

**SHERIFFDOM OF SOUTH STRATHCLYDE, DUMFRIES AT GALLOWAY AT
HAMILTON**

[2022] SC HAM 37

HAM-A119-19

JUDGMENT OF SHERIFF J SPEIR

in the cause

AM

Pursuer

against

PG

Defender

Pursuer: Thompson Family Law Solicitors

Defender: Cartys, Solicitors

Hamilton, 13 September 2022

The sheriff, having resumed consideration of the course, finds as follows:

Findings in fact

1. The pursuer seeks damages from the defender on the ground that he raped her on an occasion between January and 22 August 2015.
2. The pursuer and the defender were married in 2010. They separated on 23 September 2015 because of the defender being arrested and charged for possessing child pornography. The defender received a criminal conviction in that regard in 2016.
3. The parties both continued to reside within the matrimonial home notwithstanding their separation until the defender left on 21 November 2016.
4. Following the defender leaving the former matrimonial home, the pursuer began to

experience flashbacks of being raped on several occasions by the defender when she was asleep. She recalled the last such incident being sometime between January and August 2015 (“the incident”).

5. In December 2016 the pursuer disclosed her flashbacks including the incident to the counsellor she was attending at the time. No action followed upon that disclosure.

6. The pursuer confronted the defender in relation to the incident in or about January 2017.

7. On 12 September 2017 the defender sent the pursuer a lengthy text message through the social media platform WhatsApp setting out his recollection of the incident.

8. In that said text message the defender admits to having had sexual intercourse with the pursuer on the occasion that she alleges that she was raped but stated that said sexual intercourse was consensual.

9. In January 2018 the pursuer disclosed the incident and other rapes to a criminal justice social worker and thereafter the police. She did so because the defender made her feel anxious and unsafe. The pursuer’s counsellor did not engaged with her in relation to said disclosure.

10. In January 2018 the pursuer was interviewed at home by the police but she declined to give a formal statement at that time.

11. Between 2015 and 2018 the pursuer presented to her doctor on several occasions with symptoms of anxiety, helplessness, hopelessness and having difficulty coping with her activities of daily living.

12. The pursuer developed symptoms of posttraumatic stress disorder (“PTSD”) after the incident. She also developed symptoms of co-morbid depressive disorder and generalised anxiety disorder as a result of being in an abusive marriage with the defender.

13. In May 2018 the pursuer was prescribed antidepressants.

14. The parties were divorced in July 2018 by an action at the instance of the pursuer.

The ground of divorce was the irretrievable breakdown of the marriage as established by the defender's unreasonable behaviour. The behaviour relied on was the defender's possession of child pornography.

15. The pursuer had consulted solicitors in connection with said divorce action. She did not disclose the incident or any other allegation of rape to them.

16. In August 2018 the pursuer gave a formal witness statement to the police in which she detailed 4 occasions in which she had been raped by the defender whilst asleep, the last being the incident.

17. The pursuer provided the police with a transcript of the WhatsApp message referred to in Finding in Fact 7.

18. The police subsequently interviewed the defender in connection with said allegations. He made no comment. No charges were brought against him and no criminal prosecution followed.

19. As a consequence of that non-action the pursuer's mental health deteriorated and she required to go on long terms sick leave. She also paid for and received private medical treatment between November 2018 and March 2019.

20. Prior to September 2018 the pursuer was unfit to pursue a civil claim against the defender due to the effects of the three mental disorders referred to in Finding in Fact 12. One of those mental disorders, PTSD, had been caused or contributed to by the incident.

21. The pursuer was only in a fit mental state to bring such a claim because of the private medical treatment that commenced in November 2018.

22. Although the pursuer subsequently responded to treatment she still experiences

panic attacks and other *sequelae* when she thinks or has flashbacks of the alleged rapes. She remains vulnerable to developing further psychiatric disorders or deterioration of her psychiatric condition if untreated.

Finding in Fact and Law

In all the circumstances of the case it is equitable to allow the pursuer to bring the proposed action for personal injury arising out of her alleged rape by the defender in the period between January and August 2015 in terms of section 19A of the Prescription and Limitation (Scotland) Act 1973, which would otherwise be time barred by virtue of section 17 of the said Act.

Finding in Law

Accordingly the pursuer's first crave for an order under section 19A of the 1973 Act ought to be granted

Interlocutor

THEREFORE grants the pursuer's first crave for an order in terms of Section 19A of the Prescription and Limitation (Scotland) Act 1973 to override the provision of section 17 of said Act and to allow an action for personal injury to proceed out of time; and finds the defender liable to the pursuer in the expenses of the cause as an assisted person.

Note

[1] In this action the pursuer seeks an order in terms of section 19 of the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act") to override the provisions of section 17 of

that Act to enable her to bring an action for personal injury out of time.

[2] The proposed action for which she seeks relief from the triennial limitation is for damages against her former husband, PG. PG is the defender in this action. The basis of the proposed action for damages is that the pursuer claims to have been raped by the defender during the course of the marriage and in particular intends to find upon one such incident that took place between January and August 2015.

[3] After sundry procedure, the case was appointed to proof on this issue. At the proof the pursuer was represented by Mr Thompson and the defender by Ms Agyako.

[4] The evidence in the case in the case was of relatively short compass. The essential facts from the evidence heard are set out in my findings in fact. I heard evidence from the pursuer and Dr Mala B Singh, Consultant Psychiatrist. Cross-examination of these witnesses was relatively limited. No evidence was led for the defender and indeed the defender was absent during the course of the proof.

[5] The pursuer is 46 years old. She is employed as a health visitor. For the purposes of examination in chief she adopted a comprehensive affidavit dated 21 June 2022. This affidavit sets out in some detail the background to her marriage to and divorce from the defender. It also set out the basis upon which she intends to raise an action for damages if permitted to do so.

[6] The parties married in August 2010. They separated on 20 September 2015 and were divorced in July 2018. The catalyst for the separation was the defender's arrest and subsequent charge for downloading illegal images featuring child sexual abuse. The defender was duly convicted of said offence and received a non-custodial sentence therefor in July 2016.

[7] Although the parties separated in September 2015, the defender did not move out of

the former family home until the following year in November 2016. After that point the pursuer began to experience flashbacks of occasions of waking up to discover the defender raping her while she slept. To the best of her recollection, the last such incident took place sometime between January and August 2015("the incident"). The affidavit goes into some detail of the facts and circumstances of the incident as the pursuer now recalls it. There was no challenge to that detail in cross-examination which was focused on why there had been a delay in bringing a claim. Accordingly, for present purposes it is suffice to provide a brief summary of what is set out in the affidavit. At the time of the incident the parties were sharing a bedroom. It was a Friday or Saturday night and the pursuer had gone to bed around 11.30pm. The parties' children were already in bed. During the evening she and the defender had been watching television and had shared a bottle of wine. On going to bed the pursuer fell asleep promptly. At some point she was disturbed by the feeling of a full bladder, some movement in her vagina touching of her genitalia. She opened her eyes to discover that the defender was on top of her in an awkward position. Although his torso was not in contact with her, his penis was inside her vagina. When he saw that she had woken up, he shrunk back and then froze. He had a guilty look on his face. The pursuer felt very confused and disorientated as to what was happening. She got out the bed to go to the toilet and in doing so she realised that the defender had been raping her as she slept. Her main concern at that stage was that because of her recent hysterectomy she was worried that he had caused some damage to her. She stayed in the bathroom for 15 minutes. She was frightened. She was fearful of challenging the defender as to what had happened. She was scared of his reaction having regard to her experiences in the past when challenging him about intimate matters. She saw that the defender was lying on his side of the bed facing outwards. She climbed back into bed and attempted to move as little as possible. She was

able to see the time from her wristwatch and showed it as being 1:30am.

[8] The pursuer did not make any disclosure in relation to the incident until she started experiencing flashbacks of it. In December 2016 she disclosed what had happened to a counsellor that she was seeing through NHS Lanarkshire. The counsellor did not engage with her in relation to the incident. She did not respond to the disclosure. She did not refer the pursuer to a specialist service such as rape crisis nor make her aware of the possibility of reporting it to the police. The pursuer had been apprehensive of sharing this information with the counsellor and her lack of engagement left her feeling worse than before. Accordingly she did not bring up the issue with her again.

[9] The next occasion on which the pursuer made a disclosure was in the nature of a challenge to the defender in January 2017. She had a clear recollection of this. She and the defender had been travelling in her car to attend at a branch of Santander bank in order to close a joint bank account. She confronted the defender with her memory of the incident. He made contradictory responses. He said it did not happen. He then asked whether it was possible that he was so drunk that he did not know what he was doing. He then suggested that the pursuer had been drunk and had probably initiated the sexual contact. He then concluded by saying that he did not remember it at all. After this discussion the pursuer did not mention the incident again to the defender but he subsequently brought it up on several occasions. He did so in the context of the discussion of issues surrounding their separation. On 12 September 2017 the defender sent the pursuer a WhatsApp message in which he confirmed that there had been a sexual incident but that this was qualified by exculpatory detail. I shall return to the terms of that WhatsApp message shortly.

[10] In January 2018 the pursuer disclosed the incident to a criminal justice social worker within Motherwell social work department and soon after that she spoke with the police.

Her motivation for doing so was that she was feeling increasingly frustrated, anxious and unsafe because of the defender's communications and interactions with her. He was repeatedly abusive and even claimed to be suicidal which she did not believe. She wanted to make the police and criminal justice social work department aware of his behaviour in the hope that they would intervene to make it stop. Although the pursuer met with a sexual offences liaison officer of Police Scotland at home in January 2018 she did not give a witness statement at that time. She was too scared to take matters further and could not cope with the shame of people knowing what had happened to her.

[11] By August 2018 the pursuer's position had changed and she sent an email to that same police officer. She advised that she now wanted to provide a witness statement. In that statement she detailed four rapes by the defender in total, including the incident. The circumstances of all the rapes were broadly similar to that which have already been outlined, namely that the pursuer awoke to discover the defender raping her. The pursuer understood that the defender was questioned by the police with his solicitor present and gave a no comment interview. No charges made or prosecution brought against him. The pursuer felt devastated by this as she had once again made a disclosure that she believed to be supported by the WhatsApp message which had also been passed to the police. She had already been suffering from depression and anxiety and this worsened. She required going on long-term sick leave from her employment. She was off work from 15 November 2018 to 31 March 2019. In that period she paid for private medical treatment including EMDR (a post-traumatic stress disorder treatment). The private therapist she was working with on that suggested that she spoke to a solicitor. It had not occurred to her to do that before that point. Although she had consulted a solicitor in connection with her separation agreement and the division and sale of the family home, she had not shared with that solicitor any of

the details of the incident. The basis upon which she obtained a divorce from the defender was the matter for which he was ultimately convicted. In addition to mental health issues, the fact that the defender had raped her had resulted in career disruption in particular causing a significant delay in completion of a postgraduate course to qualify as a health visitor. The pursuer continues to experience stress, panic attacks, a racing heart, vomiting and shaking when the incident comes to mind. She has difficulty falling asleep and frequently wakes up throughout the night.

[12] The WhatsApp message from 12 September 2017 was lodged as a production for the pursuer. The message is one long continuous message from the defender to the pursuer. The original WhatsApp transcript was not available but the pursuer had made screenshots of it on her mobile telephone and these were what had been lodged. The message is lengthy but it is worth setting out part of it in some detail as follows:

“You said that you wanted things to be amicable between us, but within 4 weeks of me leaving the house you accused me of sexually assaulting you. This is the cause of my anger – it simply is not true. This accusation, more than anything that has happened between us, floored me, and left me in a terrible place. Your spite and obvious hurt when delivering this news didn't really allow me to respond in any way, and I'd like to now – there can be no degree of amicability between us as long as you think this. I understand I have hurt you badly, but that's no reason to throw such an awful accusation, when it has little substance.... Your recollection of the events of that particular evening are fairly accurate, but you missed 2 small details, both of which you obviously cannot recall (given that you were drunk – I was too, but I remember), but I feel the change everything.

you said you woke up when we were having sex, and you stopped, to go to the toilet. Yes, completely true stop however, you don't seem to recall the previous 10 minutes, where I was nodding off, and you initiated things. At this point, I remember thinking that this wouldn't go anywhere, as we were both drunk, but it did, and I went along with it, happily. I did not initiate this – if you think otherwise then ask yourself how often I initiated things in the last 4 years of our relationship – the answer is never – you simply don't respond to any type of pressure, including the pressure you put yourself under whenever you promised sex later – this never, ever subsequently happened, and I used to consider such a promise to be the death of any hopes for that evening. I accepted this pattern ages ago, and you didn't seem to notice. On that night (and every other drunken encounter going back many years)

you initiated things, asked me to stop, and I complied. How is this a sexual assault?

You said when you came out of the toilet, I had turned my back on you, and was angry. What you don't seem to recall is that you were in the toilet for more than 10 minutes, closer to 15. After about 5 minutes, I began to wonder, and after 10, I resigned myself to that being another occasion where you changed your mind. You asked me if I was in a huff with you, and I said I was annoyed at myself and left it at that.

I like a bit of drunken sex, as it can be fun and uninhibited, but I've never wanted to do without your knowledge and participation. You (sic) accusation is the worst thing you have ever said to me, and it won't go away. I asked you to have a really good think about that evening, your recollection, and your perception. I can learn not to be upset, but not as long as you think this, and I think the opposite. Perhaps we could clear this up somehow."

[13] In cross-examination the pursuer rejected the suggestion that the text of the message from the defender had been edited by her in any way. On being asked to explain why the production containing the message was headed up with the pursuer's profile and telephone number she explained that that was because she had captured the message in a series of screenshots on her mobile phone. In re-examination she explained that there had been a transcript of the whole WhatsApp conversation but this had been sent to Police Scotland. At one stage Ms Agyako appeared to suggest to the pursuer that she had in fact edited the message but withdrew that question on a timely objection from Mr Thompson.

[14] The pursuer also led evidence from Dr Mala Singh. She is 63 years old and has been qualified as a consultant psychiatrist for 17 years. She is currently a consultant psychiatrist for the Inpatient Assessment and Treatment Female only ward at Park Royal Centre for Mental Health (Central and Northwest London Foundation Trust). She has a special interest and experience in forensic psychiatry. She has prepared reports for both civil and criminal cases for over 15 years and has given evidence as an expert witness in courts.

[15] She was instructed in this case to prepare this psychiatric report on the pursuer and to provide an opinion as to whether the pursuer is suffering or has suffered in the past from

an identifiable psychiatric or social condition and identify this condition and its severity.

She was also asked to comment on why the pursuer did not or could not have taken action within the three-year period following the incident. She had not met the pursuer before receiving instructions to prepare a report in the case. She conducted an interview by Skype (because of the pandemic) to allow her to make an assessment. She also had access to the pursuer's medical records from 2015 onwards. The report that she prepared on the basis of that assessment and review is dated 31 December 2020. She adopted it in evidence. The opinion and recommendations section of that report states:

“OPINION AND RECOMMENDATIONS

Question One: Is our client suffering from and/or has she in the past suffered from an identifiable psychiatric or social condition and if so please identify the condition and comment on its severity?

In my opinion AM has the clinical features of posttraumatic stress disorder (ICD-10 43.1) with co-morbid depressive disorder of mild (ICD10 F33), and Generalised Anxiety Disorder (ICD 10)F41.1 I used the rating scale Generalised Anxiety disorder Questionnaire (GAD -7). She scored 12 as having moderate degree of anxiety. I made these diagnoses based on the Tenth Edition of the International Classification of Diseases published by the World Health Organisation.

Posttraumatic stress disorder arises as a delayed and/or protracted response to a stressful event or a situation of an exceptionally threatening or catastrophic nature, including violence behaviour. Typical symptoms include episodes of repeated reliving of the trauma in intrusive memories (flashbacks), or dreams recurring against a persistent background of a sense of numbness and emotional blunting, detachment from other people, unresponsiveness to surroundings, anhedonia and avoidance of activities and situations reminiscent of the trauma. There is also a clear avoidance of cues that remind the sufferers of the original trauma. There is usually a state of autonomic hyperarousal and hypervigilance with enhanced startle reactions and insomnia. Anxiety and depression are commonly associated with the above symptoms and signs and suicidal ideation is not infrequent.

Depressive disorder is characterised by repeated episodes of depression, during which the individual usually suffers from depressed mood, loss of interest and enjoyment, reduced energy leading to increased fatigability and diminished activity. Other common symptoms are reduced concentration, lack of energy, reduced self-esteem and self-confidence, ideas of guilt and worthlessness, bleak and pessimistic

views of the future, ideas or acts of self-harm or suicide, disturbed sleep and diminished appetite.

Generalised Anxiety Disorder is a condition marked by excessive worry, and feelings of fear dread and uneasiness that lasts 6 months or longer. Other symptoms include being restless, tired poor sleep, unable to concentrate.

I believe that AM has been suffering from the above-mentioned symptoms of the condition since being in an abusive Marriage. The symptoms of PTSD developed after the incident of rape.

Question 2: One issue before the Court relates to delay in the Claimant bringing her claim. Please include a section in your report commenting on whether or not in your opinion the alleged delay, if any, be explainable as a consequence of the psychological/psychiatric damage caused to AM.

It is not unusual for people who suffer from Domestic violence and rape to suppress all their intrusive and disturbing memories in order to cope with their present life and immediate concerns, such as making their career, raising their children and managing their day-to-day life. However later on when they have more time to themselves, these unresolved and suppressed memories come to the surface and make them feel depressed and anxious.

AM was dealing with many issues at that time. She was trying to keep her life together. Both her children have ASD, she was studying for diploma in community public health, she had a difficult time getting divorced, trying to get a mortgage for her house. She was feeling low, stressed and ashamed of being married to a paedophile. She went for extensive counselling and psychological treatment for her depression anxiety and PTSD. She received EMDT (Eye Movement Desensitisation Treatment). In May 2018 she was prescribed antidepressants Sertraline which helped with her depressive symptoms. I have reviewed her medical records from 2015 until 2018 she had presented several times with symptoms of anxiety, helplessness, hopelessness and having difficulty in coping with her activities of daily living. She was in no fit state psychologically and emotionally to bring a claim. She did report to the police, they questioned him for 2 hours but were unable to charge him due to lack of evidence. On the balance of probabilities AM was suffering from three major mental disorders which affected her thought process, she was unable to pursue a claim.

I believe that AM has unconsciously suppressed all her disturbed memories as she had to deal with the imminent issues of looking after her children and supporting her family as a single mother. After the treatment she has found more time to think about her past events and subsequently bring all those disturbing and unresolved issues to the present.

AM will remain vulnerable to developing further psychiatric disorders or deterioration of her psychiatric conditions if untreated."

[16] In cross-examination Dr Singh confirmed that she had not been asked to comment on any issues the pursuer had prior to 2015. She accepted that she had no knowledge of whether the pursuer had suffered PTSD prior to 2015 but she explained if that had been the case then the rape would have made that PTSD even more severe and prolonged. Dr Singh also explained that while the pursuer might have been capable of giving a statement to the police that was a different matter from giving a statement for the purposes of formulating a claim. That would have required a systemised thought process. The fact that she had made a complaint to the police and nothing appeared to be done about it would have led to a further deterioration in her conditions of PTSD, anxiety and depression. She would have suffered a further loss of confidence. It was not uncommon for victims to block entire incidents from the mind with revelation only coming at a later point in the form of flashbacks. This was in fact quite common and might be best understood as a defence mechanism to avoid becoming distressed and anxious. It was Dr Singh's professional opinion that the pursuer was not fit to instruct a civil claim against the defender prior to undergoing the private medical treatment she received at the end of 2018 into the beginning of 2019.

Submissions

Pursuer

[17] Mr Thompson moved that the pursuer's first plea in law be sustained and that decree be granted in terms of her first crave to allow an action for personal injury to be brought against the defender out with the triennium contained in section 17 of the 1973 Act. Reliance was placed on section 19A of the 1973 Act. The harmful event which was intended be the

subject of such an action was the incident. The writ in the present case was warranted in March 2019. There were difficulties in serving the writ because the defender had moved address from that specified in the instance. The fact that the defender had moved address only became apparent when service was attempted. After service by recorded delivery was unsuccessful there was an attempt to make personal service by sheriff officers. This was on around 10 May 2019. The sheriff officer reported that the defender was not resident at his former address. Service was eventually made on the defender on 10 September 2019 at a different address also in Motherwell. Since then the defender had changed address again and had moved away from Motherwell.

[18] Mr Thompson submitted that the test to be applied in considering whether to make an order under section 19A of the 1973 Act was as set out by Lord Drummond Young in the case of *B v Murray (No. 2)* 2005 2005 SLT 982 at paragraph 29 in the following terms:

“Section 19A: factors that may be relevant

[29] Section 19A has been the subject of considerable judicial discussion. The same is true of its English equivalent, s 33 of the Limitation Act 1980; s 33 is framed differently from s 19A, but it fulfils the same essential function and the authorities on its interpretation are accordingly of assistance in Scotland: Donald v Rutherford. A number of matters have been clearly established. First, the court has a general discretion under s 19A; the crucial question that must be considered has been stated to be ‘where do the equities lie?’: Forsyth v A F Stoddard & Co Ltd, at 1985 SLT, p 55, per Lord Justice Clerk Wheatley; Elliott v J & C Finney, at 1989 SLT, p 608E, per Lord Justice Clerk Ross. Secondly, the onus is on the pursuer to satisfy the court that it would be equitable to allow his claim to proceed: *Thompson v Brown*, at [1981] 1 WLR, p 753, per Lord Diplock. Thirdly, the conduct of a pursuer's solicitor may be relevant to the exercise of the court's discretion, and the pursuer must take the consequences of his solicitor's actings: Forsyth, supra, at p 54. Fourthly, relevant factors that the court may take into account include, but are not restricted to, three matters identified by Lord Ross in *Carson v Howard Doris Ltd*, at 1981 SC, p 282; 1981 SLT, p 275, these are ‘(1) the conduct of the pursuer since the accident and up to the time of his seeking the Court's authority to bring the action out of time, including any explanation for his not having brought the action timeously; (2) any likely prejudice to the pursuer if authority to bring the action out of time were not granted; and (3) any likely prejudice to the other party from granting authority to bring the action out of time’. Fifthly, each case ultimately turns on its own facts, a principle

which applies even if a number of claimants present similar claims against the same person: *ibid*; *KR v Bryn Alyn Community (Holdings) Ltd (In Liquidation)*, at para 45, per Auld LJ. In addition the reference was also made to *A v Glasgow City Council* 2018 SLT 32; [2019] CSIH 6 [2018] CSOH 116, *Madden v Duncan Anderson Limited* 2021 Rep L.R. 138 AND *Jacobsen v Chaturverdi* [2017] CSIH 8.”

[19] Mr Thompson submitted that in determining this issue the court had an unfettered discretion based upon a balancing of the equities. He accepted that the starting point was the pursuer had to justify why it was equitable to deprive the defender of what might otherwise be a complete defence in terms of section 17 of the 1973 Act and thereafter provide good justification for the order being granted. The pursuer should be accepted as credible and reliable. The text message sent by the defender demonstrated that he had a comprehensive memory of the incident albeit he set out a different version of events. Based upon the pursuer's recollection the terminus for raising an action would have been in August 2018. The existence and terms of this text message from the defender demonstrated no significant deterioration in his recollection of the incident as at September 2017. This was a record which remained available to him. He could not be said to have suffered prejudice through the passage of time. The defender offered no evidence of any such prejudice. The pursuer relied on the opinion evidence of Dr Singh that because of mental health issues she was not in a position to bring a claim prior to the writ in the present action being warranted. This was an adequate justification of why an action had not been brought timeously.

Defender

[20] For the defender Ms Agyako submitted that the pursuer should not be permitted relief from the triennial time bar. She had not satisfied the evidential burden necessary to engage the court's discretion in her favour. To do so would cause the defender prejudice through loss of a time bar defence and having to meet a claim based on an event from seven

years ago. The pursuer's disclosures to the police, social work and the defender demonstrate that she was capable of discussing the issue prior to expiry of the triennium. Before that point she had also instructed solicitors in connection with her separation, financial issues and divorce.

[21] Ms Agyako accepted that this was not a case where the pursuer either had disclosed the allegation of rape to her solicitors or sought advice from them in relation to making a civil claim prior to expiry of the triennium. No issue was taken in the relation to the delay between the writ being warranted and served due to the defender moving address. Indeed the defender had moved address again since the action had been raised.

[22] Ms Agyako submitted that the WhatsApp text message should be disregarded as irrelevant because its provenance in relation to date, time and origin were not established. She clarified however that she was not challenging the pursuer's credibility as to the receipt and content of the message. She was not in a position to allege that the pursuer was lying. Little or no weight should be given to the report from Dr Mala due to the limited nature of information available and that she was opining on matters which were for solicitors or the court. The pursuer had not satisfied the test formulated by Lord Drummond Young in *B v Murray, supra*.

Decision and reasons

[23] I am grateful to parties' agents for their written and oral submissions.

[24] In terms of section 17 of the 1973 Act, subject to certain statutory exceptions, an action for damages for personal injuries requires to be brought within 3 years of the date the injuries were sustained. In any case, where proceedings are barred by the expiry of that limitation period, the court may still allow the action to be brought if it seems to do so in

terms of section 19A of the 1973 act. That section provides as follows

“19A. —(1) Where a person would be entitled, but for ... the provisions of sections 17 ... of this Act, 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.”

[25] As is clear from the wording of this provision it is only potentially engaged where such an action is time barred under and in terms of section 17 of the 1973 Act. In some cases there can be an issue as to whether as a matter of fact and law a claim is time barred notwithstanding the passage of the triennium. In the present case, however, both parties were content to proceed on the basis that the pursuer would be subject to the triennial time bar unless relief is granted.

[26] As can be seen from the terms of section 19A there is no guidance specified within the provision as to how discretion should be exercised in any particular case. No reference is made to what criteria or factors should be given weight. In the present case both parties rely on the first instance decision of Lord Drummond Young in the case of *B v Murray, supra*, and in particular the dicta set out in paragraph [29] thereof. Neither party, though, referred me to the reported decisions of the appeals taken from that decision, firstly to the Inner House and thereafter to the House of Lords. The latter is *inter alia* reported as *v Poor Sisters of Nazareth* 2008 SC (HL) 146. In that case while no criticism was made of what Lord Drummond Young had identified from authority as being relevant factors neither was such a formulaic approach endorsed. At paragraph [29] of his speech Lord Hope stated:

“[25] ... In *Carson v Howard Doris Ltd* (p 282) Lord Ross said, shortly after the provision was enacted, that the power conferred by the section should be exercised sparingly and with restraint. There is a risk that if that approach were to be adopted the court will fail to do what the section requires, which is to determine what would be equitable in all the circumstances. But the context in which that discretion is to be exercised is plain enough. Its effect will be to reimpose a liability on the defender which has been removed by the expiry of the limitation period. The issue on which the court must concentrate is whether the defender can show that, in defending the action, there will be the real possibility of significant prejudice. ... it seems more in

accord with the legislative policy that the pursuer's lost right should not be revived than that the defender should have a spent liability reimposed on him. The burden rests on the party who seeks to obtain the benefit of the remedy. The court must, of course, give full weight to his explanation for the delay and the equitable considerations that it gives rise to. But proof that the defender will be exposed to the real possibility of significant prejudice will usually determine the issue in his favour. This is a question of degree for the judge by whom the discretion under s. 19A is to be exercised."

[27] Accordingly, while I accept Lord Drummond Young's analysis of the earlier authorities, in my view the starting point any consideration of section 19 is to recognise that it confers a general and unfettered discretion on the court to do what is equitable in all the circumstances with the crucial question being "where do the equities lie"? (*B v Murray, supra* per Drummond Young and cases *loc cit*).

[28] In the present case the only concrete prejudice identified on behalf by the defender is the loss of the time barred defence. While there was some attempt to criticise the pursuer's reliance on the WhatsApp message ultimately it was not the defender's position that the pursuer had somehow invented or misrepresented the content of that message. Neither was it suggested to the pursuer that the defender had not sent such message, though quite properly Ms Agyako would not have been in a position to make that challenge in the absence of being able to offer evidence of rebuttal. In terms of that message it would appear that the defender had a fairly cogent recollection of the incident which the pursuer founds upon. In the circumstances, have regard to the nature of the alleged assault, there did not appear to be any potential difficulties which the defender will be presented with if the pursuer were permitted to bring her claim. Put another way it cannot reasonably be said that the pursuer's claim has become stale and incapable of being investigated properly. Further, as I have noted, the defender made a decision not to give evidence in this case and accordingly the court has not been furnished with any material which would indicate any

difficulties of that nature.

[29] I was asked to take a critical view of the pursuer's conduct in not pursuing the claim more timeously against a background of her having made certain disclosures within the triennium. Having considered the evidence of the pursuer as supported by that of Dr Singh I am not persuaded that this is a case in which it would be appropriate to take to such a harsh view of her delay in bringing a claim. I consider it of some significance that the parties remained under the same roof for a significant part of the three year period commencing at the end of August 2015. Thereafter although the pursuer had consulted solicitors in connection with her divorce from the defender this was not a case where there was some type of misconduct or failure on the part of those solicitors for which the pursuer would require to bear responsibility. As Dr Singh observed in cross-examination, the fact that the pursuer's formal complaint to the police did not result in the defender being charged or prosecuted may well have served to weaken her resolve to take matters further at that time such as by investigating whether a civil claim was possible. Further, on the evidence of Dr Singh there is some basis for considering that the mental impairment that acted as a hurdle to the pursuer bringing a claim was causally connected to the defender's conduct.

[30] In all the circumstances, I consider that the pursuer would be very materially prejudiced by a refusal to exercise the discretion conferred on the court by section 19A of the 1973 Act. The factual basis for the pursuer's claim and the defender's position already appear to be clearly focused. There does not appear to be any reason why an action raised now should not be progressed and concluded in a short time frame. Accordingly, I am satisfied that the balance of equities comes down in the pursuer's favour and that her application for relief under section 19A of the 1973 Act should be granted.

Expenses

[31] Both parties were agreed that whatever the outcome I should find the losing party liable to the successful party in the expenses of the cause as an assisted person.