OUTER HOUSE, COURT OF SESSION

[2024] CSOH 85

PD209/21

OPINION OF LADY POOLE

in the cause

PW (AP)

Pursuer

against

KM

Defender

Pursuer: Galbraith KC, Heaney; Drummond Miller LLP
Defender: Party
Curator ad Litem: Kerrigan KC

6 September 2024

Background and summary

[1] In 2021, the defender was tried in the High Court on charges of rape of the pursuer, and indecent assault of another woman (MS). He was acquitted of both charges. In this personal injuries action in the Court of Session, the pursuer seeks damages for rape by the defender.

[2] The four main issues before the court, and the conclusions reached by the court, may be summarised as follows.

1. Is the action time barred? The alleged rape occurred on 29 January 1995, but the action was not commenced until March 2019. It was brought after the expiry of

the three year period in section 17 of the Prescription and Limitation (Scotland) Act 1973 (the "1973 Act"). The court decided that in all the circumstances it was not equitable to permit the action to proceed. It declined to exercise its discretion under section 19A of the 1973 Act to allow the action to be brought.

That decision is sufficient to dispose of the case. Nevertheless, given that the court heard evidence and full submissions, its decisions on the other three main issues before it are recorded below.

2. If the action had not been timebarred, would the defender have been liable to make reparation to the pursuer in respect of an alleged rape? The court was not satisfied on a balance of probabilities that the defender raped the pursuer on 29 January 1995, and the pursuer's claim failed.

3. If the pursuer's claim had succeeded, what is the appropriate measure of damages? Had the action not been time barred, and had liability been established, the court would have made an award of £50,000 in respect of solatium, 75% attributable to the past, with interest at 4% per annum on £37,500 since 29 January 1995.

4. Was the evidence of MS, about an alleged indecent assault on her, admissible in the pursuer's case? MS's evidence was heard as part of a proof before answer, under reservation of all questions of competence and relevance. After hearing that evidence and submissions about it, the court decided MS's evidence was inadmissible. Even if that was wrong, the evidence of MS fell to be disregarded, because it was neither credible nor reliable.

Representation

[3] The pursuer was represented by senior and junior counsel, and solicitors. The defender, a retired policeman, was representing himself, with the lay assistance of his daughter.

[4] The court made an order appointing a curator *ad litem* to the defender. The appointment was for the limited purposes of the curator conducting the cross examination of the pursuer and MS. There are already provisions to prevent personal cross examination in criminal proceedings for rape and certain other offences (section 288C of the Criminal Procedure (Scotland) Act 1995). This may also become the statutory position in civil cases, if the Scottish Parliament enacts proposed legislation amending the Vulnerable Witnesses (Scotland) Act 2004. Meantime, having heard from the parties at the outset of the proof before answer, and there being no substantive opposition, the court made a limited appointment of a curator *ad litem*. In doing so, the court considered the principles underlying appointments of curators in the cases of *Kirk* v *Scottish Gas Board* 1968 SC 328 at 331 and *Drummond's Trustees* v *Peel's Trustees* 1929 SC 484. It also had regard to section 6 of the Human Rights Act 1998, the Convention rights in articles 3 and 8, and the outcome of the case of *JM* v *UK* Application 41518/98. Taking into account the pursuer's medical history, the nature of the subject matter, and all of the circumstances of the case, the court decided that fairness (both at common law and under the Convention) necessitated the appointment, to enable the pursuer properly to give her evidence. It was consistent with other procedures adopted by the court, such as special advocate procedure, for the appointment to be limited to the aspects of the case in respect of which it was necessary. The court was grateful to Mr Kerrigan KC for taking up the appointment at short notice.

Evidence, witnesses and submissions

[5] Evidence led in the case covered sensitive information about medical issues, child abuse and domestic abuse. Witnesses included the pursuer and MS, former complainers in a criminal trial involving sexual offences, and the defender, who had been acquitted in the criminal trial, and who successfully defended these civil proceedings. Balancing principles of open justice and respect for private lives, a degree of anonymity was appropriate. Accordingly, the opinion does not set out the town in Scotland where the alleged sexual offences occurred, and initials are used to describe a number of people involved. The following table may provide a convenient reference point for initials used in this opinion.

Initials	**Description**
SR	one of the pursuer's sisters, at whose house the pursuer was staying on the night of 28 to 29 January 1995
TD	the defender's work colleague, present with him on the night of 28 to 29 January 1995 and also a serving police officer at the time
CR	the pursuer's partner for some of the 2000s
MS	The complainer in a charge of indecent assault in the criminal trial brought against the defender
Dr TJ	a consultant psychiatrist involved in treating the pursuer
GR	a solicitor instructed by the pursuer in 2002 and 2003
JP	a solicitor instructed by the pursuer in 2012, and later the solicitor for the defender in this action until withdrawing from acting in 2022
JM	a solicitor instructed by the pursuer between about 2016 and 2023, when he retired
AG	a police officer who was the custody officer when the pursuer was taken into custody on 30 September 2018, and made her allegation of rape to the police for the first time
JMC	a police officer, who was the sexual offences liaison officer appointed when the pursuer's allegation of rape was investigated in 2018 and 2019
MC	the pursuer's next door neighbour in about 2002
MR	the pursuer's mother
AR	another sister of the pursuer
BF	a friend of MS

[6] There was an extensive minute of agreement, which the court took into account together with evidence led before it, and submissions by the parties supported by

authorities. Evidence was given from the witness box in the courtroom by the pursuer's former partner CR, her sister SR, and the defender. Evidence from a number of other witnesses was given remotely and using a live link. The pursuer and MS gave evidence by live link under vulnerable witness measures. Professional witnesses also attended remotely, including the pursuer's consultant psychiatrist Dr TJ, the pursuer's former solicitor JM, the former solicitor of both the pursuer and defender JP, a police custody officer AG, and a sexual offences liaison police officer JMC. The court found the evidence of all of the professional witnesses to be credible and reliable. Findings in relation to evidence of the pursuer, defender, CR, SR and MS were more nuanced, and are more conveniently made where necessary in the context of particular issues discussed below.

[7] The court bore in mind, when assessing the evidence of the pursuer and MS, the need to take care when assessing the evidence of witnesses of traumatic events. In criminal trials, juries are routinely directed that people may react in many ways to being a victim of a sexual offence. Statute requires directions to be given to juries to counteract rape myths (sections 288DA and 288DB of the Criminal Procedure (Scotland) Act 1995). Juries are told, among other things, that the fact a complaint is made late does not necessarily make it untrue. More generally, it is known that if people undergo a traumatic event, their memory may be affected in different ways. A person's ability to take in and later recall the experience may be affected by trauma. There may be a lack of coherence and gaps in their memory, and memories may change over time. The court considered that these observations applied equally to assessment of the evidence of a witness giving evidence about rape or indecent assault in civil proceedings.

[8] However, the pursuer must still prove their case on a balance of probabilities for an action of damages to succeed. It is appropriate to bear in mind judicial remarks about

assessment of witness evidence given from recollection (*Gestmin SGPS SA* v *Credit Suisse (UK) Ltd and Anor* [2020] 1 CLC 428 paras 15 to 23, Leggatt J). Human memory is not necessarily reliable. Memories are fluid and malleable. They are rewritten whenever they are retrieved. It would be wrong to assume that because a witness has confidence in their recollection, that is a reliable guide to the truth. In *Gestmin*, it was concluded that findings made on inferences drawn from documentary evidence and known or probable facts may be more reliable than human memory. In the present case, witnesses were speaking to events alleged to have happened a long time ago. The court considered that, where contemporaneous documentary evidence, agreed facts, and other established facts were available, it was appropriate to use that evidence to test reliability of recollection.

[9] The court did not hear directly from TD, a serving police officer in 1995, who was with the pursuer and the defender on the night of 28 into 29 January 1995. He had suffered a suspected stroke, was under investigations, and subject to medical advice to avoid the stress of giving evidence. A soul and conscience letter from his doctor was produced. Following agreement between the parties, TD's evidence was before the court in the form of a statement he had provided to the police on 15 November 2018, and evidence he had given on oath in the High Court at the trial of the defender on 8 January 2021. Under section 2 of the Civil Evidence (Scotland) Act 1988, the court was entitled to take into account this hearsay evidence, and where appropriate find facts proved on the basis of that evidence.

[10] It would undoubtedly have been better to have heard from TD in person, but the fact that the court had available to it a transcript of evidence given on oath in the High Court trial, involving examination and cross examination, increased the weight the court was prepared to give to TD's hearsay evidence. The court accepted the defender's evidence that he had not discussed the matter with TD between the time of the pursuer making a report to

the police on 30 September 2018 and TD giving his statement to the police later that year. TD had retired in 2011 after 30 years police service. By the time he gave his evidence in 2018 and 2021 he was no longer a serving policeman, and for many years had not been married to the lady who was his wife in 1995. The motivations for him to be economical with the truth suggested by the pursuer had lost much of their force with the passage of time. Unlike the evidence of some other witnesses, TD's evidence was largely consistent between the statement he had given to the police, and the evidence given under oath in the High Court. TD's evidence was not consistent in all respects with the pursuer's evidence, or that of her sister SR, but where the differences were most marked, the accounts of the pursuer and SR also differed from each other, casting doubt on the reliability of their recollections. Despite the submissions to the contrary on behalf of the pursuer, the court accepted the evidence of TD as credible and reliable.

Time bar

Applicable law

[11] The first issue before the court for determination is whether the action is time barred. The effect of section 17 of the 1973 Act (as in force on 12 March 2019 when this action was brought) is that an action for personal injuries for rape as an adult should be commenced within three years. It was not in dispute the present action had been brought after the three year time period had expired. The pursuer relied on the court granting an equitable extension under section 19A of the 1973 Act, which provided insofar as material, at the time the action commenced:

> "Where a person would be entitled, but for …the provisions of section 17… of this Act, to bring an action, the court may, if it seems to it equitable to do so, allow them to bring the action notwithstanding that provision".

The defender opposed the exercise by the court of its equitable discretion under section 19A to allow the pursuer to bring the action. He referred to the right to have obligations determined within a reasonable time under article 6 of the European Convention on Human Rights.

[12] The three year time limit has been disapplied in actions of damages concerning childhood abuse (section 17A of the 1973 Act). But Parliament did not disapply that time limit for cases involving historic sexual offences against adults. Accordingly, in the present case the court required to apply relatively settled principles governing the application of section 19A of the 1973 Act, a useful source of which is the decision in *B* v *Murray (No 2)* 2005 SLT 982 (endorsed in the House of Lords in *AS* v *Poor Sisters of Nazareth* 2008 SC (HL) 146 para 25). In deciding whether it is equitable to allow an otherwise time barred action to proceed, each case will turn on its own facts. The pursuer has the onus of showing that the justice of the case requires the exercise of the discretion in her favour. The discretion has to be exercised in the context of the rationales for limitation periods, and the judgement of the legislature that the welfare of society is best served if causes of action are litigated within the specified period. Where there is delay, in general terms the quality of justice deteriorates. There is a public interest in the finality of litigation and people knowing they have no liabilities beyond a particular period. The limitation period is the general rule, and the extension is an exception designed to deal with the justice of individual cases. The court must evaluate the injustice or prejudice that either side may suffer, by reference to the rationales that underlie the limitation statute. Three matters that may be considered are the conduct of the pursuer since the alleged rape (including any explanation why the action was not brought sooner), prejudice to the pursuer if the extension is not granted, and prejudice to the defender if it is. In considering prejudice to the defender, it is important to bear in mind

that the extension period reimposes a liability the defender would otherwise have escaped. If the defender can show a real possibility of significant prejudice, it will not normally be appropriate to grant an extension. The crucial question is "where do the equities lie?".

Facts found relevant to time bar

[13] There was little dispute about most of the facts relevant to time bar. One exception was whether it was established as fact that there was a conversation on 29 January 1995 in which TD, a serving police officer, had been told of the allegation of rape, and said to the pursuer she should report it to the police. The evidence led in support of this contention was from the pursuer and her sister SR, but their accounts differed markedly in detail about when and what was said. The accounts were also inconsistent with the evidence of TD, which was that this conversation had not happened. TD's evidence was also that if that conversation had taken place, given his job he would have been duty bound to take further action, but there had been no occasion for him to do so. Given the lack of consistency, and the passage of time, the court did not consider there was reliable evidence that this conversation had happened. Otherwise, the facts of relevance to time bar found by the court (a combination of agreed facts and facts established in evidence), were as follows.

[14] The date of the incident the pursuer alleges to have occurred was 29 January 1995, in the early hours of the morning. The pursuer did not report an incident to the police, or consult a solicitor about bringing an action, immediately afterwards.

[15] Throughout her adult life, the pursuer has suffered anxiety, depression and panic attacks. Since she was a teenager, she has been affected by emotionally unstable personality disorder, which does not of itself affect her credibility or reliability as a witness, but means she is prone to periods of crisis and periods of distress. The pursuer suffered physical and

emotional abuse as a child when she was resident at two children's homes. From time to time in her adult life, she has been in abusive relationships, and a victim of physical, emotional, and mental abuse.

[16] The pursuer was under the care of psychiatric services between 1997 and 2018, when she was discharged. Prior to that, as a child, she had once been referred to a child psychologist. The pursuer has received in patient treatment in a mental health hospital on four occasions, as well as out patient care. Her in patient admissions tended to follow overdoses, although not at life threatening levels. The in patient admissions were for one day on 30 January 1997, from 11 to 23 October 2003, from 9 March to 1 April 2009, then from 9 to 16 May 2013. At none of these times did the pursuer lose mental capacity. Her complaints at times she was admitted were about issues in her family life, not her allegation of rape.

[17] The pursuer instructed solicitors to act on a number of occasions on her behalf between 1995 and 2019. She instructed various different solicitors in relation to a variety of matters, including divorce, custody of a child, domestic abuse, a collapsed lung, children's homes, her allegation of rape, and when involved with the police.

[18] In 1997, the pursuer instructed a solicitor to act for her in relation to the breakup of her marriage and custody of her son. She had married her first husband on 5 January 1996, and given birth to their son on 6 November 1996. When the baby was 8 weeks old, the pursuer's husband left her. She did not consult the solicitor acting for her in 1997 about making a claim in relation to her allegation of being raped by the defender.

[19] Over the years, the pursuer told a number of people the defender had raped her. She told two of her sisters SR and AR, who told her to report it, but the pursuer said nobody would believe her, and did not do so. In about 1999 or 2000, the pursuer told her then

partner CR that she had been raped by the defender. CR also told her she should tell someone about it. The pursuer said nobody would believe her because the defender was a police officer, and did not report it.

[20] In about 2002, the pursuer was at her then next door neighbour MC's house. When looking at christening photos, she became very emotional, because she saw a photo which she said was the man who had raped her.

[21] On or around 29 August 2002, the pursuer told her health visitor about seeing the photo, and that she had been raped some years before. She was given advice about attending a Women's centre and Rape Crisis. Her community psychiatric nurse supported her by contacting those organisations for her. The pursuer was offered a time to drop in to the Women's centre, which would introduce her to Rape Crisis. The pursuer attended various activities at the Women's centre. She decided she did not want to go to Rape Crisis. The pursuer told her mental health team she did not want to take matters further. Had she wished to do so, her mental health team would have supported her in doing so.

[22] In 2002 or 2003 a solicitor, GR, was acting for the pursuer in relation to domestic abuse. While acting for her in that unrelated matter, the pursuer told GR that the defender had raped her, and GR's advice was requested. The pursuer received legal advice not to proceed with taking a case in relation to the rape. She did not commence proceedings.

[23] The pursuer over the years had involvement with the social work department which provided her with support, particularly when she split up with CR, her partner and father of her second and third children, in 2002 and 2003.

[24] In 2012 the pursuer instructed a different solicitor, JP, to act on her behalf in respect of a personal injuries action relating to residence in children's homes. JP was satisfied the

pursuer was competent to instruct him. He advised her in general terms about timebar for personal injuries actions.

[25] The first time the pursuer made a report to the police that the defender had raped her was 30 September 2018. She had been arrested after a family event, and taken into custody at a police station. While upset and in custody, she had shouted that the police were all the same, and one had raped her. Her allegation was taken seriously, and the police investigated it, leading to prosecution of the defender. The pursuer felt more able to proceed because she had given evidence to the Scottish Child Abuse inquiry on 31 May 2018 about her experience in children's homes, and that had given her confidence she might be believed.

[26] On 3 October 2018, the pursuer telephoned the solicitor JM then acting for her (a different solicitor from those instructed by her in 1997 and 2003). JM had been acting for her in another matter since 2016. The pursuer told JM she had been raped by the defender, and he took a file note. JM was not told by the pursuer that she had already asked a different solicitor for advice about this matter in 2002/3. On 8 October 2018, the pursuer told JM that another woman MS had come forward with an allegation. JM asked the pursuer to come in to his office, and took a full statement from her on 9 October 2018. The pursuer did not wish to proceed with taking a case until she knew whether there would be a criminal prosecution of the defender, so an action for damages was not raised under emergency legal aid. The pursuer informed JM there would be a prosecution of the defender on 20 December 2018. JM made an appointment for the pursuer to come and fill in legal aid forms, which she attended on 10 January 2019.

[27] This action for damages was served on the defender on 12 March 2019. It commenced in the Sheriff Court, but was transferred by that court to the Court of Session.

[28] The defender appeared on petition, which included an allegation of rape of the pursuer, on 14 January 2019. He was tried for rape and indecent assault before a jury in the High Court in January 2021. He was acquitted of both charges against him.

Application of governing law on timebar to the facts found

[29] The three year period under section 17 of the 1973 Act, as it applies to this action, had expired by the end of January 1998. There was no period of time which fell to be disregarded under section 17(3) in the computation of that period for the pursuer being under legal disability; despite a short admission to a psychiatric hospital in 1997, there was no suggestion of unsoundness of mind. The initial writ, being served on 12 March 2019, came over 21 years after expiry of the three year period, and about 24 years after the alleged incident involving the pursuer. Proof was heard over 29 years after the alleged incident.

[30] It was submitted the pursuer delayed so long in commencing her action because of a fear of not being believed. That fear arose in the context of a troubled upbringing, being a young adult of 21 at the time of the alleged rape, being part of a family known in the area for some of its members being in trouble with the police, the defender being a policeman, somebody in authority and older than the pursuer, and allegedly saying to her she would not be believed. The pursuer overcame some of that fear after giving evidence at the Scottish Child Abuse inquiry in 2018. To this might be added her difficulties with mental health and family situations over the years, and a changing social culture in relation to sexual offences. The defender, on the other hand, pointed to inconsistencies in the pursuer's accounts of why she delayed, her ability to instruct solicitors over the period of delay, and the absence of a proper basis for the pursuer thinking she would not be believed, when the

police took those types of allegations seriously and investigated them. He also gave examples of the serious prejudice he faced if the action proceeded after so long.

[31] In considering equitability under section 19A of the 1973 Act, the court looked first at the conduct of the pursuer. As early as 1997, within the three year period under section 17 of the 1973 Act, the pursuer had found herself able to instruct solicitors. She was able to do so in matters difficult for her personally, such as custody of her child and divorce. Despite her personal and mental health issues, she has consulted solicitors repeatedly over the years, in relation to a variety of matters, including personal injury claims. She even consulted a solicitor GR in 2002 or 2003 in relation to her allegation of rape, and took his advice not to proceed. As the court said in *B* v *Murray* (para [29]), the pursuer must take the consequences of her solicitor's actings. The solicitor acting for the pursuer in 2012, JP, gave her advice in a general way about time bar when he was acting for her in a different claim for damages for abuse, so she must have been aware of the need to bring cases involving abuse expeditiously. The pursuer has had support to help her over the years, including at times she was involved in litigation, such as support from social work, health visitors, community psychiatric nurses, her mental health team in the hospital, and a Women's centre, and chose not to access support which was available to her from Rape Crisis in 2002 and 2003. When the pursuer decided to consult JM, solicitor, on 3 October 2018, which led to this action being brought, she did not tell him she had already consulted a solicitor about the alleged rape in 2002/2003, and taken his advice not to proceed. Further, in 2018 the pursuer did not proceed with all expedition. There was a delay of over 5 months between consulting a solicitor in 2018 and raising proceedings, although emergency legal aid would in principle have been available.

[32] Turning next to prejudice to the pursuer, the claim is relatively modest for the Court of Session, involving only solatium and no other heads of damage. Nevertheless, if the court declines to exercise its equitable discretion, the pursuer will be unable to claim damages from the defender in connection with an alleged rape. It is unlikely she would have an alternative remedy against anybody other than the defender. While there is undoubtedly prejudice to the pursuer if she is not able to claim damages, that factor must be weighed taking into account a submission made on the pursuer's express instructions. The pursuer wished it to be known that her primary motivation in bringing the action was not recovery of damages, but to be listened to in court. That has now happened, the court having taken additional steps such vulnerable witness measures and appointment of a curator *ad litem* to facilitate the giving of evidence by the pursuer - although it is acknowledged that the outcome of the case is not as the pursuer hoped.

[33] Looking finally at prejudice to the defender, he would be considerably prejudiced if the court were to find the action is not time barred. The defender has consistently denied the allegations made against him. The defender would lose the statutory defence otherwise available to him under section 17 of the 1973 Act. As an individual, he would face the risk of financial prejudice, when the value of the pursuer's claim, her legal expenses, the court fees, expenses of the curator, and expenses of lawyers instructed by the defender at earlier stages of the case, are taken into account. These amount to considerable sums for an individual. The very long delay results in prejudice for the defender in defending the case. It was submitted by the pursuer that prejudice could be discounted because there had been an investigation for the criminal prosecution. But the investigation does not remove all prejudice. The quality of recollections has diminished over the many years since the alleged incident. Evidence has been lost. For example, it was not possible for the defender's current

wife, given that the matter was not reported until 2018, to remember when the defender got home on 29 January 1995 and how he appeared at that time. It was not possible to trace and question potential witnesses such as the taxi driver (who on the account of SR, TD and the defender drove four of them from a nightclub to the location where the alleged rape took place on 28 January 1995), or other people in the nightclub that night (who might be able to speak to the pursuer being in the nightclub rather than only in the house as she claimed, and any interaction between the defender and pursuer there). Forensic investigations were not possible due to the passage of time. Facebook messages passing between the pursuer and MS, prior to MS reporting the sexual assault she alleged to the police were not available to the court. Potential witnesses had died (MR and BF, although they were witnesses mainly relevant to the allegations by MS). (The defender also submitted there was prejudice because he is not covered by an insurance policy that would have covered his legal costs due to the passage of time, as he is no longer a serving police officer (having retired in 2017). The court did not take that factor into account, the submission being unsupported by pleadings or any evidence about the terms of relevant insurance policies).

[34] The answer to the question "where do the equities lie?", in the light of these various considerations, is firmly on the side of the court declining to allow the action to proceed. The pursuer's explanation for delay in bringing the action is insufficient, given her repeated instruction of solicitors in a variety of matters, including seeking advice in relation to the present action in 2002 or 2003. There is significant prejudice to the defender if the action is allowed to proceed, in circumstances where the conduct of the pursuer and the loss of her ability to sue the defender do not tip the equities in her favour. The court did not find it equitable to extend the period to allow this action to be brought, under section 19A of the

1973 Act. The action is time barred. Given that outcome, it is not necessary to consider the defender's argument based on article 6 of the European Convention on Human Rights.

Liability

Governing law

[35] Although the defender was acquitted of raping the pursuer in criminal proceedings in 2021, that verdict was not determinative of liability in this civil action. The standard of proof differs between the two actions. In the criminal proceedings, the standard was proof beyond reasonable doubt, and in these civil proceedings it is a lower standard of the balance of probabilities. While grave allegations such as rape may require proof by commensurately weighty evidence, this does not elevate the necessary standard of proof. Rather, it requires the evidence to be scrutinised with care (*AR* v *Coxen* 2018 SLT (Sh Ct) 335 at [155]).

[36] The act of rape is an actionable civil wrong. The law is as set out in the case of *C* v *G* [2017] CSOH 5; 2018 SC 47 at paragraphs [267]-[268], [272]-[273]. Whether the act of rape is viewed as criminal or delictual, no material distinction arises in respect of its constituent elements, even though the definition of the crime of rape has developed in line with changing social attitudes. In this case, in order to succeed, the pursuer required to prove on the balance of probabilities that the defender penetrated her vagina with his penis without her consent on or about 29 January 1995. A person who is asleep is not in a position to consent, so having sex with a sleeping woman is non-consensual. The issue of reasonable belief in consent did not arise on the facts, because the defender's position was that there had been no penetration.

Facts found

[37] For reasons set out below, the court was able to find only limited facts relevant to liability, as follows.

[38] In January 1995 the pursuer was living temporarily with her sister SR. The pursuer had been in a relationship which had split up. The pursuer was distraught about the split, which affected her greatly. She was vulnerable, hurt, upset, and low. The pursuer was frequently emotional. SR found the pursuer's emotional state difficult to deal with.

[39] At that time, the pursuer was 21 years old. She was taking prescribed medication for mental health conditions, Prozac (fluoxetine) and Seroquel (quetiapine). Neither drug, at normal therapeutic doses, is associated with hallucinations or unreliable memory. The manufacturer's advice for fluoxetine is to avoid alcohol. A person who is established on the medication the pursuer was prescribed might still have one drink, but heavy drinking was not advised.

[40] On or about 28 January 1995, the defender and a police colleague TD attended a Burns Supper. After the Burns Supper they went out to a nightclub.

[41] In the nightclub, the defender and TD met the pursuer and her sister SR, who were out that night too. All four of them had been drinking alcohol that evening. The pursuer as well as the defender had drunk significant quantities of alcohol. TD and SR were getting on well in the nightclub.

[42] The defender lived in a house in the same town as SR. That town was approximately a quarter of an hour's drive away from the town in which the nightclub was situated. SR, TD, the pursuer and defender agreed to take a taxi together back to the town in which SR and the defender lived.

[43] The taxi dropped SR, TD, the pursuer and defender off at SR's house. SR invited TD and the defender in for coffee with her and the pursuer. All four sat in the living room and talked. The defender was not showing any particular interest in the pursuer, or she in him, at any point in the evening. The defender was approximately 8 years older than the pursuer. After about half an hour, TD and SR left the living room and went to SR's bedroom. TD spent the night at SR's house.

[44] The defender left SR's house and went home. The house he lived in was approximately 5 minutes' walk away. He lived there with a lady with whom he had been in a relationship since 1990, and who remains his wife.

[45] At some point that night the pursuer knocked on her sister SR's bedroom door and spoke with her.

Finding on liability

[46] The accounts given by the pursuer and the defender of what occurred on the night of 28/29 January 1995 differed, as might be expected in a contested rape case. Which account, if any, the court will accept, will depend on careful evaluation of the evidence, and assessment of credibility and reliability.

[47] The pursuer's account to the court, in summary, was that on the evening of 28 January 1995 she was at her sister SR's house, where she was staying at the time, watching TV. TD and SR were seeing each other at that time. TD had phoned and asked to come over for a drink with a friend. He had then arrived with the defender and a bottle of rosé wine. The pursuer sat in the living room of SR's house with the defender, SR and TD. After some time, TD and SR left the room. The pursuer fell asleep on the couch in the living room while talking to the defender. She woke up to find herself face down on the sofa, her

hands being held down, and the defender's penis in her vagina from behind. She asked him what he was doing, and he stopped. She said she would tell her sister, and he said you can tell who you want, nobody will believe you, because of who she was and who he was. He then left, and she went upstairs distraught to tell her sister she had been raped, who was there with TD.

[48] The defender's account on the other hand was that he had been at a Burns Supper in another town on 28 January 1995, then gone on to a nightclub with TD. TD had met SR, who was in the club with the pursuer. TD and SR were interested in each other. All four shared a taxi home, because SR's house and the defender's house were in a different town from the nightclub, and it made sense to share the cost. TD and the defender were invited in by SR for coffee. All four were in the living room. After coffee, TD and SR left the living room. The defender left the house and walked home. He did nothing to the pursuer.

[49] There was some support for the defender's account in other aspects of the evidence. He, TD and SR all had the same account of being at a nightclub in a nearby town on the night in question, and sharing a taxi home together with the pursuer (a different account from the pursuer's). The defender and SR lived in the same town where they were dropped off. The distance between the town where the nightclub was and the town in which they lived meant it was objectively reasonable to share a taxi fare. The evidence of all four present in SR's house, including the pursuer, was that the defender and pursuer were showing no particular interest in each other at any point in the evening. The defender was 8 years older than the pursuer (she was 21 at the time, he 29). At the time, the pursuer was still distraught from splitting up from her boyfriend, who she described at one point as the love of her life. The defender was in a long term relationship, with the lady who is still his

wife, and lived with her 5 minutes' walk away. It is also relevant that TD gave no support for the pursuer having come to SR's room in a state of distress at any point that night.

[50] The high point of support for the pursuer's evidence was an account from SR of the pursuer's distress and disclosure of rape. Lesser support was available in the evidence of TD that the pursuer had come and knocked at the door of the room he was in with SR, but this was 20-30 minutes after he and SR had gone there, and according to TD the pursuer was not in a distressed state, and they just all went to sleep.

[51] The only direct witness evidence of a rape came from the pursuer, so she was a crucial witness for her case to succeed. For her to prove her case the court had to be satisfied that her evidence that she was asleep on the sofa and woke to find the defender having sex with her from behind was credible and reliable. The case did not ultimately turn on credibility. The court was unpersuaded by the defender's attack on the pursuer's credibility to the effect that she was deliberately lying. The defender's reliance on online posts by the pursuer in 2020, in connection with trying to set up a hairdressing business, were not of assistance to the court in determining if the pursuer was telling the truth about a rape she alleged had occurred in 1995. The pursuer was clearly a very vulnerable individual who found it difficult to regulate her emotions. During her evidence, she had a tendency to accuse some people of lying, at times with no apparent foundation, if they did not accept her current view of events. Nevertheless, she appeared to be doing her best in court to tell the truth, but as she now sees it. The court's comments in *Gestmin SGPS SA* v *Credit Suisse (UK) Ltd and Anor* [2020] 1 CLC 428 paras 15 to 23 about the fluidity and malleability of human memory appeared apposite. The court was also unable to find that the defender was lying and to make an adverse credibility finding in relation to his evidence.

[52] The real problem for the pursuer in proving her case was the reliability of her evidence. Even having regard to the need to take care when assessing evidence of witnesses of traumatic events, the court could not accept the pursuer's evidence as reliable. There were four main reasons for this, summarised as the effect of the passage of time, the inconsistencies of the pursuer's account with external checks and evidence of other witnesses, the many internal inconsistencies between the accounts the pursuer had given of what happened to her over the years, and the effect of drink and prescribed drugs on accurate recollection. This summary is expanded below.

[53] The passage of time. The pursuer required to prove an event that happened in the small hours of 29 January 1995, which in another few months will be three decades ago. The key witnesses to what happened (the pursuer, SR, the defender, and TD) all had memory issues given the passage of time. The pursuer in particular had forgotten the defender's name when she initially reported a rape to the police in 2018. She did not want to be seen as wasting police time, so after she was released, she sent a number of Facebook messages to contacts to ask them to give her a name for her alleged assailant, which she subsequently provided to the police. In her evidence in court, she did not recognise a photograph of the defender that was taken in 1995 at the time of the events she alleged; she recognised the defender only in photographs she had found by looking on Facebook taken in recent times when the defender was significantly older. Although in this civil case it was a matter of agreement that the pursuer and defender were in the same house on 29 January 1995, in the criminal prosecution of the defender for rape, the pursuer had given evidence under oath that the defender had raped her in 1997. Passage of time may not of itself be fatal in an appropriate case. But in this case, the passage of time had an adverse effect on the quality

and reliability of the evidence, and resulted in difficulties for the pursuer in proving her case.

[54] Inconsistencies of the pursuer's account with external checks. As discussed above, it is appropriate to test reliability of the pursuer's recollection of being raped against agreed or established facts, rather than trusting solely to the accuracy of human memory (*Gestmin*). The pursuer's accounts differed significantly from agreed facts, documentary evidence, and facts established from evidence of other witnesses, casting doubt on the reliability of the pursuer's account.

- Hospital records and the evidence of the consultant psychiatrist Dr Tim Johnstone showed that the pursuer's first admission to a psychiatric hospital was not until January 1997. In a statement to the police on 5 October 2018, the pursuer linked the alleged rape with the timing of being admitted to that hospital as well as postdating the birth of her child. Parts of the pursuer's evidence in court still linked the timing of the alleged rape to being close to her admission to hospital, but this time she maintained she had been admitted in 1995, which was unsupported by the medical evidence.
- It was an agreed fact that the night in question was 28/29 January 1995. It was also an agreed fact that the pursuer's first child was born on 6 November 1996. In statements the pursuer gave to the police when reporting the alleged offence, she linked the timing of the offence as being shortly after the birth of her son, placing it in 1997. The birth of a first child is a significant event, which ordinarily has a major impact on a mother's body and lifestyle. Confusing the timing of the rape in this way calls into question reliability of memory.

- It was an agreed fact that the defender and his colleague had been at a Burns supper on 28 January 1995. There was evidence the court accepted that it was a formal dress event. In contrast, the pursuer's account in a witness statement of 28 January 2019 was that the defender and TD were wearing work trousers, white shirts and casual jackets.
- The evidence of all four present in SR's house was that neither the pursuer nor defender were showing any particular interest in each other that night. The defender was in a relationship with his now wife, and lived in a house with her 5 minutes' walk away. The evidence of the pursuer in court that the defender opportunistically decided to have sex with her when she was asleep did not sit easily with those facts.
- The pursuer's evidence of what happened on 28 and 29 January 1995 also differed markedly from accounts given by SR and TD.
- First, the pursuer's account of where they had been that night differed. The court preferred the evidence of SR, TD and the defender that all had met in a nightclub late on the evening in question, to the pursuer's account of being at home watching TV that evening prior to the defender arriving. Given that it was not in dispute that the defender had not known the pursuer or SR well before, the account of being at a nightclub fitted with evidence of why the defender ended up at the house – it would make sense to share a taxi back from the club in a different town. The pursuer's account in court that TD telephoned the house to arrange to come there did not sit well with the year 1995, the agreed fact TD was at a Burns supper then out afterwards, and the low takeup of mobile phones at that time. The pursuer's account that TD brought a bottle of rosé wine with him also did not chime

with the agreed facts; it was unclear how he would have obtained this at that time of night. (The pursuer's account in court was also inconsistent with a different account she had given her former partner CR, that she had been at a party on the night in question).

- Second, and more importantly, the pursuer's accounts of the aftermath of the alleged rape did not fit with the account of SR and TD. SR's account was of being woken up only once by the pursuer. According to SR, this happened when she was asleep in bed, when it was getting light, where she was next to TD, and was a rather dramatic event. The pursuer was in the bedroom screaming, being "off her head", and it was "like somebody had died". SR's evidence was that TD was involved in the conversation saying that police officer or not, the defender should not get away with it. There was no mention of the pursuer coming up once earlier in the night and another time later on, or her having a bath, with SR going in and out, as suggested by the pursuer. D's account differed again, of the pursuer knocking at the door about 20-30 minutes after he and SR had gone to SR's room, she and SR speaking in soft voices, there being no tears or concern from either of them, SR coming back to bed and them ultimately going to sleep. The pursuer gave two different accounts of the aftermath. Her initial account in evidence described watching the defender leave, going upstairs, pulling her sister SR up, telling her to help her, running a bath, SR going between the bedroom and the bathroom, and having a discussion about being raped with TD. An earlier statement to the police was then put to the pursuer when she described going up a first time, but SR was half asleep, and said they would talk about it in the morning. The pursuer then altered her evidence in court to describe going up twice, going to sleep after the first time then going up again at

8am, and it was at that point she gave the full account and TD said she would need to report it. The court was prepared to find on the basis of all of the evidence that at some point on 29 January 1995 the pursuer went up to SR's room and spoke with her. It was not possible to make any findings beyond that. The accounts were so different that it was not possible to have confidence in the pursuer's recollection of events that night.

- CPN and health visitor records dating from 2002 available to the court showed that the pursuer made a report of rape at an in person visit on 5 September 2002. The pursuer mentioned seeing photos of the defender, but did not mention being assaulted. Had she had an injury to her face at the time it is to be expected that would have been noted – the records expressly noted that finding at a subsequent visit on 19 September 2002. The pursuer's evidence in court was inconsistent with these records. She gave evidence about being at her neighbour MC's house, and becoming upset when she saw a photograph of the defender. Her evidence was that she was then punched by her neighbour MC's partner, on the same occasion as she saw the photos, and MC fell and broke her wrists. As well as being inconsistent with the records, the pursuer's evidence was also inconsistent with CR's evidence about that night, who did not speak to an assault. It was further inconsistent with hearsay evidence of MC given in a statement that the pursuer seeing the photos was a different occasion from when MC's hands were injured. This lack of consistency, while not directly relevant to 29 January 1995, does not support the reliability of the pursuer's recollection of something that happened even earlier, in 1995.

[55] Internal inconsistencies in the pursuer's evidence. It is not to be expected that accounts given by the pursuer at different times of an alleged event which happened a long

time ago would be similar in all respects. Nevertheless, the very high levels of inconsistency in this particular case gave rise to concerns about the reliability of the pursuer's evidence of being raped.

- There were material inconsistencies in the pursuer's description of the alleged rape. The pursuer's evidence to the court was an account of coming to after being asleep, face down on a couch, with the defender penetrating her vagina from behind with his penis. When she said "what's going on, what are you doing", the defender stopped straight away. But in an initial briefing to the police she had said the defender had continued for 5 minutes against her will after she woke up. That was similar to what she said in an email to the police in December 2018 – that he ignored her and kept on going. This is a striking difference.
- Another account the pursuer had given to the police, in this case to the custody officer in September 2018 (PC AG), was also very different. (The court accepted PC AG's evidence of what she had been told by the pursuer, because it was consistent with a contemporaneous notebook entry by a custody sergeant available to the court, and neither police officer had any reason to lie). The pursuer told PC AG that she was having a kiss and cuddle with the defender, and how nice that was after the breakup with her husband, but she did not want to have sex with him because of having had her baby by caesarean section. This was a detailed and entirely different scenario from the pursuer's evidence to the court about an event in 1995, which was before she had her child or had married, and in which she was in a living room with the defender showing no interest in her, and woke to find him penetrating her.

- There were also inconsistencies in the pursuer's evidence about the circumstances surrounding the rape, some of which have already been flagged up. She gave different accounts of how long she, the defender, SR and TD were in the living room – to the custody sergeant in September 2018 it was half an hour, but in her statement given on 5 October 2018 she and the others were sitting chatting and having a laugh for an hour or an hour and a half in the living room. She gave different accounts of what she was wearing (a nightdress and pyjama trousers in her evidence to the court, leggings in other accounts). There were marked differences between accounts of what the pursuer did in the aftermath, already discussed above.
- The pursuer herself has doubted the accuracy of things she has told the police or the court. For example, she emailed the police after giving one of her statements in September 2018 saying they may as well "rip it up". She had earlier written an account in a story, an account of her life written at the suggestion of the psychiatrist, but in her evidence on oath in the criminal trial said she had "wrote a wrong account of what happened". In court, she repeatedly said she had made a mistake about aspects of her evidence.

[56] The effect of drink and prescribed drugs on reliability. The reliability of the pursuer's recollection was also adversely affected by the effect of alcohol she had drunk that night, together with prescribed medication. For reasons explained above, the court found as a matter of fact that TD, SR, the defender and pursuer had met in a nightclub. The evidence of SR that it would have been normal for the pursuer to drink on a night out at that time was accepted. The pursuer, in a story of her life she had written for her psychiatrist in 2003, had said she was drunk at the time. Her initial statement to the police in 2018 was that she had been drinking on the night in question. The court found it was more likely than not she had

drunk significant amounts on the night of 28 January 1995. It was an agreed fact that the pursuer was in January 1995 taking quetiapine and fluoxetine. While one drink might have been compatible with that medication, drinking significant amounts was not advisable, on the evidence of the pursuer's consultant psychiatrist TJ. Neither of the drugs the pursuer had been provided, at normal therapeutic doses, are associated with hallucinations or unreliable memory. But given that significant amounts of alcohol had been taken too, the combined effect undermined confidence in the reliability of the pursuer's recollection of what happened on 29 January 1995.

[57] It was submitted on behalf of the pursuer that even though there were inconsistencies, it was sufficient that there was consistency over the years with the crucial detail of the pursuer's account. For example, there was consistency of her account that her attacker was a married policeman who lived locally, he came to SR's house with TD, SR and TD went upstairs, the pursuer fell asleep on a couch, woke up to find her attacker raping her from behind and holding her wrists, and he told her she would not be believed. She had given these details to various people over the years. However, it does not follow from repetition of an allegation of rape many times to many different people that it is true. Because of the fallibility of human memory, it is reasonable to test the reliability of the pursuer's account against other evidence. When that was done, as set out above, the reliability of the pursuer's evidence was found wanting.

[58] For all of these various reasons, the court was unable to accept the pursuer's account of being raped by the defender on 29 January 1995 as reliable. The passage of time, inconsistency with other evidence, internal inconsistency between the pursuer's various accounts, and the effect of drink and prescribed drugs on recollection, undermined the reliability of her evidence. While there was limited support for the pursuer in the finding

she had gone upstairs at some point to her sister's room, that was not enough to render the pursuer's account of being raped reliable, given her varying accounts of that event, and all the other problems with her evidence. At best, the evidence of the pursuer raised a possibility that the defender had taken advantage of her on 29 January 1995. But it was not established on the balance of probabilities that the pursuer was asleep in the living room of SR's house at any time when the defender was there, or that the defender's penis was in the pursuer's vagina either while she was asleep or when she was awake. Having evaluated all of the evidence and considered it as a whole, the court was not satisfied that it was more likely than not that the pursuer had been raped by the defender on 29 January 1995.

Quantum

[59] Had quantum been a live issue, the court would have awarded damages for solatium in the sum of £50,000, 75% to the past, with interest on past solatium at 4% per annum. The sum the court would have awarded is significantly less than suggested by the pursuer, and significantly more than suggested by the defender, so it is appropriate to explain the basis of the award the court would have made.

[60] The only head of damages claimed was solatium. The pursuer accepted there was no evidence before the court of a causal link between the alleged rape and the pursuer's psychiatric issues. The claim was for the rape itself, and resulting distress and upset immediately afterwards and over the years since.

[61] The defender relied on the tariff under the Criminal Injuries Compensation Scheme 2012 (as amended) for non-consensual penile penetration. This was £11,000 where there were no psychiatric consequences. The court did not consider this a reliable guide to damages in a personal injuries, since criminal injuries tariffs are set having regard to public

policy considerations including affordability, whereas damages for personal injuries aim to put a person in the position that they would have been in if the delictual act had not happened, insofar as it is possible for money to do so. Equally, the amount sought by the pursuer of £100,000 was overstated. It was based on the award of the same amount for solatium in the rape case of *AB* v *Sean Diamond* 2022 Rep LR 47. But that award was made on the basis of levels of awards in two earlier rape cases (para 113), of £100,000 in *C* v *G* [2017] CSOH 5; 2018 SC 47, and £80,000 in *AR* v *Coxen* 2018 SLT (Sh Ct) 335. The fact that those two cases involved a decree for an agreed sum covering all heads of damage, and were not assessed damages for solatium, does not appear to have been fully considered by the court in *AB* v *Sean Diamond*. The facts of *AR* v *Coxen* disclose a student had to repeat a year of university, something likely to have had pecuniary consequences.

[62] A more helpful guide to appropriate levels of damages for solatium is available in the Judicial College Guidelines for the assessment of general damages in personal injury, 17th edition. In particular, Chapter 4(C) has categories for sexual or physical abuse. Awards range from £11,870 to £183,050, depending on the category in which a case falls and aggravating circumstances. After considering the descriptions of the various categories, the court considered that the present case would be within the "moderate" category, with a range between £25,100 and £54,920, because rape is serious abuse, but in the present case there is no attributable psychiatric damage or psychological reaction (the award sought being for the event itself, and distress and suffering afterwards, both immediately and over the years). In deciding where in that bracket the incident would fall, various factors are relevant. The alleged rape was a one-off incident, which on the pursuer's evidence in court, stopped when the pursuer awoke. It did not involve violence beyond that innate in penetration of a sleeping woman while holding her wrists. The pursuer was not a child but

an adult woman of 21. There was no evidence of physical injury. There were aggravating factors in that it would be a breach of trust for a serving policeman to rape a vulnerable sleeping woman who was significantly younger than him, then manipulate her by telling her nobody would believe her, and she had had to give evidence in criminal and civil proceedings. Taking into account these various matters, the court would have assessed solatium in the sum of £50,000, 75% to the past, with interest on that past element of £37,500 since 29 January 1995 at 4% per annum (*JM* v *Fife Council* [2008] CSIH 63; 2009 SC 163).

Admissibility of the evidence of MS

Introduction

[63] In the criminal trial of the defender in 2021, there were two different complainers in two separate charges, the pursuer and MS. Only the pursuer has brought a civil claim for damages. The pursuer's pleadings included allegations that the defender had sexually assaulted MS on a different occasion, and MS was called as a witness. The defender argued that the evidence of MS was inadmissible.

[64] Logically, the question of admissibility of MS's evidence arose for determination by the court before its decision on liability. However, because the evidence of MS was heard in full as part of a proof before answer, the court was also in a position to make findings about credibility and reliability of MS's evidence. Ultimately, the court found that MS's evidence was not admissible, but even if it was, it was neither credible nor reliable. MS's evidence was put to one side.

[65] In those circumstances, MS's evidence formed no part of the court's assessment of liability, and the court's reasoning is therefore set out towards the end of this opinion. Nevertheless, because the issue of admissibility of evidence of other alleged victims is a

recurring one in cases of damages for abuse, and full argument was heard, it is appropriate to explain why the court found the evidence of MS to be inadmissible.

The law on admissibility of similar fact evidence in civil cases

[66] A fundamental rule of the law of evidence is that evidence is not admissible unless it is relevant. However, even relevant evidence may be inadmissible, because of other policy considerations. For example, previous convictions might be thought to make it more likely a person has committed a crime, but evidence of those convictions is generally not admissible in criminal proceedings because it is considered to give rise to prejudice which outweighs probative effect. Or the probative effect of a particular type of evidence may not be sufficient to justify the complexity it adds to a case. Issues of similar fact evidence often fall within this latter category.

[67] A survey of Scottish cases discussing similar fact evidence reveals that sometimes courts admit similar fact evidence in civil cases, and sometimes they do not. Cases in the former category are *Strathmore Group Ltd* v *Credit Lyonnais* 1994 SLT 1023 at 1031 H-K (an action about forged bills), *Bark* v *Scott* (IH) 1954 SC 72 (road traffic accident – evidence of prior erratic driving), and *W Alexander and Sons* v *Dundee Corporation* 1950 SC 123 (action for compensation for damage to bus caused by bad condition of street – evidence of previous events of skidding admitted). On the other hand, similar fact evidence was found inadmissible in *Leander CB Consultants Ltd* v *Bogside Investments Ltd* [2024] CSOH 9 paras 82-88 (fraud action – evidence as to four previous dealings, only one of which was admitted as having a sufficient connection with the facts in issue), *Inglis* v *the National Bank of Scotland Ltd* 1909 SC 1038 (previous misrepresentations by a bank agent), and most relevantly for present purposes in *A* v *B* (1895) 22 R 402. *A* v *B* was an action of damages for

rape, and the court did not allow proof of averments that the defender had on two specified occasions attempted to ravish other women. (The comments in *A* v *B* chime with more recent cases in the criminal Appeal Court which have found that sexual conduct on a different occasion from conduct set out in a charge is collateral and inadmissible, for example *CH* v *HMA* [2020] HCJAC 43 paragraphs 37-38. Although the context is different, the underlying rationale is similar - what happened on a different occasion has at best an indirect bearing on whether something happened on another occasion, and may be excluded for reasons of expediency). As recognised in *EG* v *Governors of Fettes Trust* [2021] CSOH 128 at paragraph [22], *A* v *B* is binding on Outer House judges.

[68] The principles underlying decisions about similar fact evidence in civil cases are as follows. The courts in Scotland recognise that similar fact evidence may have some bearing on the question the court has to decide. It does not follow that it will be admissible. That will depend on the circumstances of a particular case, and the degree to which the similar fact evidence directly bears on the matters that have to be decided. Similar fact evidence will not be admitted when the degree of relevance is outweighed by considerations of expedience and proportionality. In general, the court will guard against allowing evidence to be led of collateral issues which disproportionately add to the complexity of a proof. As put in *A* v *B*, experience shows that it may be better to sacrifice the aid that might be got from collateral issues, than to spend a great amount of time on matters that have only an indirect bearing on the matters in hand.

[69] There does not appear to be any particular need for those established principles to be altered because, in a criminal context, it is relatively common for there to be multiple complainers in sexual cases (cp *B* v *Sailor's Society* [2021] CSOH 62 at para [200]). The requirement for corroboration in criminal prosecutions, with mutual corroboration being

one way of meeting this requirement, means it is relatively frequent that there is more than one complainer in prosecutions involving sexual offences. Evidence of additional complainers may have a "reasonably direct bearing" on a fact in issue in a criminal trial, particularly where there is a charge or a docket naming the additional complainer, and corroboration is a live issue (*Moorov* v *HMA* 1930 JC 68). These factors do not apply in civil cases brought by only one pursuer, in which no corroboration is required (Civil Evidence (Scotland) Act 1988 section 1). Further, the underlying rationale for requiring corroboration in criminal cases is already recognised in the existing Scots law governing admission of similar fact evidence in civil cases. Requiring an additional source of evidence is thought to reduce the risk of miscarriage of justice, because the presence of that evidence makes it more likely that the charge it corroborates happened. In other words, the overall probative effect of the evidence is considered to be increased by there being more than one source (although the actual probative effect will depend on the circumstances of a particular case). The law governing admission of similar fact evidence in civil cases acknowledges this rationale, because probative effect is taken into account as part of the legal test for admission of similar fact evidence. Nevertheless, other considerations may outweigh potential probative effect.

[70] In the present case, consistently with *A* v *B*, and applying the principles identified above, the evidence of MS is inadmissible. Whether or not the defender had sexually assaulted MS on an earlier occasion might have some bearing on whether he had raped the pursuer on a different occasion. That was particularly so given the similarities between the allegations, as they appeared before evidence was led. Both were said to have occurred within a year of each other in the same town in Scotland. The alleged victims were both women in their 20s, and the alleged assailant was the defender. Both occurred when, after a night out, various people had gone back to a private house to continue socialising. Both

were said to have occurred on a couch in a living room in the small hours of the morning when the alleged victim (who had been drinking) had fallen asleep, and was woken by being sexually assaulted. In both, the alleged assailant stopped when challenged. Ultimately, for reasons given below, the court rejected MS's evidence as incredible and unreliable, so in fact it had no probative effect. But even if attributed the probative effect suggested by averments in the pleadings, whether or not the defender sexually assaulted MS on a different occasion had at best an indirect probative effect on whether he raped the pursuer on 29 January 1995.

[71] Either way, considerations of expedition and proportionality outweighed the probative effect of MS's evidence. It might have been better if the issue of admissibility of the evidence of MS had been decided at some stage prior to the proof. For example, the matter could have been put before the court at the time the standard motion was enrolled asking the court to allow proof, or alternatively a motion enrolled between pre-trial meeting and proof. Nevertheless, as matters now stand, the case is a clear example of the effect of including a collateral matter of this nature on a civil claim for damages. The evidence of MS added considerable cost and time. The proof before answer ultimately took seven court days including submissions (although some were not full days, due to witness availability issues). Evidence was not commenced on the first day because of the need to resolve the issue of and appoint a curator *ad litem*, in order that the evidence of MS (as well as that of the pursuer) could be taken fairly. The curator then required to attend court on three days rather than two, because of the need to take MS's evidence. Although the evidence of MS ultimately took only about 70 minutes, for various reasons she had to attend on two separate days. The court sat over lunchtime to accommodate MS's refusal to remain for an afternoon session to complete her evidence, given delays she had already experienced. The vulnerable

witness measures ordered by the court entailed additional personnel being involved at remote sites from which MS gave evidence by live link. Additional time was taken in the course of the defender's evidence to address issues concerning MS. Time was also taken during submissions to argue whether the evidence of MS should be admitted, and if so what could be taken from it. In the preparation of the case, additional documents and numerous authorities were produced to deal with the evidence of MS. Considerable judicial time was taken up considering matters related to the evidence of MS. To all of those matters might be added the undesirability of retraumatising victims of alleged sexual offences, and the inconvenience to MS personally in having to attend to give evidence. Whether the evidence of MS had indirect probative effect (on the basis of the pleadings), or no probative effect (on the basis of assessment of credibility and reliability after it had been heard), it was quite clearly evidence about a collateral issue which disproportionately added to the complexity and extent of the case. MS's evidence was inadmissible.

Credibility and reliability of the evidence of MS

[72] The court bore in mind the observations made earlier in this decision about the assessment of evidence of witnesses of traumatic events. Even so, the circumstances in which the alleged offence against MS came to be reported suggested the need for careful scrutiny of MS's evidence. MS spoke to an incident that allegedly happened in 1994, but she had not reported it at the time or in any of the 24 years between then and 2018. MS was an old family friend of the pursuer, had known her for decades, and been very close to the pursuer's mother. MS and the pursuer had been in Facebook contact after the pursuer had reported the alleged rape at the end of September 2018, in messages not made available to the court. MS knew the pursuer was upset, and had gone round after that to visit the

pursuer in her home, at a time the police were investigating and a decision whether to prosecute had yet to be made. The existence of a second complainer would have been material to that decision. After the pursuer made some sort of disclosure to MS about what happened to her, MS said something had happened to her too. The pursuer gave MS's name to the police, and MS gave her first statement to the police on 7 October 2018, just shortly after the pursuer's first report to the police.

[73] After scrutinising MS's evidence, the court found it to be neither credible nor reliable. MS came across as an evasive witness, who had made something up to help her friend in 2018. While some of MS's memory difficulties in 2024 might be due to medication, as she claimed, that was an insufficient explanation for the many inconsistencies (including with her evidence in the High Court trial in 2021). The impression the court gained was that because it was now 2024, MS could not quite remember what she had made up to report in 2018. Her evidence was not an honest and reliable account of something that had actually happened in 1994.

[74] There were a number of unsatisfactory aspects to MS's evidence. Her identification of the defender as the perpetrator was unconventional and lacking in weight. The defender's evidence was that he had never seen MS until she was giving evidence in the High Court in 2021. Identification was in dispute. In court, MS spoke to having been very drunk at the time of the alleged indecent assault on her. She said the pursuer's mother, her friend MR, told her it was a police officer (with the same first name as the defender) who had done it. MS said in a statement to the police that she would not have been able to recognise the defender in 2018. Nevertheless she picked him out in a subsequent identification parade (a VIPER). The circumstances in which she did so cast doubt on the reliability of that identification, because it followed her being shown photographs by the

pursuer on her tablet in September 2018 of the defender, prior to MS attending the VIPER, although she gave different inconsistent accounts about this. MS's identification evidence of the defender as her assailant was, overall, unsatisfactory.

[75] MS's evidence was also riddled with inconsistencies, just some of which are mentioned below.

- In court, MS's evidence was that she awoke to find a man on top of her and trying to get into her pants. She expanded to say she was on a couch in the living room of a house she had gone back to drink in, and she awoke to find him on top of her and his hand inside her trousers. In contrast, MS told the police in a statement that she awoke to find a person touching her naked breast. She had also said she was lying on her side on the couch facing into the back of it at the time. MS also gave a third account in the criminal trial in the High Court, in which her evidence was to the effect that she awoke sitting up with her head back, to find a man sitting beside her on the couch touching her breasts then sliding his hand down. The significant differences between these various accounts cast doubt on whether any of them were true.
- In court, MS mentioned for the first time that her friend BF was also on the same couch but asleep, which was difficult to reconcile with some of MS's accounts of where she was on the couch. Her earlier statement to the police said the man was sitting on the edge of the couch leaning over MS, as she was lying on her side presumably along the couch. Her earlier statements and her evidence in the High Court trial had not mentioned BF, which seemed a remarkable omission, if BF had also been on the couch where the alleged sexual assault took place.

- MS's account of other people who might have been at the party had changed over time. She named different people on different occasions. For example, she said in the High Court there were a couple of men asleep on the floor of the living room she was in, but her earlier statement mentioned only one and others crashed out in the bedrooms. While it was accepted that given the passage of time she was unlikely to remember everybody there, the level of difference again cast doubt on the reliability of MS's evidence of what had allegedly happened.
- MS initially told the court after the alleged attack she had pushed the man off and hit him. She had then got up and walked down to a caravan, where her then partner was smoking with friends, to get him to take her home. She gave quite a bit of detail about this. But in an earlier statement, and in her evidence in the High Court, she had said she had phoned her partner to pick her up. When this was put to her at the proof, she changed her evidence in court to having phoned her former partner, rather than walking to the caravan. When it was put to her that mobile phones weren't commonly in use in 1994, she maintained they were. This was again inconsistent with her evidence to the High Court, when challenged, that she had walked to a pay phone to phone her partner.
- MS's accounts of what happened when she and the pursuer first discussed matters differed in court from what she said in earlier statements, including whether the pursuer told her what had happened to her or not. MS also gave different accounts of whether the pursuer showed her a photo of the defender or not before she reported the matter to the police.
- MS's evidence in court about seeing the defender come off his shift and into pubs in the town where she was allegedly sexually assaulted in 1994, did not fit well

with the defender's service record before the court. This showed he had been posted elsewhere between late 1990 and 1994. His posting to the town which was the locus of the alleged sexual assault had been for one year ending in November 1990. MS had never challenged the defender about the alleged event afterwards, even though she maintained she had seen him afterwards in pubs near where she lived.

- These various shortcomings were not redressed by any independent support for MS's account. For example, there was no evidence from her then partner who on one of MS's accounts had picked her up, or from anyone else present at the party. Facebook messages passing between the pursuer and MS, before MS reported the alleged sexual assault on her, were not disclosed. Nor was AR, another sister of the pursuer, a witness in court, despite being mentioned by MS. MS said in her evidence she had told MR (the pursuer's mother) about the alleged assault on her by the defender some time before, and AR was there at the time. MS also said AR was there when the pursuer spoke to MS in 2018, prior to MS making a statement to the police.

[76] The inconsistencies in MS's accounts were so marked that they undermined her evidence. There was no reliable contemporaneous documentary evidence to back up MS's account. The defender's service record before the court suggested aspects of MS's evidence were incorrect. Having regard to the circumstances in which MS came to report the alleged sexual assault, and the poor quality of her evidence, the court did not find MS's evidence to be credible or reliable. Even if it had been admissible, it fell to be rejected.

Expenses

[77] The expenses of the *curator ad litem* were reserved at the time he was appointed. At the conclusion of the proof before answer, both parties invited the court to find the Scottish

Legal Aid Board, which is funding the pursuer, should be responsible for the expenses of the curator. It is just and fair to make that finding, because the expenses of the curator were incurred to enable the pursuer to give her evidence fairly, and the pursuer did not succeed in her case.

[78] Parties also submitted that the rest of the expenses should follow success. Given the outcome of the case, the court finds that the pursuer is liable to the defender in the expenses of the action. Because the pursuer is legally aided, issues arise under both sections 18 and 19 of the Legal Aid (Scotland) Act 1986 (the "1986 Act"). It was submitted on behalf of the pursuer that her liability should be modified to nil under section 18, if she did not succeed. This was opposed by the defender on the basis that there was evidence of the pursuer working, having participated in two hairdressing courses in 2020 and 2021, and posting on social media at those times about her customers. The defender also intended to apply to have his expenses paid from the legal aid fund under section 19 in the event of success, but he recognised the necessary motion would need to be accompanied by information about the probable amount of those expenses, and evidence he would suffer financial hardship if the order was not made. It is appropriate in these circumstances to defer consideration of the application of both section 18 and 19 of the 1986 Act in this particular case until the defender (which failing the pursuer) enrols the appropriate motion, unless these matters can be otherwise agreed between parties and the Scottish Legal Aid Board.