OUTER HOUSE, COURT OF SESSION

[2021] CSOH 21

PD520/19

OPINION OF LORD WOOLMAN

In the cause

A

Pursuer

against

XY LIMITED

Defender

Pursuer: Clarke QC, Middleton; Slater and Gordon Scotland Limited
Defender: Springham QC; BTO LLP

24 February 2021

Introduction

[1] In 1987 the pursuer was aged 13 and a pupil at a junior school. She went on a camping trip with other female pupils. She alleges that the young male teacher who was in charge of the group raped her in a tent. She now seeks £1.5 million compensation from the defender, which owned and managed the school.

[2] The defender does not know or admit that the alleged incident took place. It accepts, however, that if the action proceeds and the pursuer proves her account, then it would be liable for the teacher's conduct. In that event its lines of defence would centre on causation and quantification.

[3] But the defender takes a preliminary point. Although there is no longer a limitation period for claims of historic abuse, the court may refuse to allow an action to proceed. It can do so if (i) it is not possible for a fair hearing to take place, or (ii) the defender will suffer substantial prejudice and that prejudice outweighs the pursuer's interest.

[4] The defender founds on the second branch of the test. The spine of its submission is straightforward. For many years it owed no liability to the pursuer. Two changes in the law have materially changed its position. In 2001 employers became vicariously liable for the criminal acts of their employees. In 2017 limitation was removed for persons who claimed historic child abuse. In consequence the defender is now potentially liable to pay a large sum by way of damages. That amounts, it claims, to substantial prejudice which prevails over the pursuer's interest. Further it will face difficulties in investigating the claim. Documents and witnesses may no longer be available.

[5] The pursuer adopts the contrary stance. She submits that (a) the recent legislative changes were intended to remove the time-bar for historic child abuse; (b) the defender is vicariously liable for the teacher's conduct, (c) it has insurance cover, and (d) there is sufficient evidence to vouch the claim. Further, even if the defender is substantially prejudiced, the pursuer's interest should prevail in any balancing exercise.

[6] Because of the nature of the allegation I have omitted details that might lead to the identification of the pursuer. I shall refer to the alleged perpetrator as "the teacher".

Background

[7] The pursuer joined the junior school a few years before the alleged incident. In autumn 1987 she progressed to the senior school. The two schools were closely linked. Most pupils moved from the one to the other. The schools were, however, distinct legal

entities. The junior school ceased operating many years ago. The defender was dissolved but has since been restored to the Register of Companies.

[8] In summary the pursuer gives the following account of the teacher's conduct. In advance of the camping trip, he told the girls not to pack their swimming costumes as they would be "skinny-dipping". He also said that three girls would share each tent. But when the group arrived at the camp site, he told them that they were a tent short. The girls would therefore have to take turns to share with him.

[9] On the second night of the trip, the teacher laced the pupils' hot drinks with alcohol. When the pursuer entered her tent to go to sleep with two other girls, he was already there. She got into her sleeping bag, which was positioned between him and the tent wall. At some point the other two girls left the tent.

[10] The teacher unzipped the pursuer's sleeping bag and began stroking her back. She pretended to be asleep. He took hold of her, turned her to face him, began kissing her and put his tongue into her mouth. The pursuer was petrified. He then removed her nightwear, put on a condom, knelt between her legs, and inserted his penis into her vagina. This caused her immense pain. She remained helpless and crying as he held her legs.

[11] The pursuer first disclosed what had happened a few years later when she was a pupil at the senior school. Her father – to whom she was close – died in an accident. Subsequently, she attempted to commit suicide. During her stay in hospital she told a psychiatrist about the teacher's conduct on the trip. He relayed that information to her general practitioner and also to the doctor at the senior school.

[12] The pursuer then blanked out the memory of the alleged incident. It was only when she reached her 20s that she felt able to tell her mother what had happened. Later, the

pursuer came across an online forum for former pupils who alleged that they had been bullied at the senior school. In 2013 she reported the alleged incident to the police.

[13] In the course of their investigation the police took witness statements from several former pupils. One alleged that the teacher had also sexually abused her. The police sent a report to the Crown Office. It decided to prosecute the teacher on several charges involving both complainers, including the rape of the pursuer.

[14] A trial was scheduled for 2014 but it did not take place. As I understand matters, the Crown case depended on mutual corroboration. Shortly before the trial was due to commence, the other complainer felt unable to give evidence. Without her testimony there was insufficient evidence in law to ask a jury to return a conviction.

[15] Attention then turned to civil proceedings. The pursuer's legal team intimated the present claim to the defender's insurers in 2016 and raised the present action in 2019. It has assembled a portfolio of documents to support the claim. They include report cards, medical records and police witness statements from a number of fellow former pupils.

[16] With regard to the merits of the claim, the documents show: (i) the dates the pursuer attended each school, (ii) the date the teacher joined the staff, (iii) the fact that they were alone together in a tent on the camping trip, (iv) the terms of her disclosure to the psychiatrist, and (v) the details of the police investigation.

[17] With regard to the loss element of the claim, the pursuer maintains that the alleged rape has had corrosive and pervasive consequences that have affected her whole life, including her mental health and relationships. She has significantly under-achieved in her academic life and career.

[18] The defender contends that not all of the pursuer's problems are attributable to the alleged incident. It points to a number of other adverse life events that she has suffered. It also argues that the sum sought is excessive.

[19] Two other points emerge from the pleadings. First, both parties know the current address of the teacher, who lives in England. They differ as to the significance of that fact. The defender contends that the claim should be directed solely against him as the alleged perpetrator. By contrast the pursuer submits that she is entitled to insist on her claim against the defender. She argues that it can cite him to give evidence at any proof and also seek a right of relief against him if the pursuer succeeds in the action.

[20] Second, the pursuer states that the defender's insurers settled a similar action in 2019. It involved another pupil's claim of sexual abuse in 1990 by another teacher at the junior school.

Scope of the Debate

[21] The Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act") contains the time bar legislation. In respect of claims for child abuse, it has been amended twice. The Law Reform Miscellaneous Provisions (Scotland) Act 1980 ("the 1980 Act") introduced more flexibility into the limitation regime. The Limitation (Childhood Abuse) (Scotland) Act 2017 ("the 2017 Act") removed the limitation period for claims of historic child abuse, subject to certain "safeguards" to protect defenders. This case concerns the application of the "substantial prejudice" safeguard.

[22] The defender does not dispute (a) that the pursuer was a pupil at the junior school at the material time, (b) that the defender was responsible for its management, control and

operation, (c) that it would be vicariously liable if the pursuer establishes her account, and (d) that a fair trial can take place.

[23] Questions of substantial prejudice and the pursuer's interest in the action are fact sensitive. It might be thought that they are better determined once evidence has been led. This is the pursuer's position. Mr Clarke offered a proof before answer leaving all pleas-in-law standing. Ms Springham declined the offer. She submitted that the issues in this case are capable of resolution at a debate.

[24] I agree that there are distinct advantages in deciding the time-bar point at this stage. It means that no "knock-out" point overshadows the proof. Neither party has to lay out further unnecessary expense in respect of what may prove to be a time-barred claim.

The pursuer's right to make a claim prior to the 2017 Act

[25] Under the limitation regime in force at the time of the alleged incident, the pursuer had to raise proceedings on or before three years after her 16th birthday. The cut-off date for her claim was early 1993, subject to section 19A of the 1973 Act. That provision (inserted by the 1980 Act) empowered the court to allow an individual to bring an action after the expiry of the conventional limitation period "if it seems … equitable to do so".

[26] But until May 2001 the pursuer's claim faced an insurmountable obstacle. She had no ground of action against the defender. It was not vicariously liable for the teacher's alleged criminal conduct.

[27] The position changed with the landmark decision in *Lister* v *Hesley Hall Limited* [2002] 1 AC 215. The House of Lords held that vicarious liability can arise if there is a sufficient connection between an employee's criminal conduct and the work that he had been employed to do.

[28] The declaratory theory of the common law holds that the House of Lords did not change the law. It simply declared what the law had always been:

> "Such vicarious liability may not have been clear until the decision of the House of Lords in *Lister* v *Hesley Hall Ltd* … The theory of the law is that the respondents and their predecessors were always vicariously liable for the conduct of [the employee] and that the reclaimer was entitled to compensation from them from the time or times when that conduct caused injury to him." *JM* v *Fife Council* 2009 SC 163, at paragraph 38

[29] A question then arose. How did section 19A and *Lister* inter-sect? Specifically, would the court allow claims against employers arising out of conduct prior to May 2001 to proceed? Lord Drummond Young addressed the point in *B* v *Murray (No 2)* 2005 SLT 982, affirmed *sub nom AS* v *Poor Sisters of Nazareth* 2007 SC 688 and *AS* v *Poor Sisters of Nazareth* 2008 SC (HL) 146. He declined to exercise his discretion in favour of the claimant as "there is significant prejudice to the defenders as a result of changes in the law since the statutory limitation periods expired" (para 119).

[30] Mr Clarke informed me that as a result of that decision, hundreds of other similar actions were abandoned or settled on a "no expenses due or by" basis.

[31] It's convenient to deal here with Mr Clarke's submission that, had the pursuer raised an action prior to January 1993, her case would have been the watershed case on vicarious liability. I reject that argument for the reasons given by Lord Drummond Young in *B* v *Murray (No 2)*. He noted that the House of Lords in *Lister* had attached particular importance to two Canadian cases both decided in 1999.

The 2017 Act

[32] The Scottish Government published a draft Bill to address the predicament of historic child abuse claimants, which ultimately became the 2017 Act. Counsel invited me to

look at the Bill, together with the accompanying policy memorandum. They also asked me to look at a written exchange about the proposed legislation between the Justice Committee of the Scottish Parliament: (2017) 7th Report (Session 5) and the Minister for Community Safety and Legal Affairs.

[33] I have referred to these documents to ascertain the "mischief" that the legislation was designed to address: *Bennion on Statutory Interpretation, Part 7* (chapter 24).

[34] The memorandum contains the following passages:

> "The policy aim of the Bill is to improve access to justice for survivors of childhood abuse." (para 5)
>
> "The Scottish Government is persuaded that cases of childhood abuse have unique characteristics which warrant a specific limitation regime. These characteristics derive from the abhorrent nature of the act, the vulnerability of the victim (who was a child at the time), and the effect of abuse on children. In particular, it is now recognised that the effects of childhood abuse often themselves inhibit disclosure to third parties until many years after the event." (para 25)
>
> "… the application of a limitation period to cases of childhood abuse creates an inbuilt resistance to allowing historical claims to proceed which is not appropriate in the context of this class of case. It has the practical effect of protecting abusers (and their employers) from being held to account in the civil courts, while preventing abused survivors from obtaining access to justice and, if they can establish their claims, obtaining reparation for the wrongs done to them." (para 32)

[35] The memorandum also explained that the Bill contained safeguards to protect defenders' rights under Article 1 of the First Protocol of the European Convention on Human Rights ("A1P1"). In each case the court would have to strike a fair balance between the parties' competing interests (paras 47-49 and 111).

[36] The Minister answered two specific questions posed by the Justice Committee (at paragraphs 153 and 217 of its report):

(a) What should happen to claims against employers which would have failed if they had been raised in time?

> "It will be for the parties to an action, and ultimately for the Scottish courts, to consider these issues within the framework of the 1973 Act as it will be amended by the Bill. The courts must ensure that the legislation is applied in a Convention-compatible manner."

(b) Should there be further clarity about the relevant factors for the "substantial prejudice" test?

> The government does not favour a list of factors, as "every case is different and each will be considered on its own merits."

[37] I now turn to the details of the 2017 Act. It inserted sections 17A-D into the 1973 Act, which removed the limitation period for claimants in child abuse cases, subject to two safeguards:

> "17D (1) The court may not allow an action … to proceed if either of subsections (2) or (3) apply.
>
> (2) This subsection applies where the defender satisfies the court that it is not possible for a fair hearing to take place.
>
> (3) This subsection applies where—
>
> (a) the defender satisfies the court that … the defender would be substantially prejudiced were the action to proceed, and
>
> (b) having had regard to the pursuer's interest in the action proceeding, the court is satisfied that the prejudice is such that the action should not proceed."

[38] This case concerns the application of section 17D(3). It contains a number of open textured terms. It does not define "substantially prejudiced" or "pursuer's interest in the action proceeding". In my view this is deliberate. The Scottish Parliament intended that the court should apply the two stage test in a broad manner.

[39] While the defender has the onus in respect of the first branch of the test, there is no onus in respect of the second branch. In carrying out the balancing exercise, the court can take all relevant factors into account in exercising its judgement.

[40] I approach the 2017 Act on the footing that it introduces a new line of jurisprudence. In my view it is therefore not helpful to refer to prior decisions based on different provisions. In particular, there is no need to engage in an arid discussion about whether "substantially prejudiced" (as used in the new legislation) is synonymous with "significant prejudice" as used by Lord Drummond Young in *B* v *Murray (No 2)*.

Substantial prejudice

[41] I acknowledge that for this purpose I must treat the defender and its insurers as one composite unit: *Kelly* v *Bastible* [1997] PNLR 227 (CA). But insurers must embrace a wide risk:

> "… if the common law during or even after the currency of an insurance develops in a manner which increases employers' liability, compared with previous perceptions as to what the common law was, that is a risk which the insurers must accept, within the limits of the relevant insurance and insurance period."
>
> *Durham* v *BAI (Run off) Ltd* [2012] 1 WLR 867 at paragraph 70.

[42] In my view the defender has established that it would be substantially prejudiced if the action proceeds. I reach that conclusion because of the sea change in its position. For many years it had no potential liability for the alleged incident. It is now exposed to significant interference with the peaceful enjoyment of its possessions.

[43] If the pursuer succeeds in her claim, which she values at £1.5 million, the defender may have to pay substantial damages. At the least it will have to expend sums in defending the action.

[44] I therefore pass to the second branch of the test.

The balancing exercise

[45] Does the pursuer's interest outweigh the substantial prejudice to the defender? In answering this question I have regard to various factors that lie on each side of the scales.

[46] In addition to possible financial liability, the defender relies on the following as giving rise to substantial prejudice. I deal with each in turn.

Investigation problems

[47] While there may be gaps in the evidence, the pursuer's legal team has assembled a comprehensive portfolio of documents as set out above. Key witnesses appear to be available, including fellow pupils who went on the trip, the pursuer's mother, and the psychiatrist to whom the pursuer made disclosure in 1991. There are five further points: (i) the defender had notice of the alleged rape only four years after the incident; (ii) it is unusual to have full records in historic abuse cases; (iii) some of the school records were lost in a fire, the defender having stored them in a disused building without first making copies, (iv) any lack of evidence may handicap both parties to an equal degree; and (v) the defender does not argue that the problems in this regard are so fundamental that there cannot be a "fair hearing".

Arrangement of affairs

[48] I am not persuaded that the defender arranged its affairs and was wound up on the basis that it had no liability. There was insurance cover for the relevant period. The

procedure for restoring companies to the register is designed for precisely this sort of scenario.

Direct claim against the teacher

[49] I see no good reason for requiring the pursuer to bring the claim against the teacher. He may well rely on the same defence of substantial prejudice. In addition, he may be unable to satisfy any decree awarded against him, but this is a matter which the defender can test by seeking relief from him if the pursuer receives an award of damages.

[50] What factors weigh on the other side of the scales? The pursuer plainly has a financial interest in favour of the action proceeding. But she also has a vital interest in securing justice. On her account she was the victim of a detestable crime. Rape lies at the top end of the calendar of offences. The teacher's conduct, if proved, had aggravating elements. It involved premeditation and breach of trust. He took advantage of a child in a vulnerable situation. The consequences of his behaviour have been life-long.

[51] In the circumstances of this case I conclude that the scales tip decisively in favour of the pursuer. Accordingly I shall allow the action to continue.

Miscellaneous

[52] I reject as speculative Mr Clarke's submission that the defender was independently liable to the pursuer for allowing a young teacher to take a group of girls away on a seven day camping trip. No "unsafe systems" case has ever been pled.

[53] I have studied two decisions with interest and profit: *JXJ* v *de la Salle Brothers* [2020] EWHC 1914 (QB) and *M* v *DG's Ex* 2020 SLT (Sh Ct) 11. It seems to me, however, that they

are not of direct assistance. Each case is intensely fact specific. Each must be decided on its individual circumstances.

Conclusion

[54] I shall delete the limitation averments in Answer 9 and allow a proof. Meantime I reserve expenses.