SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT PERTH

[2019] SC PER 6

PD9/18

JUDGMENT OF SHERIFF LINDSAY D R FOULIS

in the cause

A B

Pursuer

against

C D

Defender

PERTH, 21 December 2018

The sheriff, having resumed consideration of the defender's unopposed motion number 7/6 of process, grants same, remits the cause to the Court of Session in terms of section 92 of the Courts Reform (Scotland) Act 2014.

NOTE

[1] On 12th December 2018 I heard parties in respect of the defender's motion, number 7/6 of process, in terms of which he sought that I remit the cause to the Court of Session in terms of section 92(2) of the Courts Reform (Scotland) Act 2014 in that the importance or difficulty of the proceedings made it appropriate so to do. The defender was represented by Miss Matthew, solicitor, Edinburgh, the pursuer by Miss McNicol, solicitor, Perth. The motion was initially opposed but that opposition was subsequently withdrawn. Notwithstanding the withdrawal of opposition, I wished to be addressed on whether the

motion should be granted. After submission, I indicated to parties that I would grant the motion. However, I considered that it was appropriate that I give the reasons for my decision in writing.

[2] In moving me to grant the motion, Miss Matthew submitted that the cause was of importance to the defender in light of the allegations made by the pursuer in her averments. In support of that contention, I was referred to the decision of *Mullan* v *Anderson* 1993 SLT 835. Further the cause was of importance to the general public. There was a lack of case law dealing with the matters raised in the averments. There were no reported decisions dealing with issues of quantum raised in the present proceedings. Quantum had been agreed in the two recent decisions arising out of circumstances not dissimilar to the present, namely *DC* v *DG and DR* 2018 SC 47 and *AR* v *Coxen* 2018 SLT (Sh Ct) 335. I was referred to *Butler* v *Thom* 1982 SLT (Sh Ct) 57 and in particular the last few lines of the judgment of Sheriff MacPhail. There was further a dearth of authority dealing with instances in which damages were sought for personal injury arising out of a course of conduct on the part of a defender. Associated with this matter was the potential issue of time bar. The present action was served on 29 March 2018. The pursuer averred that the parties had commenced their relationship in 1999. It was averred that from December 2006 the defender acted in a way which amounted to abuse of the pursuer. Indeed, virtually all the incidents which were founded on by the pursuer occurred outwith the three year period prior to the present action being raised. This potentially raised issues regarding the operation of section 19A of the Prescription and Limitation (Scotland) Act 1973 if time bar did *prima facie* operate. If a number of instances of behaviour on the part of the defender were excluded as a result of the operation of time bar, this might well raise issues regarding quantum.

[3] To conclude, Miss Matthew submitted that the present action raised the following issues which were of importance to the public, namely quantification, causation of injury, time bar and the operation of section 19A of the 1973 Act. These were of particular significance in light of the current climate in which a great emphasis is placed on prevention of domestic, including sexual, abuse and seeking recompense if acts amounting to such abuse did take place.

[4] The pursuer concurred with the content of the defender's submissions. The action had been raised to avoid the operation of the time bar. Parties were not in a position to proceed to proof. The parties anticipated that it was likely that in the event of the defender's motion being granted, the cause would be put to debate which might clarify a number of matters.

[5] In considering the averments prior to the hearing of the motion, I initially had a number of reservations concerning the grant of the motion. I had a recollection that a motion to remit had unsuccessfully been made in *AR* v *Coxen,* albeit there is no report of the outcome of that motion. I was, however, aware of the decision from Sheriff McGowan in *Cocker* v *Dumfries and Galloway Health Board and another* 2018 SC EDIN 56 in which a motion to remit a clinical negligence claim in which the sum of £1,500,000 was craved was refused. I was not initially referred to this decision. I further noted that although the pursuer's allegations of anal rape were denied, having regard to the averments relating to the convictions in the High Court of Justiciary in October 2017 and Perth Sheriff Court in February 2015 and the averments made in answer, it seemed to me that there was unlikely to be a dispute in due course that the pursuer had been subject to behaviour which would fall under the umbrella of domestic abuse. In that event, it could be anticipated that she might well suffer psychological injury as was averred. Further, if there were instances of

domestic abuse which were not ultimately disputed, it might be thought that it could be easier for the pursuer to establish the incidents that were disputed. Finally, whilst aware of the decision in *Mullan* v *Anderson,* notwithstanding it was a decision from a five judge bench in the Inner House, it was twenty five years old and had been decided prior to the Gill Review and the subsequent 2014 legislation.

[6] Notwithstanding these initial thoughts, I was persuaded that the test set out in section 92 of the 2014 Act was satisfied and it was appropriate to remit this cause. I did so for the following reasons.

[7] Firstly, the action was clearly of importance to the parties, and in light of the nature of the averments, clearly of importance to the defender. Any allegation of forcible penetration of another is particularly serious, notwithstanding one of the allegations appears to have resulted in a not guilty plea being accepted by the prosecution. This was a factor which their Lordships took account of in *Mullan* v *Anderson*. Lord Justice Clerk Ross observed that a civil court was being asked to conclude that the defender murdered the deceased. This was a matter of public interest and concern. The same observation could be made twenty five years later when a person is accused of committing serious sexual acts against another person. If any confirmation was required for such a conclusion, regard could be had to the resultant publicity following the decision in *AR* v *Coxen.* It further could not be forgotten that *Mullan* v *Anderson* was in legal timescales a recent decision from a bench of five judges of the Inner House of the Court of Session.

[8] However matters do not end there. Issues of non consensual sexual acts and domestic abuse are matters which have exercised and continue to exercise the public. The Scottish Parliament has legislated in this area on a number of occasions since the beginning of the century. In the last two years there have been two decisions from courts of civil

jurisdiction determining that defenders raped pursuers. It is not difficult to anticipate that further actions arising from similar alleged circumstances will be raised in the next few years. In 2018 the Scottish Parliament passed the Domestic Abuse (Scotland) Act. Section 1 of that legislation is directed at a course of abusive behaviour which is likely to cause the other party physical or psychological harm. What is averred on the part of the pursuer in the present action certainly has all the characteristics of behaviour which would fall within the ambit of that section. In light of what has occurred in relation to alleged non consensual sexual acts, it is not difficult to anticipate that actions which fall within the ambit of section 1 will in due course form the subject matter of a number of civil actions.

[9] Against that background, there are a number of issues upon which it will be important to have a decision from the Court of Session. Before I deal with these, I wish briefly to address the observation that an action determined in the Sheriff Court could still be ultimately brought before the Inner House as a consequence of the operation of either sections 112 or 113 of the 2014 Act. That undoubtedly is correct. However the available authorities relating to the operation of both these sections make it clear that reliance upon these provisions does not guarantee that either a remit or permission will be granted. Further, section 113 only operates in relation to a final judgment. In short, as a consequence of the provisions of the 2014 Act and the subsequent authorities, determinations made in actions commenced in the Sheriff Court require to overcome significant hurdles before they can be subject to review by the Inner House.

[10] The actions which constitute the basis of the pursuer's claim, in line with many of the actions which found abusive behaviour in a domestic context, would each constitute a separate basis for an action for damages. Not surprisingly, however, an action or claim does not follow each individual act in such an alleged course of abusive behaviour. The victim of

the abusive behaviour is quite likely to thole instances of such behaviour for numerous reasons, such as the children, financial security, or feelings of affection for the perpetrator. Such understandable tolerance, however, does not sit easily with the provisions of the Prescription and Limitation (Scotland) Act 1973. Section 17 refers to the commencement date of the triennium by reference to the date upon which injuries were sustained or, in the event of the injuries being sustained by a continuing act, the date upon which that act ceased. Every individual act of an abusive nature has the potential for causing injury to the alleged victim. Does the triennium accordingly commence with each such act? Alternatively, can a course of conduct consisting of a number of acts of abusive behaviour be construed as one continuing act in terms of section 17(2)(a) and thus the triennium commences when the course of conduct comes to an end? It appears to me that where the action is based upon a course of abusive behaviour, the terms of section 17 may cause difficulties. Section 18B of the 1973 Act relates to actions of harassment with the triennium clock commencing when the alleged harassment stops. It might be submitted that the defender's alleged behaviour amounted to harassment of the pursuer thus sidestepping any problems section 17 may present. The present action, however, is not founded on harassment. Accordingly, in light of the observations I have already made, I consider that it is important that a decision upon these matters is made by a judge in the Court of Session. Section 17A of the 1973 Act is limited to childhood abuse. In making reference to actions based on childhood abuse, there have, of course, been a number of decisions from the Court of Session arising from instances of such abuse. Reference to *A* v *N* 2015 SLT 289 gives an indication of the complex issues which may arise. The pursuer in this case was, of course, an adult at the time the alleged abusive behaviour commenced but I do not consider that the issues are necessarily any less complex.

[11] If section 17 does indeed cause difficulties, there is, of course, still section 19A of the 1973 Act which can be employed to override the triennium. That is an equitable power and once again I consider that it is important that guidance is provided by the superior court as to what the potential parameters for the successful operation of such a power should be in cases such as the present. The operation of this provision was a live issue in *A* v *N*.

[12] Finally, and perhaps as a consequence of these matters, difficult issues may arise regarding causation and quantification of damages. If certain actions complained of are determined to be time barred, does this have an effect upon the consequences for which the pursuer seeks compensation? Allied to this point are issues relating to quantification of damages.

[13] I referred to the decision from Sheriff McGowan in *Cocker* v *Dumfries and Galloway Health Board*. The first observation to make is that it is only persuasive. *Mullan* v *Anderson* is binding. However, as a matter of courtesy, it seems appropriate to set out other reasons for my coming to a different conclusion to that of Sheriff McGowan. I consider that the present action does raise matters of public policy and novel questions of law. In addition the basis of claim in the two actions is quite different. The present action has further not been instituted in the national personal injuries court.

[14] To conclude, for the foregoing reasons I consider that the present action is of such importance and difficulty to justify the remit sought. The parties still are not in a position to proceed to proof and thus to remit will not cause unacceptable delay in the present circumstances. There are also the limitations of taking any appeal to the Inner House in proceedings which remain in the Sheriff Court. In all those circumstances, I consider that I should exercise discretion in favour of granting the motion. As was observed by Sheriff MacPhail in *Butler* v *Thom*, I consider that it is likely that the judgment in this case will be of

such general importance to other cases that it is appropriate that it should carry the persuasive authority of a Lord Ordinary.