SHERIFF APPEAL COURT

2021 SAC (Civ) 26
DUM-PE1-18

Sheriff Principal Anwar
Appeal Sheriff Holligan
Appeal Sheriff Cubie

OPINION OF THE COURT

delivered by APPEAL SHERIFF ANDREW M CUBIE

in appeal in the cause

NICHOLAS DICKSON

Pursuer and Respondent

against

DUMFRIES AND GALLOWAY NHS HEALTH BOARD

Defenders and Appellants

Appellant: Pugh, advocate; National Services Scotland - Central Legal Office
Respondent: Wilson; Primrose & Gordon WS

27 July 2021

[1] The appellants challenged a decision of the sheriff in Dumfries at a hearing under chapter 36A to appoint the cause to a proof before answer. The appellants had sought a debate, and in this appeal sought to overturn the sheriff's decision and appoint the cause to debate.

Background

[2] The respondent raised an action for medical negligence against the appellants. The appellants tabled a plea of time bar pursuant to the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act"), relying upon sections 17(2)(b) and section 19A thereof.

Section 17(2)(b) provides

> (2) Subject to subsection (3) below and section 19A of this Act, no action to which this section applies shall be brought unless it is commenced within a period of 3 years after—
>
> …
>
> (b) the date (if later than any date mentioned in paragraph (a) above) on which the pursuer in the action became, or on which, in the opinion of the court, it would have been reasonably practicable for him in all the circumstances to become, aware of all the following facts—
>
> (i) that the injuries in question were sufficiently serious to justify his bringing an action of damages on the assumption that the person against whom the action was brought did not dispute liability and was able to satisfy a decree;
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> (ii) that the injuries were attributable in whole or in part to an act or omission; and
>
> (iii) that the defender was a person to whose act or omission the injuries were attributable in whole or in part or the employer or principal of such a person.

Section 19A provides so far as relevant

> (1) Where a person would be entitled, but for any of the provisions of [section 17, 18, 18A or 18B of this Act, to bring an action, the court may, if it seems to it equitable to do so, allow him to bring the action notwithstanding that provision .
>
> (2) The provisions of subsection (1) above shall have effect not only as regards rights of action accruing after the commencement of this section but also as regards those, in respect of which a final judgment has not been pronounced, accruing before such commencement.

There are two distinct aspects to the claim; firstly, that the respondent was not properly "consented" (a word used by both parties) to surgery in 2013; and secondly that an anguinal

hernia was not diagnosed until later in 2015. These cases do not overlap. They are pled as two different sets of conduct as matters of fact and law, and based on different events in the respondent's treatment.

[3] Although there was some uncertainty about the precise procedural route to this appeal and some hybrid procedure following the Ordinary Cause Rules 1993 ("the OCR"), largely as a result of the pandemic, parties were agreed that the sheriff reached his decision in the context of chapter 36A and it is against that background which the decision should be judged. Although the sheriff has made an incorrect reference to chapter 36, we think that the error can be explained by the hybrid procedure adopted and by the absence of a note in terms of rule 36A.9 from the respondent about the decision which they sought at the procedural hearing.

Appellants' submissions

[4] The appellants submitted that the sheriff fell into error by failing to recognise that the respondent's response to the plea of time bar was irrelevant; that, on the basis of the pleadings, the respondent's subjective knowledge was not sufficient to address the point; and by failing to recognise that the appellants' criticism of the respondent's pleadings was not restricted to a lack of specification, not remedied by the respondent's Minute of Amendment.

[5] In relation to the limitation point, the appellants had a plea of time bar to a significant aspect of the present case which remained unanswered. That issue should be addressed as a preliminary issue. If facts were in dispute, a preliminary proof may be required (*LM* v *DG's Executor* [2021] SAC (Civ) 3). Otherwise, the matter could be dealt with

as a matter of relevancy (*G* v *Glasgow City Council* 2011 SC 1, *J* v *C* [2017] CSIH 8). The appellants argued that the issue could and should be determined as a matter of relevancy at debate.

[6] The appellants referred to in Article 5 and Answer 5 of the Record where parties' respective positions were set out. The action related to injury sustained in December 2013. The action was raised in November 2018 and was therefore raised outwith the 3-year period allowed under 1973 Act. The respondent, averred that section 17(2)(b) of the 1973 Act delayed the start of time for the purposes of the limitation period; furthermore the Court should exercise its discretion under section 19A of the 1973 Act to allow the matter to proceed.

[7] The appellants examined the sheriff's note, in particular paragraphs [12] and [13] thereof where he concluded that "…evidence had to be heard to assess the pursuer's state of knowledge before a decision is reached…" a view apparently expressed in relation to both section 17(2)(b) and section 19A.

[8] The appellants submitted that the tests to be applied under section 17(2)(b) and section 19A were entirely different. Section 17(2)(b) postponed the start of a limitation period; section 19A provided a discretion to override it. The sheriff had conflated the tests and thereby fallen into error.

[9] In particular it was argued that the sheriff had failed to consider the correct starting point of the limitation period. The appellants' argument was that the limitation period started at the date of the surgery, being the date on which there was a concurrence of *injuria* and *damnum.* On the respondent's pleadings, it was clear that there was such concurrence

shortly after the surgery on 23 December 2013 which required further treatment throughout 2014.

[10] The test under section 17(2)(b) was a legal test, not dependent upon a litigant's subjective knowledge. The test was whether, approaching the matter objectively, the alleged wrongs averred by the pursuer "would have warranted taking proceedings" (*G* v *Glasgow City Council)*. The sheriff did not apply his mind to the objective element of the test at all.

[11] Although stating that "certain matters" raised in the pursuer's pleadings required evidence, the sheriff did not go on to identify what these matters were. Taken at their highest, the respondent's averments did not address the objective nature of the test in section 17(2)(b). They provided no basis for the court to hold that the commencement of time for the purposes of limitation was suspended. At the very least the issue of limitation, and the potential exclusion of the first part of the respondent's case, justified a debate. That demonstrated an error in the sheriff's approach.

[12] In relation to section 19A, there was no analysis of the basis upon which the court could exercise its discretion under section 19A to override the limitation period. The test, whilst providing a wide discretion, did require the Court to be satisfied of certain basic factors, including the reasons for any delay and an explanation of the whole period of delay (see *J* v *C* para 16). The respondent's pleadings on section 19A provided no basis upon which the Court could exercise discretion in its favour.

[13] The Sheriff did address the issue of prejudice, but he failed to acknowledge that such prejudice, while important, was not the whole issue on the application of section 19A; he failed to acknowledge that it had no relevance in the application of section 17(2)(b).

Relevancy and specification

[14] The appellants submitted that sheriff had erred by failing to engage in any meaningful way with the matters raised in the Revised Statement of Proposals, at paragraph 8. Those criticisms related both to the relevancy and specification of the respondent's case. That does not appear to be recognised, the sheriff only remarking on the issue of "fair notice" of the case.

[15] The sheriff appeared to place weight on the fact that the appellants did not object to amendment by the respondent in terms of the Minute of Amendment. That was irrelevant to the matter of relevancy and specification as argued before the sheriff. The arguments made on behalf of the defender as to why the case was irrelevant and lacking in specification were informed by the proposed amendments to the pleadings.

[16] The respondent says in Article 4 of condescendence.

> "As a result of the failures in duty of doctors, including but not restricted to Mr [M] and Mr [W], employed by the Defenders the Pursuer has suffered a loss, injury and damage. Had the pursuer been aware that there was a risk of chronic pain and that laparoscopic repair was a reasonable treatment option and would have reduced the risk of chronic pain he would have opted for laparoscopic repair or would have declined any surgical intervention at all and accordingly he would not have underwent (sic.) open surgery on 23rd December, 2013 and 6th October, 2014."
>
> (Emphasis added)

[17] There were two parts of that which affected the appellants' ability to prepare for the proof and to know which case they faced; the attempt to extend the pool of doctors against

whom a claim of negligence was made, and the equivocation about the choice which the respondent would have made. The appellants submitted that, properly analysed, the criticisms of the pleadings are such that significant parts of the case pled by the respondent are irrelevant and lacking in specification. The deficits are such that the appellants could not properly address the case made before proof, and that the conduct of the proof will be significantly prejudiced.

The sheriff's approach

[18] So far as the approach to be taken by the first instance court, the appellants accepted that the question of whether to appoint a case to debate was a case management decision made in terms of rule 36A.9(1). This was a case managed process. The appellants submitted that "determine" in the context of rule 36A.9(1) meant "decide," accepting that there was little guidance from the terms of chapter 36A itself as to the criteria to be applied in determining the matter.

[19] It was not suggested that the sheriff required to rehearse every submission or reflect in his note every matter raised; but it was asserted that he had to explain, bearing in mind the arguments made, how he had reached his decision; in this case it was submitted that the decision did not reflect the points made in the written statement as regards relevancy and specification. These ought to have resulted in a debate.

The Appeal Court's approach

[20] The appellants accepted that the appeal court should approach the matter in accordance with the guidance issued in para [3] of *A* v *A* [2020] CSIH 24 (a case added to the authorities at the suggestion of this court), by looking at the exercise of the sheriff's

discretion, and applying what might be described as a well-recognised test; is there unreasonableness, an error of law, the taking into account irrelevant material, or the omission of relevant material? An appeal court can interfere only sparingly.

[21] The appellants submitted that their success at a debate would have the effect of limiting the proof by, at the very least, dealing with all limitation matters. It would restrict proof, limit the evidence and focus the enquiry to be made.

Respondent's submissions

[22] The respondent accepted that the matter concerned the application of chapter 36A and that the decision was a case management decision, a discretionary decision of the sheriff which could only be interfered with in limited circumstances. The respondent had not lodged his own Note of Proposals for Further Procedure; that had been an oversight. The respondent agreed that "determine" meant "decide".

[23] The respondent invited the court to dismiss the appeal; the sheriff was right and was entitled to reach the decision which he did.

[24] The respondent recognised and accepted that the tests set out in sections 17(2)(b) and 19A were different but submitted that, as the sheriff had recognised, each decision required the leading of evidence. In the respondent's submission the sheriff did not conflate the tests but recognised that the distinct tests each required evidence to be led.

[25] In relation to section 17(2)(b) the respondent accepted that it was an objective test but submitted that the court nonetheless required to hear evidence, not just from the respondent, but from the doctors involved, to assess the objective test of constructive knowledge and when the respondent ought to have known the relevant facts.

[26] In analysing the section 19A case, the respondent accepted that his pleadings could and should be expanded upon.

[27] The respondent submitted that even if the appellants were successful at debate there would be no significant restriction in the evidence to be led; the faults were based on the lack of consent and a separate failure to diagnose recurrence of the hernia; from the respondent's point of view, the same personnel would all require to attend and give evidence.

[28] So far as the issues of relevancy and specification were concerned, the sheriff understood the position, had considered the submissions and had made no error; the sheriff had reached a reasonable decision at a procedural hearing as part of his case management function. The appeal should be refused.

Reply

[29] In a brief reply, the appellants submitted that success at debate would reduce time at proof, although they observed that not having received the respondent's Note of Proposals for Further Procedure they were handicapped by not knowing the number of witnesses the respondent proposed to call. Success in the limitation point would remove from consideration informed consent and exploration of the whole decision making process around the December 2013 surgery and the reason for chronic pain. The appellants did not concede that they would lead the same witnesses, pointing out that the issue of informed consent gave rise to very different issues to the test for clinical negligence (*Hunter* v *Hanley* 1955 SLT 213). Success at debate would materially limit the proof and the issues to be determined.

Basis for Decision

[30] The following issues arise for consideration:

The approach to be taken by the sheriff in the procedural hearing

[31] What test is to be applied in appointing a debate or proof before answer in terms of chapter 36A; what is the nature of the hearing? The rules so far as relevant provide as follows:

> **Lodging of written statements**
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> **36A.8.** Each party must, no later than 7 days before the Procedural Hearing fixed under rule 36A.7(2) lodge in process and send to every other party a written statement containing proposals for further procedure which must state—
>
> (a) whether the party is seeking to have the action appointed to debate or to have the action sent to proof;
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> (b) where it is sought to have the action appointed to debate—
>
> (i) the legal argument on which any preliminary plea should be sustained or repelled; and
>
> (ii) the principal authorities (including statutory provisions) on which the argument is founded;
>
> (c) where it is sought to have the action appointed to proof—
>
> (i) the issues for proof;
>
> (ii) the names, occupations (where known) and addresses of the witnesses who are intended to be called to give evidence, including the matters to which each witness is expected to speak and the time estimated for each witness;
>
> (iii) whether any such witness is considered to be a vulnerable witness within the meaning of section 11(1) of the Act of 2004 and whether any child witness notice under section 12(2) of that Act or vulnerable witness application under section 12(6) of that Act has been, or is to be, lodged in respect of that witness;
>
> (iv) the progress made in preparing and exchanging the reports of any skilled persons;

(v) the progress made in obtaining and exchanging records, particularly medical records;

(vi) the progress made in taking and exchanging witness statements;

(vii) the time estimated for proof and how that estimate was arrived at;

(viii) any other progress that has been made, is to be made, or could be made in advance of the proof;

(ix) whether an application has been or is to be made under rule 36B.2 (applications for jury trial).

Procedural Hearing

36A.9. (1) At the Procedural Hearing, the sheriff, after considering the written statements lodged by the parties under rule 36A.8 and hearing from the parties, is to determine whether the action should be appointed to debate or sent to proof on the whole or any part of the action.

(2) Before determining whether the action should be appointed to debate the sheriff is to hear from the parties with a view to ascertaining whether agreement can be reached on the points of law in contention.

(3) Where the action is appointed to debate, the sheriff may order that written arguments on any question of law are to be submitted.

(4) Before determining whether the action should be sent to proof, the sheriff is to hear from parties with a view to ascertaining—

(a) the matters in dispute between the parties;
(b) the readiness of parties to proceed to proof; and
(c) without prejudice to the generality of subparagraphs (a) and (b)—

(i) whether reports of skilled persons have been exchanged;
(ii) the nature and extent of the dispute between skilled persons;
(iii) whether there are facts that can be agreed between parties, upon which skilled persons can comment;
(iv) the extent to which agreement can be reached between the parties on the relevant literature upon which skilled persons intend to rely;
(v) whether there has been a meeting between skilled persons, or whether such a meeting would be useful;
(vi) whether a proof on a particular issue would allow scope for the matter to be resolved;
(vii) whether witness statements have been exchanged;

(viii) whether any party is experiencing difficulties in obtaining precognition facilities;
(ix) whether all relevant records have been recovered and whether there is an agreed bundle of medical records;
(x) whether there is a relevant case that is supported by evidence of skilled persons;
(xi) if there is no evidence of skilled persons to support a relevant case, whether such evidence is necessary;
(xii) whether there is a relevant defence to any or all of the cases supported by evidence of skilled persons;
(xiii) if there is no evidence of skilled persons to support a relevant defence, whether such evidence is necessary;
(xiv) whether causation of some or all of the injuries is the main area of dispute and, if so, what the position of the respective skilled person is;
(xv) whether valuations have been, or could be, exchanged;
(xvi) if valuations have been exchanged showing a significant disparity, whether parties should be asked to provide an explanation for such disparity;
(xvii) whether a joint minute has been considered;
(xviii) whether any of the heads of damage can be agreed;
(ixx) whether any orders would facilitate the resolution of the case or the narrowing of the scope of the dispute;
(xx) whether a pre-trial meeting should be fixed;
(xxi) whether amendment, other than updating, is anticipated; and
(xxii) the time required for proof.

(5) Where the action is sent to proof the sheriff must—
(a) fix a date for the hearing of the proof;
(b) fix a pre-proof timetable in accordance with rule 36A.10.

(6) The sheriff may fix a further Procedural Hearing—
(a) on the motion of any party;
(b) on the sheriff's own initiative.

(7) A further hearing under paragraph (6) may be fixed—
(a) at the Procedural Hearing or at any time thereafter;
(b) whether or not the action has been appointed to debate or sent to proof.

Power of sheriff to make orders

36A.11. (1) Following the fixing of a hearing under rule 36A.9(6) or 36A.10(4)(a), or the variation of the pre-proof timetable under rule 36A.10(4)(b**),** the sheriff may make such orders as the sheriff thinks necessary to secure the efficient determination of the action.

> (2) In particular, the sheriff may make orders to resolve any matters arising or outstanding from the written statements lodged by the parties under rule 36A.8 or the pre-proof timetable fixed under rule 36A.9(5)(b).

[32] In terms of rule 36A.8 each party requires to lodge a written Note of Proposals; it is a matter of regret that the respondent did not do so; the sheriff was deprived of the respondent's observations about debate and state of preparedness for proof. The failure to lodge the written note contributed to the difficulty which the sheriff faced in determining the appropriate diet.

[33] Rule 36A.9(1) then provides that at the Procedural Hearing, the sheriff, after considering the written statements lodged by the parties and hearing from the parties, is to determine whether the action should be appointed to debate or sent to proof on the whole or any part of the action. "Determine" seems to be a direct synonym for "decide". Apart from that, the rules offer no express guidance as to the basis on which the power ought to be exercised.

[34] A formal debate in which a party's written case is subject to judicial scrutiny has long been a feature of Scottish civil procedure. It can be a useful mechanism to arrest the progress of an action devoid of legal foundation or so lacking in factual substance so as to render a proof impossible or unfair. Properly used it can be both efficient and cost effective. However, it has been, or more correctly, was, a feature of our procedure that the right to insist upon a debate, without identifying the issue, could become an exercise in delay and obfuscation. The OCR marked the first step in ending such abuses. Put crudely, a party seeking a debate now requires to give notice of the issue or issues and to explain why a debate on those issues is justified. The general trend in procedure has been to encourage

disclosure and candour and ensure that matters are conducted as efficiently and expeditiously as the interests of justice allow.

[35] In the context of Chapter 36A, Rule 36A.8 and 36A.9 should be read together. Rule 36A.8 sets out what ought to be disclosed or done so as to give to the sheriff a complete picture of the relevant procedure up to that point; informed by that knowledge the sheriff can then go on to fashion orders appropriate for the expeditious progress of the particular case. In relation to debate, it will only be fixed if it is clear from the material lodged pursuant to Rule 36A.8 that there is a real purpose to be served thereby.

[36] The Lord Ordinary in the unreported case of *A* v *A* (CSOH, 12 February 2020) approached the matter as follows:

> "[4] First I did not consider that even if any of the defender's pleas were successful it would either avoid a proof or result in a significant diminution in the length of a proof. "

[37] The approach was approved by the Inner House (*A v A* [2020] CSIH 24); it reflects the OCR which provide that, in Standard Procedure at least, the sheriff can appoint the cause to a debate if that step "would lead to decree in favour of any party, or to limitation of proof to any substantial degree" (OCR 9.12(3)(c)).

[38] It is not a question of law, but an exercise of discretion. We consider that a debate should not be fixed if the issue raised does not go to the heart or root of the case. The issue should be material or substantial. The corollary is that a debate should not be fixed in relation to something peripheral, incidental, or collateral. A debate should be fixed only if that step has an ability to limit the scope or extent of any proof or indeed challenge the whole basis of a party's case.

[39] It will be rare that a pure point of specification or relevancy will justify a debate. Such matters can generally be resolved at proof and if it means that one or other side is compromised in evidence to be led, that is a matter to be resolved at proof by the presiding sheriff.

The approach to be taken by the Appeal Court in a challenge to any such order

[40] We proceed on the basis that a case management decision is the exercise of discretion by the sheriff. Such a decision should be given proper respect. An appeal court will only interfere with a discretionary decision if the sheriff has omitted a relevant factor or taken account of an irrelevant factor, or made an error in law or reached a decision that no reasonable sheriff could have reached.

[41] So much is made clear by the Inner House in *A* v *A*. Lord Malcolm in giving the opinion of the court said:-

> 2. As explained in the relevant practice note, chapter 42A [the equivalent Chapter in the Court of Session] gives the Lord Ordinary wide powers to manage an action in a manner which will facilitate its efficient determination. That was the task before the Lord Ordinary. For this purpose to be achieved, decisions of this kind must be afforded a high degree of respect and deference by this court. If, as submitted on behalf of the defender, a decision to send a case to a proof before answer had to be overturned simply because the Inner House thought that an arguable issue had been raised which could justify a debate, the overall purpose of chapter 42A would be significantly undermined. It would also, as the discussion at the hearing clearly demonstrated, involve this court in the merits of the proposed debate; and this with a view to deciding whether to require the Lord Ordinary to conduct and determine a debate, something which is self-evidently inappropriate.
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> 3. Reference was made to Sheriff Principal Kerr's decision in *Cyma Petroleum (UK) Ltd* v *Total Logistics Concepts Ltd* 2004 SLT (Sh Ct) 112 . It was based on the particular terms of the then procedural rule in force in the sheriff court. In so far as it was suggested that decisions of this kind are made on questions of law rather than matters of procedure, we respectfully disagree. In our view, this court should interfere with a case management decision of this kind sparingly, and certainly only if it is clear that it was an erroneous decision in the sense that it was not open to a reasonable Lord Ordinary.

> 4. The Lord Ordinary has explained his reasoning in his note. We are unable to identify any good ground for interfering with his decision and ordering a debate on any of the issues proposed by the defender. The Lord Ordinary was fully entitled to reserve answering the questions in law until after evidence had been led. This will often be the preferable or, at any rate, a justifiable course of action. For the Lord Ordinary this would be all the more so since he understood that he had been told that a debate could not remove the need for some kind of proof in due course. The defender has not lost the opportunity to present the substantive points. They can be argued after the evidence has been led.

[42] We emphasise that it is not for the appeal court to have a dress rehearsal of the debate; we respectfully agree with the observation in the last sentence of paragraph 2 of *A* v *A*. However, the terms of rule 36A.9, in requiring a note of argument and list of authorities, together with the requirement of the sheriff to canvass possible agreement of legal issues if a debate is fixed, anticipate a meaningful exploration of the matters at the procedural hearing which should inform the determination of whether the matter proceeds to debate or proof.

[43] The appeal is not a rehearing, or reconsideration of the arguments before the sheriff but an analysis of the decision, deciding whether the court can be satisfied that the grounds for interference are met; it is not about imperfection of expression, or an economical or condensed explanation by the sheriff; it is not enough for the appeal court to disagree; the appeal court cannot interfere unless the sheriff has gone wholly or plainly or demonstrably wrong in the sense set out above at paragraph [40].

[44] Against that background we turn to consider the arguments for the debate and the sheriff's treatment of these arguments.

Limitation argument

[45] In this case the sheriff considered that the limitation issue had to be considered after hearing evidence of certain matters. The question posed by the appellants was "evidence of what?".

[46] In relation to section 17(2)(b) the test is objective. It can be answered by when pursuer had actual awareness or objectively when he ought to have been aware of statutory facts. It is summarised in *G* v *GCC* at para [21]

> 21. In our view, what was necessary was to consider the nature and consequences of the wrongs averred by the pursuer to have been inflicted upon her and taking the averments respecting those matters *pro veritate* to decide whether, viewed objectively, they would have warranted taking proceedings on the statutory assumptions of admitted liability and guaranteed solvency of the defender.

[47] As the appellants argued, the time for assessing limitation should ordinarily run from the time of the surgery. The respondent's case is that he was not consented for chronic pain, but following surgery he had chronic pain. On one view, he offers to prove that he suffered chronic pain during 2014, on which basis that case would be time barred. We consider there is force in the appellants' observation that they do not know what the sheriff thought he had to hear evidence about and that the section 17(2)(b) issue is capable of resolution at debate, standing the requirement to take the respondent's averments p*ro veritate*.

[48] In relation to the discretion exercised under section 19A, that matter was considered in *B* v *Murray* 2008 SC (HL) 146 at paragraph [25]:

> But the context in which that [s 19A] discretion is to be exercised is plain enough. Its effect will be to reimpose a liability on the defender which has been removed by the expiry of the limitation period. The issue on which the court must concentrate is whether the defender can show that, in defending the action, there will be the real possibility of significant prejudice. As McHugh J pointed out in *Brisbane South Regional Health Authority* v *Taylor*([1996] HCA 25) p 255, it seems more in accord with the legislative policy that the pursuer's lost right should not be revived than that the defender should have a spent liability reimposed on him. The burden rests on the party who seeks to obtain the benefit of the remedy. The court must, of course, give full weight to his explanation for the delay and the equitable considerations that it gives rise to. But proof that the defender will be exposed to the real possibility of significant prejudice will usually determine the issue in his favour. This is a question of degree for the judge by whom the discretion under s 19A is to be exercised.

[49] The issue was considered by the Inner House in *J* v *C*:

> 16. The Lord Ordinary correctly determined that it is not sufficient, for the exercise of the discretion, simply for a pursuer to assert that the triennium has expired and that the action should be allowed to progress on the basis that otherwise he cannot succeed in his claim for damages. The Lord Ordinary did not ignore or "discount" the fact that the pursuer would not be able to pursue her claim, but said that that factor could not suffice on its own. This is particularly so given that the right to pursue a claim has already been lost at the point of the court's determination of a section 19A application. There require to be additional circumstances justifying a revival of the right. It is not possible to circumscribe what these circumstances might be, but they do have to be sufficiently cogent to merit depriving a defender of what will have become a complete defence to the cause. The interests of both parties and all the relevant circumstances must be considered.

[50] Applying the test so described, there is an apparent (and acknowledged) failure to aver circumstances sufficiently cogent to merit depriving the defenders of their complete defence, a matter not addressed in terms by the sheriff.

[51] We agree that the sheriff appeared to conflate the two separate aspects of the limitation point and he did not analyse the absence of any pleadings which could support the exercise of any discretion by the court to remove the time bar. The respondent's concession about the deficiency in the pleadings fortifies our view that there was no proper analysis of the appellant's motion for a debate in relation to the limitation aspect. The sheriff has not demonstrated that he has properly considered time bar in accordance with the applicable law.

Relevancy and specification

[52] The appellants had advised the court that if only issues of specification and relevancy arose they would not have troubled the appeal court, but nonetheless submitted that these were matters which could justify debate. The sheriff appeared to characterise the complaint as one of specification only but there are plainly relevancy issues; in the passage

quoted at para [16] above, the respondent purports to encompass all medical staff in the range of these responsible and, separately, to equivocate about what he would have done had he understood the implications of the procedure.

Basis for decision

[53] Applying the test which we set out in para [43] we consider that the sheriff has made a demonstrable error in (i) conflating the tests for the two provisions of the 1973 Act, (ii) overlooking the need to aver circumstances which would allow the court to exercise its section 19A discretion (iii) proceeding as if the pleading issue was an issue of fair notice and (iv) considering that the amended record answered the questions of relevancy.

[54] The appeal is accordingly allowed, the sheriff's interlocutor recalled and the matter remitted for a diet of debate to be fixed. The appellants are entitled to their expenses. We sanction the employment of junior counsel for the appeal.