emily died, Emily went to a club with a friend, and was refused entry after Mr Milligan had spoken to a bouncer at the door. Emily's attendance at lectures had "slumped" over the course of her relationship with Mr Milligan. There was a period of one week from 7 March 2016 when "lectures were all cancelled", which I took to mean that Emily did not attend them. The Drouets believed "this was a time when [Mr Milligan]'s mental abuse intensified as Emily was reportedly very down and tormented."

The funeral, 5 April 2016

[23] Emily's funeral was on 5 April 2016. A number of Emily's friends spoke to Mrs Drouet at the funeral. She learnt that Mr Milligan strangled Emily on 10 March 2016, to the extent that Emily nearly passed out. One friend told Mrs Drouet that, shortly before Emily's death, he had seen her distressed after Angus had been in her room.

Meeting with COPFS and the police, 12 April 2016

[24] On 12 April 2016, Mr and Mrs Drouet met with Andrew Hanton, procurator fiscal depute, from the Scottish Fatalities Investigation Unit and a police sergeant from the Divisional Administrative Support Unit – Sudden Death Investigations. The Drouets minuted the meeting (though the minutes were incorrectly dated 19 April 2016).
The Drouets presented Mr Hanton with a timeline covering the period between 26 February and 17 March 2016, compiled from information they had received. It set out "key events", "date/location", "witnesses" and "evidence/supporting material" and attached screen shots of various messages. The list of "key events" detailed several instances of alleged physical and verbal abuse of Emily by Mr Milligan. These included alleged assaults on 10, 16 and

17 March 2016, allegations of shouting and swearing, and allegations that Mr Milligan sent Emily offensive and threatening messages. The document noted by way of evidence for the alleged assault in Emily's flat on 17 March 2016, that she had sought the support of a neighbouring student, and told him that Mr Milligan had hit her again. Mrs Drouet commented at the meeting that Mr Milligan had "broken down [Emily's] character". There had been a "decline in [Emily's] mental state" and an increase in her alcohol intake. It was "like she was having a nervous breakdown".

[25] In her evidence, Mrs Drouet commented on the alleged assault on 17 March 2016. She said that the neighbouring student in whom Emily had confided had told her that Emily had been distressed and that Emily had said to him that she "couldn't go on". Mrs Drouet also explained that she had been aware by the time of the 12 April 2016 meeting that Emily had been "psychologically impacted" or "psychologically harmed" as a result of Mr Milligan's behaviour. She described the reference to Emily's actions resembling the behaviour of someone having a nervous breakdown as a turn of phrase. For Emily to take her own life, Mrs Drouet said, she must have had a breakdown of some kind. Mr Drouet accepted that, by 12 April 2016, he knew Emily's mental health had been impaired.

Mr Hanton's email, 13 April 2016

[26] Following this meeting, Mr Hanton emailed the Drouets, advising them that he was satisfied that there was no criminality "surrounding Emily's tragic death itself". However, given the issues raised about the conduct of Mr Milligan "in the weeks and months before she died", he undertook to keep the file open to allow the police to review matters.

May/June 2016

[27] The police took witness statements. Mr Milligan was interviewed under caution on 17 May 2016 and questioned in relation to allegations of domestic abuse, threatening and abusive behaviour, and sending offensive messages. A report was subsequently submitted to COPFS in May/June 2016, and criminal proceedings were brought against him.

Email to Mr Hanton, 14 August 2016

[28] On 14 August 2016, Mrs Drouet sent an email to Mr Hanton in which she stated that she had found a kitchen knife in Emily's room while they had been clearing it. The email stated that one of Emily's friends told the Drouets that Emily had used the knife on 11 March 2016 "to score through her study planner during what seems to have been a breakdown". This was the night after Emily had been "seriously assaulted and strangled to the point of passing out/dying by Mr Milligan".

[29] Mr Drouet accepted that the deceased's conduct, as described in this email, was an indication of poor mental health, and that its cause was "the campaign of abuse by Angus Milligan".

After 3 September 2016

[30] In July 2017, Mr Milligan was sentenced at Aberdeen Sheriff Court, his plea of guilty to charges of assault, threatening and abusive behaviour and indecent communication having been accepted by the Crown. It was only after the conclusion of these criminal proceedings that Mr and Mrs Drouet were given a copy of the downloaded contents of Emily's phone. These covered the full period of Emily's and Mr Milligan's contact. They provided a context for some of Emily's behaviour reported to them by friends, for example,

that Emily was always rushing. From the download, they could see that Mr Milligan had been sending her "2 minute timers". It gave them a deeper insight into the increasingly abusive nature of the relationship between Emily and Mr Milligan, and the anxiety and distress it was causing Emily.

[31] There were 34 statements taken by the police. Mr and Mrs Drouet had seen most of these by the time Dr Brow was preparing his report.

[32] Mrs Drouet stated that it was not until they received Dr Brow's report that they focussed on Emily's psychiatric illness.

The first summons, March 2019

[33] Mr Gillies was a partner of BTO and had been involved in assisting Mr and Mrs Drouet from about 24 March 2016, primarily in liaising with the police and the procurator fiscal. He did not assist in the recovery of Emily's telecommunications records, or the police statements. The focus shifted to raising a civil action after Crown counsel's decision in December 2018 not to hold a Fatal Accident Inquiry.

[34] His firm had made a mistake regarding when the summons needed to be lodged for calling. The rule for ordinary actions was that the summons required to call within one year and a day of passing signet. They had proceeded on the basis that the rule for ordinary actions applied, rather than the "three month and a day" rule applicable to actions of damages for, or arising from, personal injuries. He did not become aware that the instance had fallen until 16 August 2019. Mr Dalyell gave evidence, confirming his opinion provided in a report lodged on behalf of Mr Milligan, that no reasonably competent solicitor acting with ordinary skill and care would have failed timeously to lodge the summons for calling.

[35] The first summons stated,

> "Prior to the period from January 2016 to the date of her death, the deceased had neither experienced nor demonstrated any symptoms of mental ill-health, aside from a short-lived eating disorder when 15 years old, which was quickly rectified. … It is believed and averred that the defender's said acts of assault together with threatening behaviour and verbal abuse progressively rendered the defender to be in such state [*sic*] of emotional anxiety and distress as to constitute a state of mental impairment in consequence of which the deceased took her own life".

The present action

[36] Dominic Ritchie qualified as a solicitor in 2015. He was employed by Jones Whyte & Co, who have been representing the pursuers since 2020. In view of the perceived complexity of the case, and on the advice of counsel, he decided it was appropriate to instruct an expert report. Dr Brow was instructed on 29 March 2021. The averments in the summons regarding Emily's having sustained a psychological injury were introduced after obtaining Dr Brow's report.

Dr Brow's report

[37] Dr Brow's report was dated 9 December 2021, though Mr and Mrs Drouet received a first draft on 6 July 2021. Though this proof was not concerned with the merits of his views, it was important to note what these views were, and the information upon which they were based. Dr Brow's view was that, at the time of her death, Emily was in the midst of an evolving and fluctuating adjustment reaction with mixed disturbance of emotions and conduct and as such was suffering from mental impairment. He made reference to the International Classification of Diseases, code F43.22. (He gave a secondary diagnosis of EDNOS (eating disorder not otherwise specified). Adjustment disorders were associated with psychological distress and were strongly correlated with suicides. In Emily's case her

condition was complicated by her anxiety and fear of external and public family shaming and humiliation. This was compounded by her internal "self-admonishment and guilt at having been involved in a threesome – ironically a situation in which she may have been a victim". He said that,

> "Emily's case narrative [was] consistent with the steady escalation of an adjustment reaction (as evidenced by emotional and conduct problems, depression, anxiety, suicidal ideation, and increased alcohol intake), the trajectory of which mirrored Mr Milligan's escalating harassments, sexual and physical assaults and threats of blackmail and abandonment".

[38] Explaining how he reached his views, he referred to Appendix A to his report, containing a list of the documents available to him. These comprised the WhatsApp messages, Instagram messages, police statements, and Emily's mobile telecommunications from December 2015 until the date of her death. At a very general level, Dr Brow was able to confirm that all of this material was of importance in reaching his diagnosis. It would not have been possible without that information "to understand the stressors". He was asked in cross-examination whether it would be possible to conclude that Emily was psychologically unwell just from "the texts" (it was unclear from the question which texts specifically were being referred to). He replied that one could certainly identify a stressor. Asked whether one could arrive at a "working diagnosis that something was wrong", based on the messages sent by university friends, he replied that it would "not be that difficult". In re-examination, he was asked to confirm whether, even on that limited information, it would be possible to reach a view that something had gone wrong, to which he replied, "Absolutely". Pressed regarding what texts it would be necessary to see in order to be alerted to the fact that something had gone wrong psychiatrically, he said there was "no prescribed threshold". He had considered various statements, crown statements, statements from friends and fellow students, and the statement given by Mr Milligan to the police. He

was asked whether he could be more specific about which of these was necessary to reach a diagnosis. He replied that most of the statements had helped him to build a picture and come to a conclusion. Finally, he was asked to comment on the suggestion made in cross-examination that he could have reached a diagnosis of a recognisable medical condition on less information. He replied that, "Certainly it would have been possible". Asked what he would have needed, he replied,

> "Good corroborating evidence of a maladaptive reaction in the presence of a stressor. For example, following the break-up of the relationship, did someone observe Emily becoming more anxious?"

Argument for the pursuers

[39] Clearly, the action was raised more than three years after the date of death. However, Mr Ellis argued that, because of the operation of section 18(2) of the 1973 Act, time did not start to run until after 3 September 2016.

[40] Section 18 applied to any action in which, following the death of any person from personal injuries, damages were claimed in respect of the injuries or death. The expression "personal injuries" included any impairment of a person's mental condition. In order for a person to bring a claim for personal injuries in respect of their mental condition it was necessary that the injured person had suffered an "identifiable psychiatric or psychological illness or condition" (*McEwen & Paton*, para 9.03; *McLoughlin* v *O'Brian* [1983] 1 AC 410, at 431H; *Mack* v *Glasgow City Council* 2006 SC 543, at paragraphs 14 and 16). References in the 1973 Act to "impairment" or "mental condition" should be understood as references to an identifiable psychiatric or psychological illness or condition. Anything else was simply not actionable. Section 22(3) provided only that knowledge that any act or omission was or was not actionable was irrelevant.

[41] The pursuers founded upon their lack of awareness of the fact set out in section 18(2)(b)(i). The pursuers required to be aware, actually or constructively, "that the injuries of the deceased were attributable in whole or in part to an act or omission". The awareness required for the purposes of section 18(2)(b)(i) must necessarily involve awareness of there being a relevant injury which caused the death. Without awareness of a relevant injury there could be no awareness that the injuries that caused the death were attributable to an act or omission. In the context of a death consequent upon a psychiatric injury, that awareness must be of an identifiable psychiatric or psychological illness or condition. Otherwise there would be no personal injury and no right of action.

[42] Reference in section 18(2)(b)(i) to "the injuries" of the deceased should be understood as a reference to section 18(1) and the injuries from which death resulted. Time should not start to run when it was not known that there was a personal injury that caused the death. It was unlikely that Parliament intended the three-year period to run whilst the existence of the personal injury was unknown. Mr Ellis referred to the Scottish Law Commission's Report on the Law relating to Prescription and Limitation of Actions (1970), at paragraphs 123 and 124, and to its recommendation number 176, that the three-year period should run from when "any of the pursuers first acquired knowledge (actual or constructive) of the material facts relating to the right of action". Mr Ellis submitted that "awareness" was akin to knowledge, under reference to Johnston, *Prescription and Limitation* (2nd edition), paragraphs 10-21 to 10-25.

[43] So far as constructive knowledge was concerned, this was partly a subjective and partly an objective test, looking at what would be reasonably practicable for a reasonable person to be aware of in the particular circumstances of the pursuer: *Agnew* v *Scott Lithgow (No 2)* 2003 SC 448, at paragraphs 20 and 22.

[44] Mr Ellis accepted that Mr and Mrs Drouet had received information in the days and weeks after Emily's death of "bullying information" on the part of Mr Milligan. They were aware he might be prosecuted. They were aware Emily had been caused emotional anxiety and distress, and had suffered damage to her mental health. However they were not aware that Emily had suffered a "relevant psychiatric or psychological illness or condition" until they received Dr Brow's report in July 2021. As to constructive knowledge, there was nothing in the early months after Emily's death to put the pursuers "on notice" that Emily might have suffered a relevant psychiatric or psychological condition. Only after the conclusion of the criminal case, when "fuller information" about the nature and extent of Mr Milligan's behaviour became available might it be suggested that the pursuers were put on notice. The "actual trigger" for seeking psychiatric evidence, Mr Ellis submitted, was the needs of the court action, which I understood him to mean the need to obtain expert evidence properly to plead the existence of a relevant psychiatric or psychological condition.

[45] Even if the Drouets should be held to have been on notice by, say, the meeting on 12 April 2016, it would not have been reasonably practicable for the pursuers to have become aware of Emily's condition until a psychiatric report could be obtained. According to Mr Ellis, Dr Brow's evidence supported the view that it would not have been possible to identify Emily's particular condition without the full picture of Mr Milligan's behaviour (stressors) and Emily's behaviour in response (maladaptive behaviour) provided by the witness statements, Mr Milligan's police statement, and the social media records downloaded from Emily's phone. Mr Ellis acknowledged that it may have been possible for a medical expert to diagnose a psychiatric condition on less information, but it would still require good evidence of the stressors and the maladaptive response. Dr Brow made it clear that it would not be possible to make a diagnosis without the medical records. Mr Ritchie's

evidence was that this would take 6-8 weeks to obtain these. A solicitor would have to be instructed. Good evidence of the stressor and maladaptive response would require to be obtained before a report could be instructed. In April 2016 the Drouets had only been provided with a limited number of screenshots of text messages. It would have been unlikely that further details of the social media communications and witness statements could have been obtained from COPFS until after the conclusion of the criminal proceedings against Mr Milligan. Even if the pursuers had sought independently to have obtained witness statements this would likely have taken a "material amount of time". A suitably qualified expert had to be identified. The report had to be prepared, considered and written. In a posthumous case, this would always have been a complex and delicate exercise. "Precision", Mr Ellis claimed, "as to what would happen in the hypothetical world in this case [was] not possible". In all the circumstances, even if the pursuers were put on notice by 12 April 2016 of the need to investigate, they would not, taking reasonably practicable steps, have been aware that Emily had suffered from a relevant medical condition until on or after 3 September 2016.

[46] If the court concluded that the action was time-barred, it should nevertheless exercise its equitable discretion pursuant to section 19A of the 1973 Act, allowing the action to proceed. The discretion conferred by statute was broadly expressed. The question was whether it is equitable in all the circumstances to allow the action to proceed: *AS* v *Poor Sisters of Nazareth* 2008 SC (HL) 146, at paragraph 25. The existence of an alternative remedy was a factor that might weigh against exercising that discretion in favour of the pursuers: *A* v *N* 2009 SC 449, at paragraphs 13 and 14; *Jacobsen* v *Chaturvedi* [2017] CSIH 8, at paragraph 18. However, it was necessary to look at the circumstances of the alternative remedy: *Anderson* v *Glasgow District Council* 1987 SC 11, at pages 24 to 27.

[47] Each case turned on its own facts. This was an unusual case, in which Mr Ellis relied on the following factors. An action had been timeously raised, even if it may not have been relevantly plead in the absence of any averment of a recognised psychiatric or psychological illness or condition. That action warned Mr Milligan that his behaviour would be scrutinised. Mr Milligan had not been prejudiced in his ability to defend the action by reason of any delay. The omission on the part of the pursuers' solicitors was not one that would have misled Mr Milligan into believing that the pursuers had abandoned their rights. The omission was not due to any fault of the pursuers personally. The current action was commenced very quickly after the pursuers' solicitor was made aware of his error. Assuming the action were time-barred, only a very short time could have elapsed between the expiry of the triennium and the raising of fresh proceedings. If the action were not allowed to proceed, the pursuers would lose the opportunity to prove that Mr Milligan's conduct caused Emily's death and that each of them suffered loss as a result. They would suffer considerable upset and distress as a result. Any upset and inconvenience that might be suffered by Mr Milligan due to the continuation of the action had to be balanced against the fact that the action would proceed, in any event, at the instance of the first pursuer as parent and guardian of Emily's siblings. In *Collins* v *Scottish Homes* 2006 SLT 769, the fact that a child's claim was to be pursued anyway was seen as a reason to grant his mother equitable relief pursuant to section 19A. The expense of the action would not be materially increased. The investigation of the merits would involve the same evidence. The quantum of the claims would likely involve little evidence. The remedy against the pursuers' former solicitors was unlikely to be a satisfactory alternative. It would not provide the pursuers with the opportunity they sought to establish that they had suffered loss as a result of a wrong committed by Mr Milligan. But even in monetary terms, there would be a real

question about how much the lost right of action would have been worth had it not been time-barred: *Yeoman* v *Ferries* 1967 SC 255, at pp 262-4. There would be real questions about prospects on the merits, that would likely require a degree of discounting. The suggestion that the adults' claims against the solicitors might be sisted pending the resolution of the children's claims, while ingenious, might not find favour with the solicitors, their insurers, or any court seized of the matter. Mr Milligan had no money with which to meet a decree or any award of expenses. Given that he was legally aided, expenses would not be recoverable in any event. For all these reasons, even if time-barred, the court should allow the action to proceed.

Argument for Mr Milligan

[48] Mr Primrose submitted that the pursuers had actual awareness of the statutory facts by 12 April 2016 at the latest. Failing that, they had constructive knowledge prior to 3 September 2016. Time started to run once a pursuer was aware of any injury to the deceased's mental condition that was more than *de minimis*. Whether or not it subsequently transpired that the injury constituted an actionable loss was irrelevant. Mr Primrose conceded that there could be no recovery for distress or injured feelings. But the injury of which the pursuers were required to be aware, in terms of section 18(1) and section 22 of the 1973 Act, was "any impairment" of the deceased's physical or mental condition. Once the pursuers became aware of such an impairment, they had three years to investigate, among other things, whether there was an identifiable psychiatric or psychological condition. The words "any impairment" should be given their ordinary, plain meaning.

[49] It was relevant to have regard to section 17 of the 1973 Act, applying to actions in respect of personal injuries not resulting in death, in which similar wording appeared. In

such non-death cases the statutory facts of which the pursuer must be aware, actually or constructively, before time started to run included awareness "that the injuries were attributable in whole or in part to an act or omission". Commenting on that provision, Professor Johnston observed that,

> "it seems not unreasonable to require only a relatively modest degree 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" (para 10-24).

Awareness of personal injury did not require awareness of the correct diagnosis, or the right "label" to apply to it (*Cowan* v *Toffollo Jackson & Co Ltd* 1998 SLT 1000, Lord Nimmo Smith, 1002E, 1002L; *Chinn* v *Cyclacel Ltd* [2010] CSOH 33, Lady Smith, paragraphs 35, 38, 39, 43, 44, 48). In this case, the pursuers were aware, in the weeks immediately following Emily's death, that there had been an injury. They were aware of the marked impairment or decline in Emily's mental health such that she took her own life, and that the decline was a consequence of Mr Milligan's acts. The fact that they did not know Emily was suffering from a recognised psychiatric of psychological condition was irrelevant.

[50] In the original summons, the pursuers "believed and averred" that Mr Milligan's acts of assault, together with his threatening behaviour and verbal abuse progressively rendered the pursuer to be in "such a state of emotional anxiety and distress as to constitute a state of mental impairment in consequence of which the deceased took her own life". The pursuers' own advisers were perfectly aware that all they required to plead regarding personal injury was a state of mental impairment. By contrast, if the pursuers' present argument were correct, they did not become relevantly aware until they received Dr Brow's report in July 2021 after they had served both the original summons and the summons in the present

action. How was it possible that a pursuer could serve a summons twice, and yet claim that time had still not started to run?

[51] Mr Primrose relied on the case of *AB* v *Ministry of Defence* [2013] 1 AC 78, in which the claimants all alleged a breach of duty by the defendant in exposing former servicemen between 1952 and 1958 to radiation causing illness, injury and death. The majority of the claimants commenced a group action in 2004, with others joining in 2007 and 2008. Until 2007, when a new scientific study was shown to them, the claimants had no objective basis for their belief, held over many years, that the servicemen had been exposed to, and their injuries caused by, such radiation. They argued that until then they had no knowledge for the purposes of sections 11 and 14(1) of the Limitation Act 1980 that the injuries were attributable in whole or in part to the act or omission of the defendant. However, the Supreme Court held that a claimant was likely to have acquired knowledge of the relevant facts when he first came reasonably to believe them. Knowledge did not mean knowing for certain and beyond possibility of contradiction. Mere suspicion was not enough. In order to amount to knowledge a belief had to be held with sufficient confidence to justify embarking on the preliminaries to issuing proceedings, which would involve investigating, probably with the assistance of lawyers, whether the claimant had a valid claim in law and, if so, how it could be established in court. The date on which the claimant first consulted a lawyer or expert was not in itself likely to assist the court in determining whether he had the requisite knowledge. It followed that it was a legal impossibility for a pursuer to lack awareness of "attributability" for the purposes of section 14(1) at a time after he had already issued his claim (Lords Wilson, Brown, Mance and Walker, JJSC, but on this last point compare paragraphs 3, 69, 79, with paragraph 66). The Supreme Court's reasoning was capable of being applied by extension to the test of "awareness" in sections 17 and 18 of the 1973 Act.

Applying that test, it was legally impossible for the pursuers to claim they lacked knowledge until they received Dr Brow's report in 2021, having already twice raised proceedings.

[52] The policy behind limitation statutes was to prevent stale claims and to provide a degree of legal certainty (*B* v *Murray (No 2)* 2005 SLT 982, Lord Drummond Young, paragraphs 20–22). If the pursuers' argument were correct, then the present action would not become barred until July 2024, three years after they received Dr Brow's report, and eight years after Emily's death.

[53] So far as constructive awareness was concerned, the question was at what date would it have been reasonable practicable for the pursuers to have become aware of any impairment of Emily's mental condition (not that she had suffered a recognised psychiatric or psychological condition). The pursuers accepted that they could have approached the police or procurator fiscal if there were anything they needed to know, and that Mr Hanton's email of 13 April included an offer of help. It would have been reasonably practicable for the pursuers, taking up any of these options, to have become aware of the statutory facts before 3 September 2016. Mr Primrose cited *Agnew* v *Scott Lithgow (No 2)* 2003 SC 448, *Little* v *East Ayrshire Council* 1998 SCLR 520, *CG* v *Glasgow City Council* [2009] CSOH 34, and *Kelman* v *Moray Council* [2021] CSOH 131.

[54] So far as the exercise of the equitable jurisdiction pursuant to section 19A was concerned, Mr Primrose accepted that the delay had not caused Mr Milligan prejudice in his investigation of the claim. However, he submitted that the pursuers had what might be called a "cast iron" claim against their former solicitors. It was true that, in *Collins* v *Scottish Homes* 2006 SLT 769, Lord Bracadale was of the view that it would be appropriate to exercise the discretionary power so as to allow an adult pursuer's claim to proceed, though

potentially time-barred, since her child's action, which was indisputably not time-barred, would require to be investigated anyway. However, his opinion on section 19A was strictly *obiter*, since he had already held, following a debate, that he could not determine the question of time-bar without hearing evidence. More significantly, the case fell to be distinguished as one not involving any alternative right of action.

[55] The existence of an alternative remedy had been observed on many occasions to be an important factor, and the stronger the case against the negligent solicitor, the more likely it was that the court would refuse to allow the action to proceed (*Jacobsen* v *Chaturvedi* [2017] CSIH 8, paragraphs 15-19). The pursuers' suggestion that insurers might discount any sum offered in settlement of such an action to reflect Mr Milligan's impecuniosity and the prospects of success was not a factor to which any real weight could be attached. Mr Ritchie, the pursuer's solicitor, appeared to have little experience of such situations. Mr Dalyell, who had considerable experience, would not be drawn on the matter beyond confirming that each case would depend on its own merits. Any uncertainty about the prospects of the children's claims in the present action, and the effect that might have on any discount in the negligence action, could be avoided by raising, and then immediately sisting, the latter pending the outcome of the former. In any event, Mr Milligan was impecunious and in receipt of legal aid. There would be little practical benefit in any award of damages and expenses against him. An award of damages against the former solicitors would achieve something practical for the pursuers in respect of their time-barred claims. Although the delay in raising the claim was short, a delay of only one day had been held not to justify allowing a time-barred action to proceed where the pursuers had a reasonable claim for damages for professional negligence (*Fleming* v *Keiller* [2006] CSOH 163).

Decision

Time bar

[56] Section 3 of the 2011 Act provides that the relative's right to damages pursuant to section 4 of that Act applies where A dies in consequence of suffering personal injuries as the result of the act or omission of B. However, in order for section 4 to apply, section 3 provides that it is necessary that B's act or omission gives rise to liability to pay damages to A (or to A's executor), or that it would have done but for A's death. On the assumed facts of this case, that condition is satisfied, since the summons attributes Emily's personal injuries to a course of conduct involving physical assaults, verbal abuse and displays of anger carried out by Mr Milligan with the intention of causing her physical harm and severe mental and emotional distress. On these assumed facts, Mr Milligan would be liable to pay damages to Emily or to her executor. However, the limitation period applicable to that right of action would be different from the limitation period applicable to the section 4 action at the instance of her relatives. The latter commences on the date of death or, if later, the date of the relatives' awareness, actual or constructive, of the facts set out in section 18(2)(i) and (ii) of the 1973 Act. The argument in this case focussed on the first of these facts, namely, "that the injuries of the deceased were attributable in whole or in part to an act or omission".

[57] Mr Ellis's submission was that awareness that the injuries of the deceased were attributable to an act or omission necessarily involved awareness of the injuries from which death resulted. But awareness of the injuries from which death resulted necessarily involved awareness of their being legally relevant injuries. Without awareness of their being legally relevant injuries, there could be no awareness that the injuries that caused the death were attributable to an act or omission. Where death was in consequence of a

psychiatric injury, in order for that psychiatric injury to be a relevant injury, it must have been a recognised psychiatric or psychological illness or condition. Therefore the fact of which the pursuers would require to have been aware, actually or constructively, for the purposes of section 18(2)(b)(i), was that Emily was suffering from a recognised psychiatric or psychological illness or condition that was attributable to an act or omission.

[58] Mr Ellis's submission was attractively presented, but I am not persuaded that it is correct. For the purposes of section 18(2)(b)(i) the pursuers required to be aware of the deceased's injuries, and that the injuries were attributable to an act or omission. No doubt, in order for any action to succeed, the injuries would also require to be relevant injuries as a matter of law. Awareness of an injury that was irrelevant as a matter of law would not be relevant awareness for the purposes of section 18(2)(b)(i). So, for example, there was no dispute that the mere distress or injured feelings of the deceased would not be a legally relevant injury (*McLoughlin* v *O'Brian* [1983] A AC 410; *Alcock* v *Chief Constable of South Yorkshire Police* [1992] 1 AC 310; *Frost* v *Chief Constable of South Yorkshire* [1999] 2 AC 455; *Paul* v *Royal Wolverhampton NHS Trust* [2024] UKSC 1, [2024] 2 WLR 417). However, it does not follow that the pursuers required positively to be aware, as a matter of fact, that the injuries of the deceased were relevant injuries as a matter of law. In short, they didn't need to be aware of the right label to apply (*Cowan, op cit*; *Chinn, op cit*). One can be aware that gathering clouds are attributable to condensation without knowing their precise meteorological classification as nimbostratus or cumulonimbus.

[59] "Personal injuries" are defined in the 1973 Act as including "any disease and any impairment of a person's physical or mental condition". For the purposes of section 18(2)(b)(i), therefore, the pursuers require to be aware, actually or constructively, that the deceased was suffering from an impairment of her mental condition that was

attributable in whole or in part to an act or omission. Obviously, section 18(2)(b)(ii) also requires the pursuer to be aware that the act or omission was an act of omission of the defender, but there was no discussion of that requirement at the proof, and it did not seem to be in dispute that if the pursuers were aware, actually or constructively, that Emily was suffering from an impairment to her mental condition that was attributable to an act or omission, then they were also aware that it was attributable to an act or omission of Mr Milligan for the purposes of section 18(2)(b)(ii).

[60] The 1973 Act's definition of "personal injuries" predates *McLoughlin* v *O'Brian*. It is the same wording that was used in earlier limitation statutes, for example, the Law Reform (Limitation of Actions, etc) Act 1954. Therefore it even predates *Hinz* v *Berry* [1970] 2 QB 40, in which Lord Denning famously said that, although no damages were awarded in English law for grief or sorrow, damages were recoverable for "any recognisable psychiatric illness" (at p42H). There can be no suggestion, therefore, that the definition of personal injuries for the purposes of the law of limitation had been tailored specifically to reflect the requirements of legal relevance or actionability. I agree with Mr Primrose that the words "impairment of a person's mental condition" are ordinary words that should be given their ordinary meaning.

[61] I accept that Mr and Mrs Drouet were not aware until they received Dr Brow's diagnosis that Emily was suffering from an adjustment disorder with anxiety in terms of F43.22 of the International Classification of Diseases. However, they were aware by 12 April 2016, at the latest, of the decline in Emily's mental state, that she had been psychologically harmed, and that she had been experiencing something akin to a nervous breakdown. I accept that Mrs Drouet did not have a professional diagnosis of Emily's mental condition at this time. But the use of the phrase "breakdown" is more than just a

turn of phrase. It implies an awareness that Emily had become overwhelmed by her anxieties, and that this had become evident in her capacity to cope with ordinary, everyday activities. Her commitment to her studies had declined. Her intake of alcohol had increased. There was no real dispute that the Drouets had become aware of all of these things by April 2016. In my view it was obvious that they had become aware of her significantly impaired mental condition.

[62] Mr and Mrs Drouet were also aware, by 12 April 2016 at the latest, that Emily's significantly impaired mental condition was attributable to the alleged conduct of Mr Milligan. They were aware of the alleged assaults on 10, 16 and 17 March 2019, the allegations of shouting and swearing, and of sending offensive and threatening messages. They were aware of what they referred to as Mr Milligan's "persistent and verbal cyber persecution". Mr and Mrs Drouet were aware that Mr Milligan had threatened to reveal to them intimate details of Emily's sexual behaviour. They were aware that Emily would find that deeply shaming. Not only were they aware that Emily had experienced something akin to a breakdown, they were aware that this was attributable to acts or omissions of Mr Milligan. As Mrs Drouet put it at the meeting of 12 April 2016, he had "broken down her character".

[63] I conclude that the pursuers had actual awareness by 12 April 2016 that Emily was suffering from a significant impairment to her mental condition that was attributable to acts or omissions of Mr Milligan. It follows that the action at the instance of all but Emily's siblings is time-barred. That being the case, it is strictly speaking unnecessary to consider the question of constructive awareness. In particular, it is not clear what further information the pursuers required to have in order to be aware either of the impairment of Emily's mental condition or that it was attributable to Mr Milligan's alleged conduct. I accept that

the Drouets gained a deeper insight into both Emily's condition and Mr Milligan's conduct when they gained access to the police statements, and the full contents of the messages stored on Emily's telephone. I also accept that it may have been difficult to secure the release of that evidence from COPFS until after the outcome of the criminal proceedings against Mr Milligan. However, I am not persuaded that they added anything of any real substance to what the Drouets already knew in April 2016. It seemed to me to be precisely the sort of information that the 1973 Act affords pursuers three years to discover in order for them to frame a relevant case.

[64] I have also considered what the position would be on the footing that Mr Ellis is correct in his submission that it was necessary for the pursuers to have been aware, actually or constructively, that Emily was suffering from a recognised psychiatric or psychological illness or condition before time could start to run. On that footing, I would accept his submission that it would not have been reasonably practicable for the pursuers to have become aware of the diagnosis until some time after 3 September 2016. Dr Brow's evidence was that before making a diagnosis it would be necessary to have "good corroborating evidence of a maladaptive reaction in the presence of a stressor". He suggested that evidence of Emily becoming more anxious after a break-up of the relationship might suffice. He was quite confident that a diagnosis would have been possible on the basis of less information than he was in fact given. However, he also said that he found all the information he received helpful in building a picture and reaching a conclusion. This information included the police statements and the telephone messages. The relevant question is not how soon *could* a report have been prepared, but how long was it reasonably practicable to allow for the report to be prepared. Taking all the circumstances into account, I would accept Mr Ellis's submission that it would not have been reasonably practicable for

the pursuers to have obtained a professional diagnosis until some considerable time after 3 September 2016. As it happens, Dr Brow's draft report was not completed until July 2021, after the action had already been raised, not once, but twice. This might well be regarded as an additional reason for rejecting Mr Ellis's submission that the pursuers required to be aware, actually or constructively, of a legally relevant injury. It cannot have been Parliament's intention to introduce such uncertainty into the calculation of when time starts to run.

Equitable discretion

[65] The starting point for any consideration of the exercise of the court's discretion under section 19A of the 1973 Act is the fact that the right to pursue a claim has already been lost. It follows from the broad discretionary character of the jurisdiction that it is not possible to circumscribe what circumstances will justify the revival of a lost right. However, these circumstances do require to be

> "sufficiently cogent to merit depriving a defender of what will have become a complete defence to the action. The interests of both parties and all the relevant circumstances must be considered" (*Jacobsen* v *Chaturvedi*, *op cit*, paragraph 16).

[66] Mr Ellis advanced a number of arguments in support of the exercise of the court's discretion in his clients' favour. In the particular circumstances of this case, where an action had already been raised, and then re-raised relatively soon after the previous one fell, it could not be said that Mr Milligan would suffer any significant prejudice in the investigation of the claims against him. Mr Primrose accepted that, but relied heavily on the availability of an alternative remedy against the pursuers' former solicitors. The stronger the case of professional negligence, the more likely it is that the court will refuse the section 19A application (*Leith* v *Grampian University Hospital NHS Trust* [2005] CSOH 20, Lord Brodie at

paragraph 12; *Jacobsen* v *Chaturvedi*, *op cit*, paragraph 18). Mr Primrose described the pursuers' case that their former solicitors had been negligent as cast iron. While it is true that there has been no formal admission of liability, it is difficult to imagine a more straightforward case of professional negligence than there was here. Mr Gillies conceded in evidence that his firm made a simple and obvious error. Mr Dalyell's evidence that no solicitor acting with reasonable skill and care would have made such an error went unchallenged.

[67] Ordinarily it might be necessary to discount the value of the professional negligence action against the former solicitors to reflect any uncertainty in the prospects of the principal action. However, the present case is rather unusual in that, whatever the fate of the adults' claims, the children's claims must be allowed to proceed. That allows for at least the possibility that the negligence action against the former solicitors, if raised, could be sisted pending the resolution of the principal action. No doubt Mr Ellis is correct that there can be no certainty that the defenders in the negligence action, or their insurers, would be content with a sist, to say nothing of the attitude of the court. However, the possibility, indeed the obvious attractions, of such a course of action must be a relevant factor to take into account in the exercise of the section 19A discretion.

[68] It might be said that, since the children's claims will in any event proceed to a proof, it would be appropriate to allow the adult pursuers' claims to go with them. This was the course taken by Lord Bracadale in *Collins* v *Scottish Homes* 2006 SLT 769. However, the argument cuts both ways. The principal issue for the pursuers is that of Mr Milligan's responsibility for Emily's death, as a matter of civil law. Since that issue is going to proof anyway, there seems no particularly cogent reason to allow the adults' already time-barred claims to continue.

[69] Refusing the application does of course mean that the adult pursuers will receive no compensation. But this is where the pursuers' alternative remedy against their former solicitors comes in. I was asked to take account of Mr Milligan's impecuniosity as a factor that might discount the value of the pursuer's claim against their former advisers. But Mr Dalyell is an experienced solicitor in this field, and he was very reluctant to be drawn on that matter. I would regard Mr Milligan's financial position as broadly a neutral factor. To the extent that it is a factor justifying a discount in any negligence action, it also deprives the adult pursuers of any realistic chance of obtaining compensation in the principal action.

[70] When Mr Drouet was asked whether, if his action were time-barred, he would be satisfied with a potential claim in damages against his former solicitors, he replied, no, it was not about the money. Nor was it about any finding of solicitors' negligence. It was about getting "some form of justice" for what Mr Milligan did to Emily. He did not see why Mr Milligan should get "a discount for what he did". In cross-examination, he said that the most important thing for him was justice, which he explained as "showing that Angus Milligan caused Emily's death, and by making him realise the pain the family were going through, not just the children". Mrs Drouet agreed that compensation was important, but not necessarily because of what the money would mean to her, but because of what it would mean to Mr Milligan.

[71] On hearing Mrs Drouet's evidence, in particular, my initial thoughts were that there was a punitive element to her motivation. She seemed to want to make Mr Milligan pay for what he did. However, on reflection, I am satisfied that all she meant was that full compensation would be an expression in monetary terms of the extent to which Mr Milligan had caused Emily's whole immediate family to suffer. The difficulty of course is that the adults' claims are time-barred. In answer to Mr Drouet's question, Why should Mr Milligan

get a discount for what he did, the simple answer is that, section 19A aside, he has a complete defence to their action. One might just as well ask, Why should the Drouets' former solicitors be relieved of liability for their negligence at the expense of Mr Milligan? Taking all the circumstances into account, in what I acknowledge is a finely balanced decision, I have come to the conclusion that there are insufficiently cogent grounds to allow the adult claims to proceed. In agreement with Mr Drouet, who was an impressive witness, the Drouets' primary goal is to get "some form of justice for what Mr Milligan did to Emily", and that this involves "showing that Angus Milligan caused her death". Whether or not that was truly the case is a question that will be determined in the children's action, assuming it proceeds.

Disposal

[72] I shall allow a proof before answer of the action raised by the first pursuer as parent and guardian of Rachel Drouet and Calvin Drouet. *Quoad ultra* I shall grant decree of absolvitor in favour of Mr Milligan. I shall reserve any question of expenses.