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Russell, Eleanor J.

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Discretion denied again: Gracie v City of Edinburgh Council considered
Eleanor J Russell
Glasgow Caledonian University

The author considers the recent decision in Gracie v City of Edinburgh Council [2018] CSOH 37 and argues that it lends weight to the view that the courts are increasingly having regard to the underlying rationales for limitation rules in making decisions about whether to exercise the equitable discretion.

Introduction

Limitation or “time bar” rules are often a source of anxiety for those engaged in personal injury litigation. Should a time bar period be missed, the pursuer’s right of action becomes unenforceable. Solicitors may therefore become exposed to professional negligence litigation in relation to their failure to raise proceedings timeously and may have liability visited upon them if they are found to be at fault in this regard. In this article, the author sets out the statutory regime in respect of limitation of actions before considering the recent case of *Gracie v City of Edinburgh Council* [2018] CSOH 37 in which an attempt was made to rely upon the equitable extension provision in relation to an action arising from an accident which had occurred more than fifty years earlier.

Limitation and the equitable discretion

Rules of limitation are found in almost all jurisdictions across the globe. Such rules- which impose time limits in respect of the raising of court proceedings- are designed to prevent stale litigation. They ensure that actions are raised before vital evidence is forgotten or lost. John Stuart Mill stated the position in the following terms:

“[T]he revival of a claim which has been long dormant, would generally be a greater injustice, and almost always a greater private and public mischief, than leaving the original wrong without atonement. It may seem hard that a claim, originally just, should be defeated by mere lapse of time; but there is a time after which ...the balance of hardship turns the other way.” (J S Mill, *Principles of political economy* (4th edn, Parker & Co, 1857) 2.2.2).

In Scotland, the key piece of legislation is the Prescription and Limitation (Scotland) Act 1973, as amended. The general rule is that actions for personal injuries must be raised within three years, this period being known as the triennium. (Actions arising from childhood abuse have recently been removed from the limitation regime by virtue of the Limitation (Childhood Abuse) (Scotland) Act 2017.) The starting date for the effluxion of time is the date on which the injuries were sustained or, if later, the date on which a continuing wrong ceased (s.17(2)(a) of the 1973 Act). The legislation contains special provisions to alleviate hardship, however. One of these is the “awareness” provision which provides that time does not run until the pursuer becomes aware (actually or constructively) of the following 3 facts: (1) that the injuries in question were sufficiently serious to justify raising an action, (2) that the injuries were attributable to an act or omission and (3) that the defender was a person to whose act or omission the injuries were attributable or the employer or principal of such a person (s.17(2)(b) of the 1973 Act). The “awareness” provision was introduced as a result of the patent injustice exposed by the English case of *Cartledge v E Jopling & Sons Ltd.* [1963] A.C. 758. There, an action in respect of a

latent injury (pneumoconiosis) was held to be time-barred even although the plaintiff had been unaware of the fact of his injury. Another mechanism which is designed to alleviate hardship is the equitable extension provision of section 19A of the 1973 Act. That section permits the court to allow an otherwise time-barred action to proceed, if it deems it equitable to do so. This provision was introduced by section 23 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 as a result of hardship exposed by the decision in *McIntyre v Armitage Shanks Ltd.* 1980 S.C. (H.L.) 46. There, a workman had been told by the local secretary of his trade union that he could not sue in respect of his injury. Nonetheless, his action was held to have suffered limitation because he had the requisite awareness of all the relevant facts.

In terms of section 17(3) of the 1973 Act, time does not run against a person who was under a legal disability by reason of nonage or unsoundness of mind. Thus, time does not run against a child until that child attains the age of 16. (Age of Legal Capacity (Scotland) Act 1991, s.1(2)). (Prior to the commencement of the 1991 Act, time did not run until a young person attained the age of 18. (Age of Majority (Scotland) Act 1969, s.1.))

It is section 19A of the 1973 Act with which this article is chiefly concerned. Section 19A provides that the court may override the statutory time-limit "if it seems to it equitable to do so". In other words, the pursuer may be allowed to bring the action notwithstanding that it is time-barred. The statutory discretion has been exercised in a number of cases. Thus in *Comber v Greater Glasgow Health Board* 1989 S.L.T. 639 the court allowed a time-barred action to proceed at the instance of a socially reclusive pursuer who had no knowledge of her right of action. (See, also, *A v N* [2015] CSIH 26 for a further example of the application of the court's discretion.) In other cases, the courts have declined to exercise the discretion, particularly where the lapse of time has prejudiced the defender's ability to refute the claim made against him. (See *Kane v Argyll and Clyde Health Board* 1999 S.L.T. 823 and *AS v Poor Sisters of Nazareth; sub nom. B v Murray* 2008 S.C. (H.L.) 146).

The author has previously suggested that there has been a hardening of approach to the discretion in recent years. (See Eleanor J Russell, "Denying the discretion-a trilogy of cases" 2013 J.R. 95). Members of the judiciary have increasingly focused attention on the various rationales which underpin the existence of limitation rules and, in the absence of a cogent excuse for the delay on the part of the pursuer, the rules of limitation will usually prevail. The various rationales for rules of limitation were perhaps most eloquently stated by McHugh J. in the Australian case of *Brisbane South Regional Health Authority v Taylor* [1996] 186 C.L.R. 541 at 551 *et seq* as follows:

"The discretion to extend time must be exercised in the context of the rationales for the existence of limitation periods. For nearly 400 years, the policy of the law has been to fix definite time limits... for prosecuting civil claims. The enactment of time limitations has been driven by the general perception that '[w]here there is delay the whole quality of justice deteriorates': *R v Lawrence*, [1982] AC 510 at 517, per Lord Hailsham of St Marylebone LC. Sometimes the deterioration in quality is palpable, as in the case where a crucial witness is dead or an important document has been destroyed. But sometimes, perhaps more often than we realize, the deterioration in quality is not recognizable even by the parties.

Prejudice may exist without the parties or anybody else realizing that it exists. As the United States Supreme Court pointed out in *Barker v Wingo* 407 US 514 at 532 (1972), 'what has been forgotten can rarely be shown'. So, it must often happen that important, perhaps decisive, evidence has disappeared without anybody 'knowing' that it ever existed. Similarly, it must often happen that time will diminish the significance of a known fact or circumstance because its relationship to the cause of action is no longer as apparent as it was when the cause of action arose...

The effect of delay on the quality of justice is no doubt one of the most important influences motivating a legislature to enact limitation periods for commencing actions. But it is not the only one. Courts and commentators have perceived four broad rationales for the enactment of limitation periods. First, as time goes by, relevant evidence is likely to be lost. Second, it is oppressive, even 'cruel', to a defendant to allow an action to be brought long after the circumstances which gave rise to it have passed. Third, people should be able to arrange their affairs and utilize their resources on the basis that claims can no longer be made against them. Insurers, public institutions and businesses, particularly limited liability companies, have a significant interest in knowing that they have no liabilities beyond a definite period. As the New South Wales Law Reform Commission has pointed out (*Limitation of Actions for Personal Injury Claims* (1986) LRC 50, page 3):

'The potential defendant is thus able to make the most productive use of his or her resources and the disruptive effect of unsettled claims on commercial intercourse is thereby avoided. To that extent the public interest is also served.'

Even where the cause of action relates to personal injuries, it will be often just as unfair to make the shareholders, ratepayers or taxpayers of today ultimately liable for wrongs of the distant past, as it is to refuse a plaintiff the right to reinstate a spent action arising from that wrong. The final rationale for limitation periods is that the public interest requires that disputes be settled as quickly as possible.

In enacting limitation periods, legislatures have regard to all these rationales. A limitation period should not be seen therefore as an arbitrary cut off point unrelated to the demands of justice or the general welfare of society. It represents the legislature's judgment that the welfare of society is best served by causes of action being litigated within the limitation period, notwithstanding that the enactment of that period may often result in a good cause of action being defeated..."

McHugh J.'s judicial statement has exerted considerable influence in the Scottish courts. At first instance in the historic abuse case of *B v Murray (No 2)* 2005 S.L.T. 982, Lord Drummond Young (at para 21) described McHugh J.'s discussion of limitation statutes as "illuminating" and "the most helpful discussion of the policy underlying limitation statutes." At the Inner House stage of proceedings, Lord President Hamilton saw "no reason not to accept [McHugh J.'s] discussion of the policy as appropriate in the context of Scots law" (*AS v Poor Sisters of Nazareth; sub*

nom. B v Murray 2007 S.C. 688 at para 82) and, in the House of Lords, Lord Hope also made reference to *Brisbane* before stating that it was “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” (*AS v Poor Sisters of Nazareth; sub nom. B v Murray* 2008 S.C. (H.L.) 146 at para 25). The influence of *Brisbane* was again apparent in the opinion of Lord Glennie in *M v O’Neill* 2006 S.L.T. 823 at para 96. In *Gracie*, Lord Tyre, too, would also be influenced by the words of the Australian judge, the passage set out above (from *Brisbane*) being cited with approval. It is the *Gracie* case to which attention is now turned.

Alleged facts of the case

The pursuer, Brian Gracie, was born in 1959. He sought £650,000 in damages against City of Edinburgh Council in respect of injuries said to have been sustained when he was a five year old school pupil at Sciennes Primary School in Edinburgh. The pursuer alleged that, on about 19 May 1965, he sustained serious injury when he ran out through the school gates and was struck by a motor vehicle. The pursuer asserted that the accident was caused by the fault of the defender’s employees, the staff of the school, who permitted children to play in the playground unsupervised and failed to keep the school gates shut. The head injuries which the pursuer suffered were said to have had life-changing adverse effects on his personality. The pursuer had no memory of the accident and only became aware of what had happened in 1994 because relatives had previously concealed it from him.

Progress of the legal proceedings

The pursuer’s action was raised in 1997 in Edinburgh Sheriff Court. Following a lengthy sist, the case was remitted in March 2007 to the Court of Session where, several months later, it was again sisted. Almost a decade later (in June 2017) a draft minute of amendment was intimated to the defender, in which it was averred that the court should exercise its discretion to allow the action to proceed in terms of section 19A of the 1973 Act. (The existing pleadings contained no such averments.) The defender opposed the pursuer’s motion to allow the minute to be received and the record to be amended in terms thereof on the ground that the action was time-barred. Parties agreed that it was appropriate to deal with the time bar issue at the stage of receipt of the proposed minute of amendment. The proposed amendment sought to add an averment that “the normal practice of the school was to lock the school gates after 9 am after the children arrived for class”. It also contained averments relevant to causation and quantum of damages and an account of the difficulties which the pursuer had faced in progressing the action, including those encountered in obtaining expert support on causation. However, when the matter came before Lord Tyre he observed that very little of this related to the period prior to the pursuer’s 21st birthday in 1980 (when the action became time-barred). His Lordship observed that it was not contended that the pursuer lacked legal capacity at any time after he reached full age. So far as the period prior to 1980 was concerned, all that was said in the existing pleadings was that “[t]he pursuer was unaware of this accident until June 1994. After he had been released from his last prison sentence the pursuer started investigating his past and it was only following those investigations that a relative informed him of the accident.” The minute of amendment proposed to add the following averments: “He spoke to his mother. He asked her why he was different from his brother and sister. She believed it was for the best not to tell the pursuer about the accident. His family hid the accident from

the pursuer. They were reluctant to tell him about it until around 1994...”

Submissions of parties

When the motion came before Lord Tyre, the pursuer submitted that it was in the interests of justice that his action should be allowed to proceed. He had now obtained two expert opinions supporting his case on causation. Refusals of legal aid had been on the ground of time bar; the pursuer was now represented without the need for legal aid. He had attempted over many years to investigate the circumstances of the accident. This had proved difficult as the driver of the vehicle and the school staff could not be traced. Moreover, no contemporaneous report existed. The only source of evidence was the pursuer’s mother, who was informed of the accident by a female member of staff whose identity was unknown.

The defender resisted the application of the court’s discretion, arguing that no satisfactory explanation had been proffered as to why proceedings had not been raised timeously. The pursuer required to focus on the period *before* the triennium expired (in 1980) rather than on difficulties encountered more recently. His explanation that family members were reticent to tell him about the accident sat uneasily with his averments of personality change during childhood caused by his injury. Serious prejudice would be occasioned to the defender were the action to proceed. The accident had occurred more than 50 years ago when safety practices were different and there was almost no evidence of what happened and what evidence had perished over time. Even when the action was first raised in 1997, it had not been possible to investigate as more than three decades had elapsed. Moreover, the defender and its current taxpayers and ratepayers should not be exposed to the expense of defending a very large claim arising out of events so long ago. Reference was made to the opinion of Lord Drummond Young in *B v Murray (No 2)* 2005 S.L.T. 982 and to passages cited therein from the judgment of McHugh J. in the *Brisbane* case. There had, in addition, been a failure to prosecute the action after its commencement.

Decision of the Lord Ordinary

Like Lord Drummond Young, Lord Tyre derived considerable assistance from the observations of McHugh J. in the *Brisbane* case and had regard to those observations when addressing the question of whether to exercise the discretion conferred upon the court by section 19A.

Lord Tyre agreed with the defender’s submission that the primary focus should be on the period *prior* to expiry of the triennium in order to ascertain why the action was not raised timeously. The explanation offered by the pursuer was that his family, and in particular his mother, concealed the accident from him until after the triennium had expired.

Lord Tyre stated (at para 9):

“I do not regard that as a compelling reason to allow the action to proceed now. Clearly it implies no criticism of the defender. Nor does it explain why the pursuer who...had full legal capacity during the period when time was running against him, was unable to find out for himself about the accident from the medical practitioners responsible for his care at that time. It is noteworthy that according to the averments in the minute of amendment the pursuer had at that time already been diagnosed with various mental disorders including

dementia due to head trauma, personality change, and closed head injury.”

Lord Tyre also took the view (at para 10) that allowing the action to proceed would occasion “irremediable prejudice” to the defender. Referring to the observations of McHugh J. in *Brisbane*, his Lordship continued (at para 10):

“It would be impossible for the defender to carry out any realistic investigation of the circumstances of the accident, as indeed it probably already was when the action was raised in 1997. Evidence that would have existed at one time has been lost. Establishing the level of supervision required according to the standards applicable at the time of the accident would be equally problematic. The sum sued for is very large. It is contrary to the public interest to expose the defender and its taxpayers and ratepayers to a liability arising out of a claim which expired without intimation many years ago; the defender has been entitled to order its affairs on the basis that it would not require to meet such a claim. The passage of time since expiry of the triennium has only exacerbated these concerns.”

Lord Tyre concluded that it would not be equitable to allow the pursuer’s pleadings to be amended with a view to enabling the action to proceed. His view was reinforced after considering the pursuer’s prospects of success, which he described (at para 11) as “virtually non-existent”. Lord Tyre continued (at para 11):

“The only evidence on the merits would be that of the pursuer’s mother, who could speak only to what she was told, some hours after the incident occurred, by an unidentified member of staff. It is not stated that this member of staff witnessed the incident, or that she received her information from someone who witnessed it, or indeed that anybody in the school saw what happened. The driver cannot be traced and it was not suggested that relevant evidence is available from any child present. I find it very hard indeed to see how the pursuer could satisfy the court, on balance of probabilities, that the accident occurred as averred or, if it did, how it came about that he was able to run on to the road in front of a vehicle, or, if indeed a school gate was left open, whether this occurred in circumstances implying breach by the defender’s employees of whatever standard of reasonable care might be found to have been applicable in 1965. The averment which the minute of amendment seeks to insert regarding the normal practice of the school would seem, if established, to make the pursuer’s task even more difficult.”

For all of the above reasons, Lord Tyre refused the pursuer’s motion. The pursuer had accepted that if receipt of the minute of amendment were to be refused, the action could not continue (see para 5.)

Conclusion

Gracie provides a useful addition to the jurisprudence on the equitable discretion enshrined in section 19A of the 1973 Act. The final result is perhaps unsurprising given that the incident in question was said to have occurred several decades previously and given the paucity of evidence which existed in relation to the pursuer’s accident. What is perhaps most interesting about the case is the Lord Ordinary’s reliance upon the judgment of McHugh J. in the Australian case of

Brisbane. In this regard, the case appears to follow a growing trend of Scottish cases where emphasis is laid upon the underlying rationales for rules of limitation. In view of that approach it would seem that attempts to rely on the equitable extension are increasingly likely to be rejected by the courts unless a compelling reason can be advanced to explain the delay. Post *Gracie* developments will therefore be monitored with interest.