Divisible Views about Historic Abuse Claims

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Similar Fact Evidence

- 7.2.1 When the question in issue is whether a person did a particular thing at a particular time, it is in generally irrelevant to show that he did a similar thing on some other occasion. "The question being whether A said a certain thing to B," it is irrelevant "to show that A said something of the same sort upon another occasion to C." In an action of damages for rape committed on two specified days, it was held irrelevant to prove that on other occasions the defender had attempted to ravish other women. Where a pursuer sought to recover money alleged to have been paid as a result of misrepresentations, he was not allowed to prove that similar misrepresentations had been made by the same person to others. Theft and attempted theft on two specified dates having been charged, it was said to be improper to lead evidence that the accused had been in the premises on earlier occasions when cash shortages had occurred. Where the question in issue on a plea of veritas in an action of damages for slander was whether the pursuer, a married woman, had committed adultery with the defender, the latter was not allowed to prove that the pursuer had committed adultery with another man on another occasion.

A v B 1895 SC 402

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- A raised an action of damages in Aberdeen Sheriff Court and averred that B had raped her on two specified occasions.
- She went on to plead that the defender was "a man of brutal and licentious disposition, and for a number of years past he has sought systematically to gratify his lust by ravishing girls and young women"
- And:
- "… in accordance with his system…" on certain dates in 1887 and 1893 he had attempted to ravish two other named women.

- In pronouncing any averment to be irrelevant to the issue, it is not implied that the matter averred has no bearing at all on the question in hand. For example, if the defender admitted at the trial that he had attempted to ravish those two other women, I think the jury might legitimately hold that this made it the more likely that he ravished the pursuer. But, then, Courts of law are not bound to admit the ascertainment of every disputed fact which may contribute, however slightly or indirectly, towards the solution of the issue to be tried. Regard must be had to the limitations which time and human liability to confusion impose upon the conduct of all trials. Experience shews that it is better to sacrifice the aid which might be got from the more or less uncertain solution of collateral issues, than to spend a great amount of time, and confuse the jury with what, in the end, even supposing it to be certain, has only an indirect bearing on the matter in hand.
- The present case seems to me to be clearly one for the application of these principles

G v Governors of Fettes Trust [2021] CSOH 128

- The pursuer claimed that when he was a pupil at the school in 1975 and 1976 he was physically and sexually assaulted on a number of occasions by a teacher. He also averred that the teacher carried out similar physical and sexual assaults and abuse on three other pupils at the school, who are named.
- Case came before the court on the pursuer's motion for issues: the question was whether the averments of assaults upon others were of doubtful relevancy.
- D relied on A v B and Inglis to argue averments were of doubtful relevancy.
- Lord Clark held that they were and refused to allow issues.
- But he also expressed some doubts as to whether A v B would still be applied with such rigour in the 21st century, when mutual corroboration is widely used in the criminal courts.

- [22] While corroboration is not an evidential requirement in civil cases (Civil Evidence (Scotland) Act 1988, s 1) , that does not of course disallow reliance upon it to support or strengthen a party's position. To take an obvious example, in a claim based upon a traffic accident an eye-witness may be called to corroborate and thereby enhance the evidence of the injured driver. In civil cases involving sexual assault, the only source of evidence of that assault might well be the person making the allegation. If in civil proceedings it is proved that there has been a conviction for that assault, the offence will be taken to have been committed unless the contrary is proved (Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, s 10) . However, if there has been no conviction, and mutual corroboration is not allowed, the pursuer's position is more difficult to prove. So, there is some force in the view that the *Moorov* doctrine on mutual corroboration should be available for use also in civil cases, particularly involving a sexual assault. But as I have noted the earlier Inner House cases to which I was referred have not been overruled and so, while the point may come to be reconsidered, those decisions currently remain binding upon me. As the Scottish Law Commission noted in its Discussion Paper on Similar Fact Evidence and the *Moorov* Doctrine (No 145, at paragraph

- 5.6 *et seq*) the principle that evidence on one charge could corroborate another charge on the same indictment was recognised long before *Moorov* and indeed before those Inner House cases. *Inglis v The National Bank of Scotland Ltd (No.1)* makes clear that in a delictual claim evidence of similar conduct with other persons is not admissible. It is perhaps open to argument that this is not a correct interpretation of what was said by the Lord President in *A v B* . However, the present case is a delictual claim, involving intentional harm. These earlier cases support the proposition advanced on behalf of the defender that there exists doubtful relevancy in this aspect of the pursuer's case. It is therefore appropriate for the case to go to a proof before answer, at which final determination can be made on the issues of relevancy.

PW v KM 2024 CSOH 85

- (1) The court was not satisfied on a balance of probabilities that the defender had raped the pursuer. The court was unable to accept the pursuer's evidence as reliable given the effect of the passage of time, the inconsistencies of her 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 (para. [52]);
- (2) The pursuer wished to call M as a witness but the court found her evidence inadmissible having regard to the principles underlying similar fact evidence in civil cases, namely, that while such evidence might have some bearing on the question before the court, it did not follow that it would be admissible and the court would guard against allowing evidence to be led of collateral issues which disproportionately added to the complexity of a proof, A v B (1895) 22 R. 402 considered.

- Whether or not the defender had sexually assaulted M on an earlier occasion might have had some bearing on whether he had raped the pursuer but considerations of expedition and proportionality outweighed the probative effect of M's evidence (albeit the court ultimately rejected her evidence as incredible and unreliable), and it might have been better if the issue of the admissibility of M's evidence had been decided prior to proof instead of adding considerable cost and time (paras 66-71).

- 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.

Mutual corroboration in criminal cases

- The criminal appeal court has contorted itself over the last 30 years by extending the application of the Moorov doctrine by degrees.
- To remind us of what the moorov doctrine is, and a trip back to university- where you have a series of offences (more than one) which are connected in time, character and circumstance so as to be the same course of criminal conduct, each crime may be spoken to by one witness each corroborating the other.
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- The various permutations and limitations of that doctrine have been steadily eroded over the last 20 years. For example, it was previously thought that a lesser crime could not corroborate a more serious crime- not the law;
- it was thought that different types of sexual offending could not corroborate each other- not the law, sex is sex, is sex according to the appeal court, and in particular, the sexual abuse of children.

- A relatively recent innovation in criminal law is the use by the prosecution of dockets- these are notices which are appended to the indictment, which give notice of criminal conduct upon which the jury cannot return a verdict but the crown, for the purposes of mutual corroboration, wishes to lead evidence of. For example, if an accused has a conviction in relation to a particular complainer and a subsequent complainer comes forward but there is no corroboration for the new charge, the conduct relating to the previous conviction will be narrated in a docket, evidence lead from that complainer and the jury invitied to apply the moorov doctrine between the two. The fact that there has been a conviction is withheld from the jury.

- There are underlying policy considerations as to why this approach in the criminal courts should be applied- ie it is very much in the public interest that sexual offending is prosecuted. Do the same considerations apply in the context of a personal injuries action?

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