OUTER HOUSE, COURT OF SESSION

[2019] CSOH 6

A200/07

OPINION OF LORD TYRE

In the cause

BRIAN ALEXANDER GRACIE

Pursuer

against

CITY OF EDINBURGH COUNCIL

Defender

Pursuer: Party
Defender: N Mackenzie; City of Edinburgh Council, Legal Services Division

24 January 2019

Introduction

[1] The background to this action was narrated in my opinion dated 10 April 2018 (see [2018] CSOH 37). For ease of reference I shall repeat the material part of that narrative here.

[2] The pursuer was born on 9 September 1959 and is presently aged 59. In this action he avers that on about 19 May 1965, when he was 5 years old and a pupil at Sciennes Primary School, Edinburgh, he suffered serious injury when he ran out through the school gates and was struck by a motor vehicle. The pursuer has no recollection of the accident. He claims that it was caused by the fault of the defender's employees, the staff of the school,

who allowed children to play in the playground unsupervised and failed to keep the school gates closed. He avers that he sustained head injuries that had life-changing adverse effects on his personality. The sum sued for is £650,000.

[3] The present action was raised in May 1997 in Edinburgh Sheriff Court. There was a lengthy sist to enable the pursuer to apply for legal aid, following which a specification of documents was approved for recovery of the pursuer's medical records. Nothing further happened for almost 10 years. On 9 March 2007 the case was remitted to the Court of Session and the defenders were appointed to lodge defences. Adjustments were made to the pursuer's pleadings and further attempts were made to recover medical records. Legal aid was subsequently withdrawn, and in October 2007, the pursuer's agents withdrew from acting. The case was sisted on 16 November 2007.

[4] Nothing then happened in the court proceedings for a further 10 years. The pursuer made sporadic attempts to obtain legal representation, without success until about 2015. An affidavit was obtained from the pursuer's mother. In June 2017 a draft minute of amendment was intimated to the defender. The minute included averments addressing the issue of whether the court should exercise its discretion in terms of section 19A of the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act") to allow the action to proceed. On 20 February 2018 I heard a motion to allow the minute of amendment to be received and to allow the record to be amended in terms thereof. The pursuer was represented by senior and junior counsel. The motion was opposed by the defender. It was a matter of agreement between parties that it was appropriate to deal with the time bar issue at the stage of receipt of the proposed minute of amendment.

[5] For the reasons set out in the opinion referred to above, I refused to allow the minute of amendment to be received. At the end of that opinion I recorded my understanding that

it was accepted by the pursuer's legal representatives that if the minute were not received, the action would fall to be dismissed. The pursuer is not now legally represented and does not, for his part, accept that the action should now be dismissed. This opinion accordingly proceeds on the basis that no such concession has been made.

[6] I was informed that during the time since the motion was heard, the pursuer's mother has died.

[7] The procedural history of the action since the issuing of my opinion has been as follows. The pursuer's agents withdrew from acting and he has since represented himself. On 29 June 2018 the case called by order but the pursuer was unwell and could not address the court. Having been addressed by counsel for the defender, I made the formal orders necessary to give effect to my opinion, and appointed the cause to the procedure roll for a debate on 21 September 2018. On that date the pursuer appeared in person and moved to discharge the diet in order to allow him further time to seek to obtain representation. I granted that motion. The case called again by order on 9 November 2018, when the pursuer explained that he had been unable to find solicitors willing to act. The cause was re-appointed for debate on a date to be afterwards fixed.

The pursuer's pleadings

[8] As regards the occurrence of the accident, the pursuer avers that during a break the staff of the primary school allowed the children into the playground to play unsupervised. The pleadings continue: "Said playground is adjacent to Sciennes Road. The gates of the playground had been left open. The pursuer ran through the gates and was struck by a motor vehicle as a result of which he was injured as hereinafter condescended upon. The pursuer suffered severe head injuries as hereinafter condescended upon." It is averred that

the staff of the school were under a duty to take reasonable care to supervise all the children in the playground, to ensure that all the children were kept within the school grounds and not allowed to leave the playground, and to ensure that the school gates were kept closed and that the children were kept away from a busy road, that they breached those duties and thus caused the accident.

[9] With regard to loss and damage, the pursuer avers that as a direct result of a brain injury sustained in the accident, he suffered a personality disorder and developed into a delinquent, manifested initially by telling lies, stealing and setting fire to a car. At the instigation of his mother, he was sent to the psychiatric department of the Royal Hospital for Sick Children, and subsequently spent 3 years in Ladyfield West Children's Unit at the Crichton Royal Hospital, Dumfries. Later he was sent to two List D schools. Before 1994 he accumulated many criminal convictions and spent a total of 22 years in detention or imprisonment after attaining the age of 16.

[10] In response to the defender's plea-in-law that the present action is time-barred in terms of section 17 of the 1973 Act, all that is said in the pursuer's pleadings is that:

> "The pursuer was unaware of this accident until June 1994. After he had been released from his last prison sentence the pursuer started investigating his past and it was only following those investigations that a relative informed him of the accident."

I mention in passing that the minute of amendment whose receipt I refused would have inserted additional averments that (in 1994) the pursuer spoke to his mother and asked her why he was different from his brother and sister; that she believed it was for the best not to tell the pursuer about the accident; and that the pursuer's family hid the accident from him and were reluctant to tell him about it until around 1994.

The issues

[11] The issues to be determined are:

(a) whether the pursuer has made a relevant case of breach of duty against the defender; and, if so,

(b) whether the pursuer has pled a relevant case that he was not aware, and could not reasonably have become aware, of all of the above facts until a date less than 3 years before the action was raised on 23 May 1997.

Argument for the defender

[12] On behalf of the defender it was submitted that I should sustain the defender's pleas-in-law with regard to relevancy and time bar, and dismiss the action. The pursuer had failed to plead a relevant case of breach of duty on the part of the staff of the school and, in any event, had failed to give fair notice of the case against the defender. To make a relevant case, the pursuer would require to plead and prove either (a) that the staff did not do something that was commonly done by staff at other primary schools in Edinburgh in 1965; or (b) that they failed to do something that was so obviously wanted that it would be folly for anyone to neglect to provide it. Reference was made to *Skinner* v *Glasgow Corporation* 1961 SLT 130 and *Morton* v *William Dixon Ltd* 1909 SC 807. The test was: what would the reasonable teacher have had in contemplation? In asserting that the defender's employees had duties to ensure that all the children were kept within the school grounds and that the school gates were kept closed, the pursuer overstated the duties incumbent upon them. It was not suggested that the pursuer was permitted by staff to leave the playground, and there was no explanation of what Edinburgh primary schools commonly did in 1965 to look after pupils during breaks. If it was the usual practice at that time to leave gates open, an

explanation was needed of what gave rise to liability in this particular case. If it was not the usual practice to leave gates open, an explanation was needed of what gave rise to liability if this was an isolated occasion.

[13] There was, moreover, a lack of fair notice. The pursuer did not offer to prove that any children had previously run out of the school playground. He did not explain what degree of supervision there ought to have been, or how long the gates had been open prior to his accident. Nor did he specify the speed at which the car was being driven. It was impossible for the defender to investigate the claim made against it.

[14] As regards time bar, it was submitted that the pursuer did not give a clear or cogent explanation of why proceedings were not brought before 9 September 1980. No attempt was made to narrate "all the circumstances" in which it would not have been reasonably practicable for him to become aware of the material facts more than 3 years before the action was raised. Having regard to the pursuer's emphasis of the severity of the consequences of his injuries, an explanation was required of his lack of awareness of the matters set out in section 17(2)(b) of the 1973 Act.

Reply by the pursuer

[15] In his reply, Mr Gracie acknowledged that he had little to say on the points of law advanced by counsel for the defender. He confirmed that he had no recollection of the accident itself, and that he was not told until about 1994 that it had occurred. He wished to have an opportunity of proving that the accident had occurred as described, and that it had caused all his subsequent problems. After the hearing he sent me a folder of documents. I have read these but they have not affected my decision.

Decision: relevancy

[16] As is usual in a legal debate of a party's pleadings, I proceed upon an assumption that the facts stated by the pursuer, as set out above, are true. In my opinion the facts and circumstances that the pursuer has been able to plead are insufficient in law to found a case of fault on the part of the defender. I do not say this as a criticism of the pursuer; it is merely a reflection of the difficulties faced when attempting to plead circumstances that occurred more than 50 years ago, and which were not even investigated until almost 30 years after they are said to have happened.

[17] Counsel for the defender founded upon the observation of Lord President Dunedin in *Morton* v *William Dixon Ltd* (above) that where a case was founded on an omission, it was necessary to prove either that the thing omitted was commonly done by other persons in like circumstances, or that it was so obviously wanted that it would be folly in anyone to neglect to provide it. In *Kennedy* v *Cordia (Services) LLP* 2016 SC (UKSC) 59, this formulation was regarded by the Supreme Court as "outdated" (see paragraph 111), and for my part I place no reliance upon it. I agree, however, with the defender's contention that to assert a duty to ensure that all children were kept within the school grounds and that the gates were kept closed is to overstate the duty incumbent upon the defender's employees. The duty imposed by law upon them was to take reasonable care that the children did not suffer injury. It was described by Lord Mackintosh in *Skinner* v *Glasgow Corporation* (above) at page 136 as a duty "to take such care of [the children] as would be expected of a good parent in like circumstances".

[18] The critical difficulty faced by the pursuer, as I see it, is that the mere fact that he was able to run out through the school gates on to the road is not in itself enough to establish negligence on the part of the defender's employees, ie the school staff. In order to set out a

relevant case of fault, the pursuer would require more. In the first place, he founds his case on a duty to ensure that the gates were not left open, but is unable to provide any detail as to why the gates were open at this particular time, or the length of time for which they had been open before he was able to run through. Without such detail there is no legal basis upon which a court could hold after proof that negligence on the part of the defender had been established. Nor can he provide any detail of the circumstances that led up to him running out of the gate. In the second place, it would be necessary for the pursuer to set out a case which measured the defender's employees' acts and omissions against the standards of care reasonably to be expected of school staff in 1965, which may have been different from standards expected today. It is not, in my view, self-evident that it was negligent in 1965 to allow children to play in a playground with open gates; there might have been other ways of enforcing a rule that children remain within the school grounds during breaks. It is reasonable to infer from the pursuer's pleadings as a whole that children at the school, himself included, were not permitted to run out of the gates.

[19] As I have already said, it is not a personal criticism of the pursuer that these essential ingredients of the case are absent. It is simply a reflection of the fact that the incident was not investigated until after it was too late to obtain the information required in order to establish a case in law of fault on the part of the school staff, especially in circumstances where the pursuer himself has no memory of what happened. Unfortunately for the pursuer, the consequence is that the action is irrelevant in law and must be dismissed.

Decision: time bar

[20] In terms of section 17 of the 1973 Act, the present action became time-barred either on the pursuer's 21st birthday on 9 September 1980, or, if later, on the date specified by section 17(2)(b), namely:

> "the date… on which the pursuer in the action became, or on which, in the opinion of the court, it would have been reasonably practicable for him in all the circumstances to become, aware of all the following facts—
>
> (i) that the injuries in question were sufficiently serious to justify his bringing an action of damages on the assumption that the person against whom the action was brought did not dispute liability and was able to satisfy a decree;
>
> (ii) that the injuries were attributable in whole or in part to an act or omission; and
>
> (iii) that the defender was a person to whose act or omission the injuries were attributable in whole or in part or the employer or principal of such a person."

[21] The very brief passage in the pursuer's pleadings that I quoted above does not address the requirements of section 17(2)(b). As counsel for the defender reminded me, I must at a procedure roll debate address the parties' pleadings as they stand, and it is in my opinion quite clear that what is currently pled is insufficient to found a case that the commencement of the 3 year period for bringing an action of damages was postponed until 1994. It provides an explanation of why the pursuer took action when he did, but provides no explanation either of why the pursuer was unaware of the accident until 1994, or why it would not have been reasonably practicable for him to have become aware of it before then. It is not averred, and has never been suggested, that the pursuer, at any time after attaining the age of 18, lacked full legal capacity. In these circumstances there is nothing pled that would entitle the court to hold that it was not reasonably practicable until 1994 for the pursuer to become aware that his personality disorder was attributable to an act or omission for which the defender was liable. I therefore hold that the present action was not raised

within the period specified in section 17(2)(b) of the 1973 Act. Had I held the case to be otherwise relevant for proof, I would have dismissed it on the ground that it is time-barred.

[22] In case this sounds as if I have taken an unduly technical approach to the pursuer's pleadings, I have considered what would have been my view if I had allowed the amendment summarised at paragraph 10 above to be made to the pursuer's pleadings, inserting the explanation that his mother and other members of his family had concealed the occurrence of the accident from him until 1994. In my opinion this would still not have been sufficient to bring the case within section 17(2)(b). In *Agnew* v *Scott Lithgow Ltd (No 2)* 2003 SC 448 at paragraph 23, it was pointed out that the statutory test was not whether the pursuer had a reasonable excuse for not taking steps to obtain the material information, but whether it would have been reasonably practicable for him to have done so. The issue of reasonable practicability would not have been addressed by the proposed amendment. As is well established, section 17(2)(b) contains both a subjective and an objective element. It is clear from the pursuer's pleadings that for some years he received psychiatric care in various institutions for the personality disorder caused by the accident. Even in the passage sought to be added, the pursuer did not set out circumstances in which it would not have been reasonably practicable for him to obtain, more than three years before the action was raised in 1997, the information contained in his own medical records that would have resulted in him becoming aware of the facts listed in section 17(2)(b).

Disposal

[23] In formal terms, I shall sustain the defender's first and second pleas-in-law (to time bar and relevancy respectively) and dismiss the action.