OUTER HOUSE, COURT OF SESSION

[2021] CSOH 62

PD525/19
PD527/19

OPINION OF LADY CARMICHAEL

In the cause

B

Pursuer

against

SAILORS' SOCIETY

Defender

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C

Pursuer

against

SAILORS' SOCIETY

Defender

Pursuer: Milligan QC, McCall; Thompsons
Defender: Duncan QC, P Reid; Clyde & Co (Scotland) LLP

20 April 2021

Introduction

[1] In these two cases the pursuers allege that they were subjected to physical, sexual and psychological abuse at a children's home in which they were resident between,

respectively, 1968 and 1970 and 1972 and 1982. The defenders operated the home, Lagarie in Rhu ("Lagarie" or "the home"). I heard a preliminary proof on the defenders' argument that the actions should be dismissed in terms of section 17D(2), which failing (3) of the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act"). The proof involved no oral evidence. The defender led in the proof.

[2] The following background matters are not controversial. Lagarie was a home for the children of seafarers. Local authorities placed children in the home, sometimes, [redacted] in sibling groups. The home closed in 1982. Some children from Lagarie moved to a home operated by Quarriers on the south side of Glasgow.

[3] In 2001 [redacted] about physical and sexual abuse at the home in the late 1960s. A number of individuals, including B, raised claims which were abandoned following decisions in other cases regarding the potential for reliance on section 19A of the 1973 Act where the historic abuse of children was alleged. [redacted] about alleged abuse at Lagarie in 2018. Parties invited me to [redacted] and I did so. A number of claims, including these two cases, have been brought since the enactment of the Limitation (Childhood Abuse) (Scotland) Act 2017 ("the 2017 Act").

Anonymisation

[4] Interlocutors were pronounced in both cases at an earlier stage prohibiting the publication of the identities of the pursuers. Some of the witnesses from whom affidavits have been produced are [redacted] There are references to [redacted] other individuals who are not witnesses. Identification of them by name in this opinion might lead to identification of one or both the pursuers. Some of witnesses themselves state that

they have been victims of sexual abuse. I have therefore referred to the witnesses and other individuals who are former residents of Lagarie by letters running from D to S. I have provided a key, which will not otherwise be published, to parties. Some of the allegations involve an individual who has now died. He is referred to in some of the papers as "A", because he is a sibling of one of the pursuers, and he is referred to as "A" in this opinion.

Agreed matters

[5] The following matters were agreed in a joint minute for the purposes of the preliminary proof.

[6] B was born in [redacted] 1960. He was resident at the home from [redacted] 1968 to [redacted] 1970. B alleges he was physically and emotionally abused by Anne Miller ("AM"), the matron employed by the defender. He also alleges that he was sexually abused by Norman Skelton ("NS") who was employed by the defender. In 2001 B intimated a claim to the defenders for damages for loss injury and damage caused by that childhood abuse perpetrated by AM and NS when he was at Lagarie.

[7] B raised an action for damages against the defender for reparation for the loss, injury and damage he claims to have suffered as a result of the alleged acts of AM and NS in the Court of Session in 2005. The defender denied liability and pled that the action was time-barred in terms of section 17 of the Prescription and Limitation (Scotland) Act 1973. Decree of absolvitor was pronounced on 19 July 2006. B understood that the action was abandoned because it was time-barred. He reasonably believed that his action was time-barred and would be disposed of by the court by reason of section 17. B did not recover any sum of money as a result of this action.

[8] C was born in 1968. She was resident at the home from [redacted] 1974 until [redacted] 1982. The home was managed by couple, Reverend William Barrie, Superintendent ("WB") and Mary Barrie ("MB"), Matron. They were employed by the defender. C alleges that while she was a resident at the home she was physically, verbally, emotionally and sexually abused.

[9] The affidavits and statements lodged by the parties for each of the witnesses in both actions were to be treated as the equivalent of the oral evidence of that witness. In relation to evidence of the pursuers and of those other witnesses whose affidavits make allegations of abuse, it was accepted that these are the allegations they made.

[10] In relation to the evidence in the affidavits, supplementary affidavits and letters from Graeme Watson and Mel Warman, it was agreed that that evidence could be accepted for the purposes of the preliminary proof.

[11] The social work records of M contained a letter dated 21 June 1968 to the Childcare Officer of the Corporation of Glasgow which says, inter alia, "the children were inclined to be difficult, and it was decided that we would not admit them for this and other reasons … [we] simply have not the staff to cope with this type of family."

[12] AM died on 22 November 1978. NS died on 23 June 1999. Rachel Skelton (NS's wife) died on 28 July 2012. WB died on 28 May 1993. MB died on 29 September 2017. A died on 25 September 2018.

[13] All copy documents were accurate copies of the originals and should be treated as such. The productions in Joint Bundle B were what they bore to be and could be admitted in evidence for the purposes of the preliminary proof without the need to be spoken to by a witness.

[14] Evidence in one case was to be treated as evidence in the other so far was is necessary.

The statutory provisions

[15] Sections 17A-D of the 1973 Act were added by section 1 of the 2017 Act. They provide:

> "**17A Actions in respect of personal injuries resulting from childhood abuse**
> (1) The time limit in section 17 does not apply to an action of damages if—
> (a) the damages claimed consist of damages in respect of personal injuries,
> (b) the person who sustained the injuries was a child on the date the act or omission to which the injuries were attributable occurred or, where the act or omission was a continuing one, the date the act or omission began,
> (c) the act or omission to which the injuries were attributable constitutes abuse of the person who sustained the injuries, and
> (d) the action is brought by the person who sustained the injuries.
> (2) In this section—
> 'abuse includes sexual abuse, physical abuse, emotional abuse and abuse which takes the form of neglect,
> 'child' means an individual under the age of 18.
>
> **17B Childhood abuse actions: previously accrued rights of action**
> Section 17A has effect as regards a right of action accruing before the commencement of section 17A.
>
> **17C Childhood abuse actions: previously litigated rights of action**
> (1) This section applies where a right of action in respect of relevant personal injuries has been disposed of in the circumstances described in subsection (2).
> (2) The circumstances are that—
> (a) prior to the commencement of section 17A, an action of damages was brought in respect of the right of action ('the initial action'), and
> (b) the initial action was disposed of by the court—
> (i) by reason of section 17, or
> (ii) in accordance with a relevant settlement.
> (3) A person may bring an action of damages in respect of the right of action despite the initial action previously having been disposed of (including by way of decree of absolvitor).
> (4) In this section—
> (a) personal injuries are 'relevant personal injuries' if they were sustained in the circumstances described in paragraphs (b) and (c) of section 17A(1),
> (b) a settlement is a 'relevant settlement' if—
> (i) it was agreed by the parties to the initial action,

(ii) the pursuer entered into it under the reasonable belief that the initial action was likely to be disposed of by the court by reason of section 17, and

(iii) any sum of money which it required the defender to pay to the pursuer, or to a person nominated by the pursuer, did not exceed the pursuer's expenses in connection with bringing and settling the initial action.

(5) The condition in subsection (4)(b)(iii) is not met if the terms of the settlement indicate that the sum payable under it is or includes something other than reimbursement of the pursuer's expenses in connection with bringing and settling the initial action.

17D Childhood abuse actions: circumstances in which an action may not proceed

(1) The court may not allow an action which is brought by virtue of section 17A(1) to proceed if either of subsections (2) or (3) apply.

(2) This subsection applies where the defender satisfies the court that it is not possible for a fair hearing to take place.

(3) This subsection applies where—

(a) the defender satisfies the court that, as a result of the operation of section 17B or (as the case may be) 17C, the defender would be substantially prejudiced were the action to proceed, and

(b) having had regard to the pursuer's interest in the action proceeding, the court is satisfied that the prejudice is such that the action should not proceed."

[16] The language of section 17D(2) and (3) makes it plain that the onus is on a defender to satisfy the court that the conditions in section 17D(2) and 17D(3)(a) are met. If the condition in section 17D(3)(a) is satisfied, the court then requires to take into account the pursuer's interest in the action proceeding and consider whether or not the prejudice to the defender is such that the action should not proceed. The defenders argue, first, that it is not possible for a fair hearing to take place and, alternatively, that they would be substantially prejudiced were the actions to proceed and that, having regard to the pursuer's interest in each case in the action proceeding, the prejudice is such that the action should not proceed.

Allegations on record

[17] B's allegations are summarised sufficiently in paragraph 6. The defenders accept on record that they are vicariously liable for acts and omissions of AM and NS.

[18] C pleads that she

> "was physically, verbally, emotionally and sexually abused. The home was regimented and strict. [C] was verbally abused and was hit both with and without implements including a wooden ruler, wooden shoe and a leather belt. Carbolic soap was put in her mouth. She was humiliated in front of other children when she wet herself. If she wet the bed she received threats that her face would be rubbed in it. The pursuer wet her bed regularly. Other residents of the Home sexually abused her. She was physically abused and raped by her brother. The pursuer was sexually assaulted by sailors and Naval Officers who attended the Home. [WB] brought the sailors and naval officers to the Home and arranged for them to have access to the girls including the pursuer. On the instructions of [WB] the pursuer was taken to the sailors bedroom where the sailors were lying on the beds. [redacted]
>
> … The defender is vicariously liable for the acts and omissions of [WB and MB] who assaulted and abused the pursuer, enabled abuse of the pursuer and who failed to take reasonable care for the pursuer."

Summary of evidence

Defenders

[19] The defenders provided affidavits from Graeme Watson and Melanie Warman.

Graeme Watson

[20] Graeme Watson is a partner at Clyde & Co (Scotland) LLP. He was assumed as a partner in Simpson & Marwick WS in 2008, and remained with the firm when it merged with Clyde & Co in 2015. Simpson & Marwick were instructed on behalf of the defenders in the early 2000s in five actions raised by former residents. The cases were all abandoned after the decision of the House of Lords in *AS v The Poor Sisters of Nazareth* 2008 HL 148. The cases

were handled by Peter Anderson and Dr Pamela Abernethy, who were partners in the firm. Most of the day to day investigations were carried out by Diana Hall, Dr Abernethy's assistant. Ms Hall left the firm about 10 years ago. At that time Mr Watson was an assistant in the same time. The firm retained its files.

[21] General investigations were made in relation to Lagarie. Simpson & Marwick were told that records were transferred from Scotland to London on the dissolution of the Scottish committee in the 1980s, and that in the 1980s a flood in a basement caused records to be lost.

[22] Dr Abernethy and Ms Hall spoke to MB, and to A. Dr Abernethy and Ms Hall tried to trace staff members, but their investigations were not completed before the cases were abandoned. Simpson & Marwick's in-house investigator spoke to DS Michael Lappin of Strathclyde Police. DS Lappin provided documents in February 2003, which Mr Watson lists at paragraph 10 of his affidavit. They include a correspondence file; Scottish Committee minutes, which are incomplete and which do not include any minutes from November 1966 to March 1970; Scottish Finance Committee Minutes, which are again incomplete, and exclude the period January 1970 to December 1976; and some newsletters. Mr Watson found the list of the documents in the firm's files. There is a reference in a letter dated 17 July 2006 to the effect that DS Lappin had returned the documentation to the defenders.

[23] Dr Abernethy spoke to Dr Campbell, who had visited the home during both the Miller and Barrie eras. There is a note of the call. Dr Campbell said he visited Lagarie once a week for 25 years. He had no reason to suspect abuse by AM, WB or MB. He never found signs of bruising or other signs of abuse on the children.

[24] Medical records were recovered in at least four of the five cases, and social work records in at least two. There were no care records specific to the pursuers' time at the home.

[25] B and C intimated claims by letter in September and October 2018 respectively. Since then, Clyde & Co have undertaken investigations to trace former staff members. They have used their own intelligence team, and the services of a genealogist. They have sought to recover school records, social work records, medical records and records of police investigations.

[26] Clyde & Co's investigations department uses tracing software called Connexus, which has access to data from sources including the edited electoral roll, Companies House, BT, some financial institutions and the Post Office, and data from organisations which collate "consented" data (ie data provided by individuals themselves, which may include contact details). Older individuals often have less of a digital footprint. It is difficult to trace people from a last known address if they do not still live there, unless they have moved in the last 10 years. Where there are details of the known family members of an individual, Clyde & Co instruct Janet Bishop, a genealogist, to try to trace the individual using the registers of births, marriages and deaths.

[27] Mr Watson goes on to provide the information that is known to him about AM, NS and WB. None of them was the subject of police investigation when alive, although WB was the subject of investigation posthumously.

[28] So far as MB is concerned, Mr Watson narrates what is known to him about her, and also things that she told Dr Abernethy. Dr Abernethy and Ms Hall spoke to MB on 4 June 2004. She said she had no knowledge of her husband abusing children. She said she never had any suspicions about her husband, and that he was not alone with children (paragraph 8 of affidavit). MB said that she had received a telephone call from C. At that time C had not made a claim.

[29] DS Lappin advised that MB told him that she did use physical chastisement.

[30] Ms Hall spoke to A on 19 April 2005. At that time C had not made any allegations of abuse. A stated that he was employed as an apprentice gardener at Lagarie when he turned 16. He remained at Lagarie until the home closed. A was asked about allegations of sexual abuse made in one of the cases then being litigated. He said he never saw that occur. He described being physically chastised by MB and WB for poor behaviour. No more detail appears in Mr Watson's affidavit as to the nature of the physical chastisement that A described.

[31] Mr Watson traced successfully the two other former residents that C says abused her sexually. He decided not to contact them, in light of the court's comments in *F* v *Quarriers* 2016 SCLR 111 (Lord Bannatyne, paragraph 155). Mr Watson was concerned about the risk of re-traumatising the individuals. He bore in mind that the individuals were not named on record. He had been unable to trace the sailors that C said abused her, because he did not have their names. In the earlier litigations contact had been made with Alan Smith, General Secretary of the defenders. He had served at Faslane. He said he drove past the home twice a day between 1967 and 1970 but never visited. This was at a period before C resided in the home.

[32] Mr Watson's affidavit includes a list of staff members. It is not exhaustive or reliable. The names come from pay records, information from A, employment tribunal records, and press reports. In respect of some, there is no documentary evidence to confirm that they were employed in the home. The affidavit contains information about the attempts to trace them, and also witnesses who were not members of staff. It names a total of forty-three individuals.

[33] Of these, there is either definitive or good evidence in respect of five that the correct person was traced, and that he or she is dead: Jessie Melville; Rachel Skelton; Graham Skelton; Dr Peter Campbell; Ann Gillespie.

[34] In respect of Peter and Gladys Lanigan or Lannahan the information is inconclusive as to whether the correct persons have been traced. If the correct persons were identified, then, according to Mr Lanigan's second wife, both are dead. It is unclear whether the correct Robert Clark has been traced; a death record has been found for an individual with that name. Jean Clark is untraced.

[35] In respect of twelve individuals, Mr Watson decided not to instruct a trace because of the absence of a full first name (11) or a surname (1).

[36] In respect of some individuals, a number of name matches have been identified. In respect of some of those names, they were filtered further by age range. In respect of others, the affidavit does not mention that there was any attempt to filter by age range. Even after filtering to a reduced number, Mr Watson's affidavit relates that there was no further information "to corroborate a match". This is the situation in relation to Elizabeth Kay or Kaye (22 potential matches); Elsie White (14, after exclusion of an individual who died in 2011); Sandra McAdam (16); Karen Marvin (16). In the case of a Mary Bovill Gardener, there was no exact name match, but 52 records had been found for a Mary Gardner. It is not clear whether any further filtering was carried for those results.

[37] David and Isabelle Brooks are untraced. An Isabelle Brooks listed at an address with a David Brooks (deceased) and who was a nurse was traced, but she said she had not worked for the defenders. A Barbara Mason was traced and contacted, but the individual said she had never worked at Lagarie. There is no mention of any further attempt to trace these individuals.

[38] In respect of three individuals with fairly common names, the initial search produced results large numbers of results in Scotland (990, 1504, 2826), and no further steps were taken.

[39] In two cases a name produced no match. No names matching an appropriate range of ages had been identified in the case of Dr Third. In another there were no matches in Scotland for the combination of name and surname, after trying different spellings of the surname. In one case, three address records were identified, but all were in England, so no further action was taken.

[40] In respect of four (Stewart Barrie, Heather Le Sommer, Anne Munro, Anne Marie O'Reilly) the information in the affidavit was that a person thought to be a match had been traced, and written to by Clyde & Co, in July 2020 but there had been no reply.

[41] One potential witness, Robert Lyden, a former employee, had been traced and written to in July 2020. He had made contact and confirmed that he had worked at the home. He had given a statement to police and was not willing to answer any further questions. NS's daughter was successfully traced and contacted. She stated that she had lived at the Lodge at Lagarie between 1957 and 1965. She said she had no knowledge of any abuse until a [redacted] reporter had contacted her 2 years earlier.

[42] There were social work records for B. Clyde & Co had identified five former social workers who had been involved in B's care, namely Isobel Bruce, C T Robinson, M F Pollock, Marjory Booth, and M Simpson. For those for whom only first initials were available, the trace results identified too many records. Investigations from the earlier litigations indicated that Isobel Bruce was dead, but no death certificate was obtained. Matches restricted to the Aberdeen area and deceased persons disclosed four records, and the intelligence team was "unable to corroborate a match" for those. They succeeded in

making contact with Marjory Booth. She did not start her training until 1975, shadowing Isobel Bruce. She did not recall B's name, although she remembered that Isobel Bruce was responsible for a family in Lagarie. She did not remember visiting there. She said Isobel Bruce was dead. She could not help with identifying the C T Robinson or M F Pollock, but suggested that there were two individuals with similar names who might be M Simpson, namely Moira Simpson and Moyra Simpson. Clyde & Co's intelligence team identified 122 matches for the former, and 11 for the latter. Given the number of results obtained, no further steps were taken.

[43] Mr Watson decided not to contact any former residents, for the reasons already adverted to. Clyde & Co had a current address for DS Lappin. He was spoken to in 2003.

[44] So far as the defenders' records were concerned, Clyde & Co had only very limited records. There were no care records, punishment books, visitors' books, accident books, incident logs, daily logs or admission registers. A code of discipline, photographs and other papers were recovered from MB in 2004. With the exception of the code of discipline, they were returned to her. Clyde & Co reviewed their files in April 2019 but were unable to locate the code of discipline. Minutes of the Scottish Committee were available which made limited references to Lagarie, and none to B or C specifically. The defenders' newsletters mentioning Lagarie were available. Staff pay details were in some cases available. Admissions registers for Rhu Primary School were available. General practitioner records for both pursuers had been recovered, but no relevant childhood medical records.

[45] The defenders provided Clyde & Co with copies of the Scottish Home and Health Department inspection reports from July 1966, January 1967 and March 1968. Also available were some press reports and the Industrial Tribunal decision relating to Jean and Robert Clark.

[46] In his supplementary affidavit, Mr Watson provides further information. In B's case an additional potential witness had been identified, but the intelligence team were unable to corroborate a match. In respect of both B and C, schools had responded to orders for commission and diligence for their records. The responses had been lodged. Very little was available. C's social work records were now available. Four social workers had been identified from them. One had been traced, but a relative communicated that he had suffered from two strokes and had a very poor memory, and the matter was not pursued further.

[47] Further investigations had been carried out in the light of the information in the affidavits from the pursuers and their witnesses, particularly where they identified further potential witnesses. Some of those further potential witnesses had been written to on 9 September 2020. Four had responded. Three said they had not worked at Lagarie. The other had worked at Lagarie, and said she had no knowledge of any abuse of children during her time there (March to July 1971). Contact had been made by the relative of a person who had been contacted, and the relative had indicated that the addressee of agents' letter had died, and that the addressee had never worked at Lagarie.

[48] Mr Watson provides some comment on the affidavits from the pursuers' witnesses, which I will not repeat at length. He refers to the difficulty in investigating some specific allegations without access to the medical or social work records of the witnesses. He indicates that he does have social work records for witnesses D, E and M.

[49] In his supplementary affidavit, Mr Watson refers to the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill, and relates his understanding that it seeks to make provision for financial redress for the victims of childhood abuse in residential accommodation. An applicant accepting a redress payment would have to sign a waiver

agreeing to abandon civil proceedings, and not to bring civil proceedings in the future against scheme contributors.

[50] Finally, I was provided with a letter from Mr Watson, confirming that one further potential witness had been traced as at 14 September 2020. Her employment at Lagarie post-dated B's time there and pre-dated C's time there. She had worked for about 1 year in 1972. She said she was not aware of any abuse. She left shortly after the Barries arrived, but not as the result of any particular incident.

Melanie Warman

[51] Melanie Warman is the director of media and advocacy for the defenders. She is the member of staff responsible for responding to claims made in Scotland, but decisions are taken by the defenders' board of trustees. Her affidavit contains information about the history of the defenders, and their current charitable activities. The core work of the charity is chaplaincy for the seafaring community. The defenders also provide services for seafarers in crisis, including victims of piracy and seafarers experiencing thoughts of suicide. Their activities are international, and include support for communities in the Philippines. Lagarie is the only children's home the defender ever ran.

[52] Ms Warman's affidavit relates that the defenders have been able to "piece together" the layout of the home from available records. They have a hand-drawn plan from a former resident. The defenders know little about the policies and procedures in place at the relevant time. From information provided by MB in investigations in the earlier litigations, the defenders know that there was a Code of Discipline in 1974, but they do not have a copy. There was a punishment book, but, again, they do not have a copy. Some information is available from Scottish Home and Health Department reports from 1966 to 1968 inclusive.

The record of the October 1966 visit records that there seemed to be no admission and discharge register, log book or menu book. In the January 1967 visit those items were seen and reported to be up to date and well maintained.

[53] Lagarie was originally envisaged as a respite home for the children of seafaring families, but at some point it began to receive long-term residents. The defenders cannot say with certainty the number of children who resided there in any given year, other than in relation to 3 years in the late 1960s for which external (I take this to mean the Scottish Home and Health Department) reports are available.

[54] The defenders had compiled a spreadsheet setting out the staff members they understood, from investigation with MB, press reports, pay records, committee minutes and the recollection of former residents. Where pay records were available, the defenders were more confident as to the dates of employment of staff. Some of the dates in the spreadsheet were approximate only. The defenders did not know how many names might be missing from the list. Since the police investigations in the early 2000s the defenders had not attempted to contact former members of staff, but had passed information to the police and, in relation to the earlier civil litigations, their solicitors at the time, Simpson & Marwick. Simpson & Marwick had taken steps to locate former staff members. There were two exceptions. In 2001 the defenders' then principal chaplain, Rev James MacDonald contacted MB. In 2019 Rene Mears of the defenders sent a letter to Elizabeth Kay's last known address. No response was received.

[55] The defenders assisted police with their investigations in the early 2000s, when the investigation was led by DS Lappin. The former CEO, Stuart Rivers, asked police to reopen investigations in 2014, and again the defenders assisted with those investigation. Following [redacted] in 2018 the defenders had been assisting police.

[56] The financial position of the defenders was precarious. They were "heavily impacted" by the crash of 2008, and the COVID-19 pandemic was having a further negative impact. The recession in 2008 had affected the shipping industry, on which the defenders had been heavily reliant. The defenders attempted to diversify their sources of income, but without success. The defenders had a total of 77 staff around the world, of whom 19 worked in their headquarters. They leased a number of buildings, including charity shops. They had "an undertaking" until September 2020 to provide support to their care home, the Sir Gabriel Wood's Mariner's Home. There were redundancies at the beginning of 2019. Over the preceding 5 years the defenders had a deficit of £10.6 million. They had sold investments, and their investments were currently worth less than £5M. It was likely that investments would have to be sold to fund future deficits. Unspecified contingency plans were in place for the event that the financial position were to become "untenable". They were considering the potential financial consequences of the Scottish Government's redress scheme, and had had a meeting with the Scottish Government's team. It was likely that a contribution by the defenders to that scheme would be substantial. The claims in the present cases were valued by the pursuers respectively at £772,850 and £1,425,060. There were 19 claims in total.

[57] While the defenders had insurance for "some of these actions", the position as to their own contribution was unclear. In her first affidavit, Ms Warman deponed that the defenders had identified insurance cover from 24 June 1968 until after Lagarie closed. Where insurance cover had been identified, there were differing limits to the indemnity. From 24 June 1968 to 28 August 1971 the annual limit was £100,000 per year. For the period thereafter it was £250,000 per year. It was not clear what that would mean in relation to the present claims. Ms Warman's understanding was that the insurer construed it as meaning

that the limit applied per year, per abuser, so that if one abuser abused a number of people in the same year, the limit of indemnity was split between each of these people. Any shortfall would rest with the defenders. Another "potential scenario" was that any abuse that occurred during the period WB and MB were in charge would be regarded as a "policy of abuse" with the limit applying to all of the abuse regardless of the perpetrator.

[58] The action raised by B covered 3 policy years. If the claim exceeded £300,000 then the limit of indemnity would be exceeded.

[59] In her supplementary affidavit, Ms Warman provided the following additional information about financial matters. From 2013 to 2015 there had been a review of the defenders' operations. At that time the defenders had "considerable reserves". The reason for the operating deficits since 2015 were twofold. First, the defenders had wanted to differentiate themselves from other maritime welfare organisations, and expanded its programme to include mental health awareness, apps to support seafarer welfare, and global projects working with seafarers and the communities in which their families lived. Second, fundraising which had relied on the shipping industry was adversely affected by the 2008 global financial crash. The defenders tried to diversify its sources of income, with commercial activity that required up-front funding. Some potential donors said that the defenders' net assets were high in comparison to its annual running costs, so the trustees had been willing to fund initiatives, so long as activity could be scaled back in the future. The defenders had been successful in developing their global programmes. That had meant increased expenditure, but the commercial activities aimed at producing income were not successful. Those commercial activities had subsequently been cut back. A high turnover of fundraising staff, adverse publicity about Lagarie and COVID-19 had all affected fundraising. COVID-19 had affected the value of investments. When the defenders

reviewed their operations in 2014/5, they had not set aside reserves for claims from Lagarie. The earlier claims had been abandoned, and the present claims had not been brought. At that time the trustees had not anticipated that there would be a financial liability for such claims.

[60] There were very limited records available relating to Lagarie.

[61] The defenders had used the records of Rhu Primary School as a method of determining whether a person was formerly resident at Lagarie. Other potentially relevant schools, namely Hermitage Academy and St Joseph's Primary School, had not retained their records.

[62] The defenders did not know what had happened to Lagarie's own records. They had reviewed all of their own archives, and investigated whether some records had been transferred to Quarriers. They had contacted local authorities, libraries and universities in Scotland, and details were provided in a table attached to Ms Warman's first affidavit. There was an explanation of longstanding (dating back at least to the late 1980s) to the effect that some records were destroyed because they were stored in a basement which was flooded by a swimming pool. The defenders had not been able to substantiate that explanation. The defenders felt they had exhausted the avenues open to them.

[63] Ms Warman's affidavit goes on to set out information known to the defenders about particular staff members. It adds nothing of substance to Mr Watson's affidavit about attempts to trace staff. Part of her supplementary affidavit responds in relation to names of additional staff provided by the pursuer's agents, and in relation to most of whom Ms Warman says the defenders have no records.

[64] According to paragraph 141 of Ms Warman's affidavit, information from MB referred to the playground being built by the Navy. The defenders had uncaptioned

photographs of people in sailors' uniforms. They did not know who the people were. It is not entirely clear to me when and to whom MB provided the information about the role of the Navy in building the playground. It is not mentioned by Mr Watson in his narrative of what MB said to Dr Abernethy and Ms Hall. It may be that MB communicated this information to James MacDonald in 2001 (paragraph 40).

[65] I was provided with a letter from Ms Warman dated 15 September 2020 seeking to clarify further paragraph 28 of her supplementary affidavit, regarding the statement that no reserves were put aside in 2014/15. It had been pointed out to her that there was an apparent inconsistency between that statement and the Trustees' Report for the year ended 31 December 2018. That referred to [redacted], and stated that the defenders had made a reserve of £775,000 for potential uninsured elements of 18 civil claims relating to Lagarie. The 2018 annual report had been submitted in quarter three of 2019. By that time the defenders knew that the law on time-bar had changed, and that they had a number of claims against them.

[66] I note that, according to the 2018 report, the trustees' policy was to maintain reserves of 24-36 months' expenditure. At the end of 2018 the reserves held were £10.3 million, with endowment and restricted funds totalling £2.3 million. Allowing for fixed assets and other designated funder free reserves stood at £6.3 million, or approximately only 17 months of unrestricted expenditure.

[67] The trust, according to Ms Warman's letter would have to sell investments to pay the sum described as a reserve. The sum of £775,000 was shown as a liability in the balance sheet. While funds could be realised from investments, the defenders were operating at a deficit funded by the investments.

Pursuers

[68] B and C both provided affidavits. D and E are [redacted], and speak to the period when he was resident. The affidavits of F, G, H, J and P relate both to times when AM was the matron, and times when the Barries were in charge. K and L are [redacted]. The affidavits of K, L, M, N and O relate to the period when the Barries were in charge. The pursuers also produced an affidavit from Alf Goldberg, a private investigator.

B's affidavit

[69] B gives an account of abuse starting a couple of days after he [redacted] arrived in the home, and continuing every day thereafter. He says that AM regularly put him in a bath of freezing cold water. He remembers being lifted up by his ears, and his head being forced under the water. AM punished him daily by covering two of her fingers with carbolic soap and forcing them into his throat, which made him gag and feel sick. This happened while he was in the bath. If he was unable to finish a meal, AM would try to force feed him by pulling his head back and forcing the food to the back of his throat. If he wet the bed, AM forced him to stand, naked, in the corner of the bedroom. AM abused him psychologically by telling him that he was "useless", "fat" and "no good". AM beat [redacted] Q, who was "black and blue from bruising" as a result.

[70] B also gives an account of sexual abuse, including rape, by NS. The abuse occurred daily, and sometimes more than once in a single day. B tried to [redacted], having been told to stand naked in the bedroom as a punishment. He [redacted] AM took him to the bathroom, and forced soap down his throat while he was in a cold bath.

[71] B says that police contacted D in 2001, following the [redacted]. He says that he, D and E provided statements to officers of Lothian and Borders Police.

C's affidavit

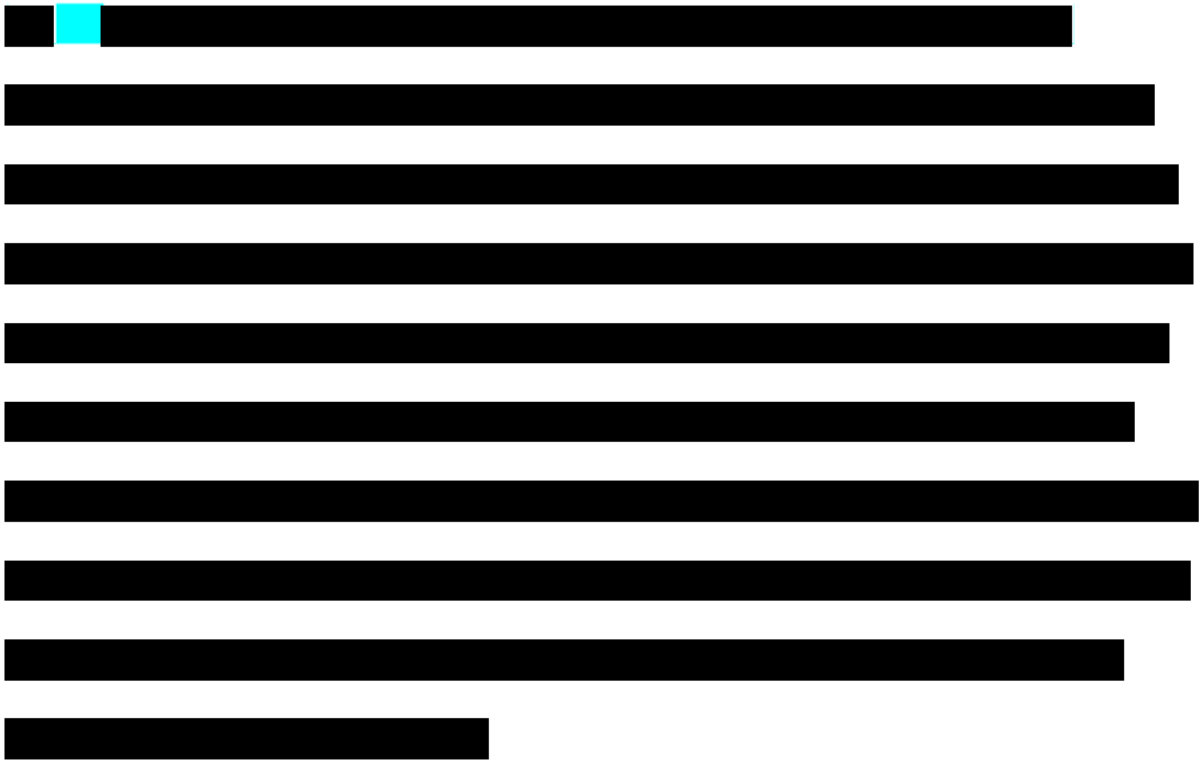
[72] C says that she [redacted] placed in the care of Tayside Regional Council in 1973. Following some months in other accommodation, they were moved to Lagarie on [redacted] 1974, shortly after her 6th birthday. She remained there until [redacted] 1982. WB was the superintendent and MB was the matron. C says that she was physically, psychologically and sexually abused by other residents and by members of staff.

[73] WB and MB would smack the children with "different implements". C was hit with a thick, heavy, wooden ruler which had inlays of different types of Australian trees; a wooden Scholl slip-on shoe that belonged to MB; a leather belt; and sometimes with hands. On an occasion when C was 9 or 10 years old she was attending church and had forgotten to change her pop socks for tights. MB slapped her across the face with such force that she fell onto the hallway floor. On another occasion she was travelling on a bus to a church to sing as part of a choir. She needed to urinate but was afraid to ask to go to the toilet, and wet herself. WB made her stand and sing with the choir although she was "soaking wet". She was humiliated and ashamed. It was a common punishment for children to have their mouths rinsed with carbolic soap for using a word that "they" did not like. This happened to C on at least one occasion and she was aware of it happening to others.

[74] C wet the bed frequently. When she did, MB would threaten to rub her face in the wet sheets. Families sat together at meal times. This was problematic, because C's brother,

A, was abusive. He hit and punched "us". He would usually hit her in the face. On one occasion he smashed a side plate over her head, and she has a scar as a result.

[75] WB would take children into his office to be punished. Once "we" were in his office he would beat "us". C witnessed WB with other girls, and remembers him poking H in the sides and on her chest. It made C feel uncomfortable. C did not see WB going into the girls' bedroom at night, but heard about that often. She overheard M speaking about WB. M said that WB kissed her, and laughed and joked about it as she made fun of WB.



[77] It was not unusual for seamen to be around the house and to interact with the children. They came from the naval base at Faslane. The base had an affiliation with Lagarie, as it was a home for the children of seamen. The children were taken on trips to visit the base. Sailors built rope swings for the children in the grounds of the home.

[78] A assaulted C sexually. Two other residents, R and S, assaulted C sexually. Although it is not entirely clear, I understand C to be saying in her affidavit that after she

had spoken to police, many years later, she spoke to a former house mother, Mary Gardiner, and told her what had happened with R.

[79] C gives accounts of the sexual assaults the details of which I do not require to repeat here.

[80] Police contacted C after M had made a report of abuse. C provides the names of a number of members of staff and fellow residents whom she says she remembers. She recalls that there was a gardener called Norman Skelton, but she did not have a lot of interaction with him. He seemed to spend more time with the boys.

D's affidavit

[81] D is [redacted]. He was about 4 years old when he was sent to Lagarie. He remembers an incident less than a week after he arrived. He was in bed, sucking his thumb. AM sat on his bed. She pulled his thumb out of his mouth. She put her knee on his chest and pinned him onto the bed. She covered her fingers in soap and forced her fingers down his throat until he gagged. Later in the affidavit he says that she "would" act in that way if she caught him sucking his thumb. He could hear her doing the same to another boy, with whom D shared a room.

[82] He recalls that if he did not finish his dinner, he was given it again for breakfast. He says that if he was unable to finish his food, AM would remove him from the table, and take him into another room and beat him with a stick on the back of his legs and on his back, until he was bruised. AM routinely covered her fingers in soap and forced them down his throat as a punishment for not eating. This would happen to any child who did not finish a meal. Every night he was forced to take a freezing cold bath.

[83] AM always smelled strongly of alcohol. D sometimes ran to his sisters for comfort. He knew that if he were caught he would be beaten. AM would grab him and hit him repeatedly with her stick. He knew other children were being abused. He could hear shouting from other bedrooms at night. On a couple of occasions he heard his older sister, E, screaming. On one occasion he got up in the night to use the bathroom. The bathroom door was locked. He heard AM shouting from inside, and then a child screaming. He was terrified.

[84] AM continually told the children that they were bad children, and that they were in the home because nobody wanted them. D remembered NS. He did not have a lot of interaction with him. He had since learned that NS sexually assaulted B. He did not know that at the time. He remembered an incident when B [redacted].

[85] He witnessed B being dragged along the ground by AM by his hair and his ears. D told his mother what was happening to "us". He showed her the bruising on his legs. She tried to have her children removed from Lagarie. There was a relevant entry in the social work records.

[86] D approached a journalist after he had read a story by her about abuse in a home run by the De La Salle Brothers. [redacted] 2001. After that, Lothian and Borders Police contacted them. D attempted to pursue a civil claim, but was told that the case had failed because of time-bar.

E's affidavit

[87] E describes AM eating sweets and leaving the wrappers around then blaming a child for having done. She would punish the child by putting her fingers down their throat and making them sick. AM did this to E on a number of occasions. Sometimes E wet the bed. AM would rub "our" face in the urine soaked sheet. She would make "us" go for a cold bath. A cold bath was a common punishment. E could sometimes hear crying from other bedrooms at night. AM would often force feed children who did not finish their meals. AM regularly beat E. She used a wooden ruler and a heavy leather belt. AM hit E on the back of her legs and her bottom, causing bruising.

[88] Celebrities often visited the home. E describes a Barbara Mullen visiting and providing presents at Christmas. AM took the toys away, and the children did not see them again. AM told E that she was not wanted, and that her mother and father did not love her.

[89] E saw AM assault Q. She threw Q to the ground, and Q hit her head off the bottom step. E later learned that Q had fractured her skull as a result.

[90] She remembered NS, but did not have a lot of dealings with him. He seemed to gravitate more towards the boys. She remembered seeing AM taking boys to NS. B told her, after they left Lagarie, that NS had assaulted him sexually. She knew that B had run away from the home, naked. She did not see him leave, but saw him when he was brought back, covered in a blanket. She told her mother what was happening, and showed her bruising. She knew that her mother had tried to get the children out of Lagarie.

F's affidavit

[91] F lived at Lagarie between 1961 and 1967. He describes an assault by AM on the day he arrived at the home. He was struck with such force he was knocked to the ground. He

named a former resident, by then a carer, called Lizzie Kay, who picked him up. AM slapped his bare bottom repeatedly to punish him for wetting the bed. He was put in a room with 12 beds in it called the "pee the bed room". He was routinely humiliated by other children as a result. Also as a result of the wetting the bed he would sometimes be starved. He was sometimes made to stand naked in the corner of the room, facing away from everyone. This could last all day, meaning that he did not eat or drink all day. AM used several different forms of punishment. She would bend F's fingers back until he was screaming in agony. She would twist and pull his ear until he screamed. F says that AM broke his sister's fingers by doing this.

[92] F recalls an occasion at night when AM got everyone in his room out of bed, stripped them naked and lined them all up. He says he was denied meals if AM found that his hands were not clean. On an occasion when he was sick he was made to lie in bed in his own vomit. He recalls both very hot and very cold baths, and AM acting as if she was going to drown him, by holding his head underwater. She would punish him by making him bite down on carbolic soap. On occasions when he was ill and the doctor required to visit, F would be put in a bedroom with six beds in it, and fresh linen would be supplied, but when the doctor left "life would go back to normal". AM beat F with a stick because he lost the cord of his dressing gown. F's mother visited the next day. He was told to wear long trousers, a shirt and a jumper. He was made to wear long sleeved clothes at school until the bruising had gone.

[93] He describes an incident in which AM introduced him and other children to her sister. AM threatened to put Fs' hand through a mangle. She slapped him and his brother. She shouted about how disgusting F was for wetting himself. He describes AM and her sister taking turns at slapping children on that occasion.

[94] F describes non penetrative sexual abuse by NS, following what could be construed as grooming, and repeatedly touching F's hair and face, after complimenting his hair. NS left F alone after F had a very short haircut.

[95] F describes a visit at Christmas by Barbara Mullen, who gave out presents to the children. The toys were gone the next day.

[96] F describes being underweight when he left the home at the age of 10. He says that he never saw or spoke to a social worker during his time at the home. After reading an article in [redacted] in 2001, he got in touch with the defenders. He was invited to a meeting in Manchester in 2014, at which about 14 other former residents were present. Statements were taken from the former residents. He describes dissatisfaction with the minutes taken by a Natalie Shaw.

G's affidavit

[97] G was resident in Lagarie between 1966/7 and 1977. She describes AM as physically and emotionally abusive. G says that she was made to wash AM's underwear in the bath. AM used to put her fingers down Gs' throat to make G sick. When she did this AM phoned the local doctor, Peter Campbell, to tell him that G had been sick again.

[98] If G did not eat her porridge at breakfast, she had to sit at table until lunchtime. The porridge was left until she ate it, or was force fed. She describes being forced into a freezing cold bath regularly. If she did not get into the bath, AM would batter her. AM regularly battered G, using her hands or a belt. Every child was treated in the same way. She describes incidents when she and others in her room were sent to bed early. AM would then get older children to waken them. They were taken into a different room and lined up. AM would give each of them a sweet and make them unwrap it. As soon as they placed the

sweets to their lips the sweets would be collected and the children would not get to eat them.

[99] AM would separate G from others in her group. She did the same things to G as she did to others. AM usually took children upstairs to punish them, to be away from others, but it was clear who was being taken upstairs and why. When they came back they looked upset and as if they had been beaten. G was often punished by having her fingers bent back. This caused permanent damage to G's fingers. The only time AM was ever nice or kind was when the Women's Guild visited with toys for the children, and she "put on a show" for them.

[100] AM retired and the Barries took over. They were abusive as well. At first it did not seem as bad as what G had been used to. She thought physical abuse was an everyday occurrence. She recalls being called in to be told that AM had died. She told WB and MB that she was happy, and both of them beat her.

[101] G alleges that WB sexually assaulted her. She does not remember seeing any social workers during her time at Lagarie. When she was 11 or 12 she was sent to see a psychiatrist, but did not tell the psychiatrist about the abuse.

[102] G describes people being brought in to give the children Christmas presents that had been donated. After they were handed out they were taken away.

[103] G remembers a couple called the Clarks. Mr Clark was "heavy handed" with the boys. The Clarks were fired for hitting the children. The Clarks were going to take the defenders to court but did not. G thought the defenders paid them off. She remembers NS. She did not know at the time of any abuse carried out by him. She remembered speaking to his wife when his wife was intoxicated.

[104] G says that she knows that sailors visited the home to put up rope swings in the grounds, and that they were sometimes inside the home, but she did not see them when they were there. She remembers C and her family. In 2015 police asked her about WB and MB, but not about AM.

H's affidavit

[105] H is [redacted]. She was a resident from 1966/7 to 1981, approximately. When she first arrived, Mrs Smith and AM were in charge. H shared a room with, among others, C, and M. C was younger than H. One of the first things H remembers is being made to stand on a box to clean AM's underwear, frequently. H recalls being locked in cupboards for hours, on more than one occasion. AM used to force her fingers down H's throat to force her to be sick. She forced her into cold baths by dragging her by her ear or her hair, a couple of times a week.

[106] H's worst memories are from after WB and MB took over. When she was around 7-9 years of age, WB called her into his office once a week. He would ask different children into his office each night of the week. She witnessed M and M's sister going into his office once a week. He would call H over and tell her to sit on his knee. He would joke with her, and grope her by grabbing her chest. He would grab her by the face and force his tongue down her throat. At night WB would come into H's room and take one child out, more than once a week, on week nights. She did not see who he took out, but they would be returned later and go back to sleep. He never took her out of the room.

J's affidavit

[107] J and a sibling spent 7 weeks each year during the summer at Lagarie between 1963 and 1969. He recalls a matron called Mrs Melville, who abused him physically by hitting and kicking him. [redacted] He says he was screaming in agony but was not taken to hospital. He was left in bed for a week, and the other children from his "dorm" were moved downstairs. He describes Mrs Melville forcing carbolic soap into his mouth. He names another boy, who has the same first name as F, and says that he saw Mrs Melville abusing that boy by hitting him and making him eat carbolic soap.

[108] J describes being seriously sexually assaulted by NS on various occasions. He recalls sailors in uniform visiting Lagarie at weekends, and sometimes twice a week during the week.

K's affidavit

[109] K is [redacted]. He describes A being violent and abusive at meal times. He says staff saw this happening, but did nothing about it. WB and MB punished K for errors he made in Bible reading and study by beating him. He was punished on a number of occasions for other matters. One of WB or MB would hold him down, wrap both arms around him to hold him still, and the other would beat him with an object or slap, punch and kick him.

[110] If MB found that K had wet the bed she took him into the shower room and slapped and punched him, then rubbed his face in the wet sheets. He saw others being treated in the same way. WB or MB locked him in cupboards for being cheeky. If K swore he would be

forced to the washroom, and "they" would put carbolic soap in his mouth. He was beaten and made to read and recite passages from the Bible as punishment for skipping school.

[111] He describes sailors' having built swings in the woods at the back of the grounds.

[redacted]

[112] K was in the home along with M. M told him some years ago that WB molested her. K says that WB was known for having girls sit next to him on the bus he drove the children in, and for putting his hand up their skirts as he did so. He only did that when MB was not there. K remembers O, [redacted].

[113] K fell ill with bacterial meningitis in 1991. He was told his sinuses were the source of the problem. He says that he always had headaches and blocked noses at Lagarie, but was beaten and punished by other means if he complained about them.

L's affidavit

[114] L is [redacted] He says that shortly before he died, A told him that NS had sexually abused him. L describes being punished physically by the Barries because he had difficulty with school work and Bible study as a result of his dyslexia. He describes WB hitting him with a wooden ruler, sometimes on bare skin and sometimes through clothing. MB used a wooden sandal and hit him with it over his clothing. MB punished him for

wetting the bed by beating him and rubbing his face in the wet sheets in front of other children. He had his mouth washed with soap once for swearing. On one occasion MB punished him by making him strip naked in front of other children.

[115] The Barries failed to protect L from violence at A's hands. L saw the Barries physically abusing other children.

[116] L recalls sailors building an "assault course type" play area in the woods. They were around for 1 or 2 weeks both inside and outside the home. He recalls visits from social workers, but says that he was not close enough with any particular social worker to trust them with a report of the abuse. He first spoke in detail about the abuse when police approached him in 2015.

M's affidavit

[117] M was placed in Lagarie with a number of siblings. She lived there between 1968 and 1978. When she arrived a couple called Smith were in charge. WB and MB took over in 1971. She describes MB punishing her by slapping her and "jumping" on her. MB once pulled her along a corridor by the hair.

[118] M started to wet the bed after she started being sexually abused. MB would rub the wet sheets over her body to punish her and did not allow her to wash before going to school. She describes attending school with a hand mark on her face because MB slapped her, and on another occasion with a black eye caused by her falling on to a bed post after MB slapped her.

[119] WB sexually abused her. She gives a detailed account of increasingly serious sexual assaults by WB. She also gives an account of being made to engage in sexual activity with men at evangelical conventions. She says that on one occasion the Barries took her and her

sister to a house in Musselburgh where the couple who owned the house sexually assaulted her, and possibly also her sister.

[120] She recalls sailors building a play area which included an old car without wheels. WB sexually assaulted her in the car. She describes girls, including her sisters, "kissing and frolicking" under the covers with sailors. She remembers seeing K bring C into a room where the sailors were with some girls, and then leaving. One of her sisters "saw" one of the sailors for several months, and met in Helensburgh at weekends. She provides a name for the sailor in question.

[121] WB stopped abusing M when she started menstruating.

[122] M describes MB getting boys out of bed and asking them to strip naked. This happened regularly. She did not see this happening, but heard the screams and shouts of the boys pleading with MB. MB would punish the boys by making them have cold showers. M heard the boys talking about this. She describes WB assaulting one of her brothers by slapping him after a church service.

[123] M describes WB taking other girls out of their beds at night. She believes MB turned a blind eye. MB saw her sitting on WB's knee, and he almost threw her off his knee when MB came in the room.

[124] She describes an incident involving H and a married couple, who were members of staff, called Brooks.

[125] M says that on one occasion social workers gave the children forms to fill in regarding their care and treatment at Lagarie. They said the feedback would be in complete confidence. The following day she was called into office and accused of telling lies about WB, who then beat her. She was dragged into the washroom and her mouth was scrubbed with carbolic soap.

N's affidavit

[126] N lived in Lagarie from 1973 to 1977 with his siblings. At first he did not have any trouble with the Barries. They went on, however, to "force religion" on him. He was slapped and battered for refusing to go to church. If he did not eat his meals he was slapped. MB often gave him a slap on the head. He says that he saw what she did to children who wet their beds, although he does not elaborate as to what she did.

[127] On one occasion he refused to clean the front stairs with a toothbrush, and was left with bruises so severe that he was not allowed to go to school for a week. On another occasion the Barries went on holiday leaving "the Russells" and Mr Clark in charge. Mr Clark beat N regularly. N told his father and brothers what was happening, but nothing was done. The Barries stopped his father and brother from visiting.

[128] N recalls two sailors from Faslane, called Jimmy and John, who visited the home often. They would go into the front dorms where the girls were. N believes that this happened almost weekly.

[129] WB often had young children sitting on his knee or between his legs in the TV room.

O's affidavit

[130] [redacted]. She gives a fairly detailed description of the lay-out of the home.

[131] WB sexually assaulted her. She did not tell her mother what was happening. [redacted]

[redacted]

[redacted]

[redacted]

[132] O describes an occasion when the actress Annette Crosby visited to give out Christmas presents. When she had left, the presents were taken away from the children. She describes being smacked by a younger member of staff. She remembers NS. On one occasion his demeanour scared her. On that occasion A noticed and called her back into the house, saying that her mother was looking for her. As an adult A disclosed to her that NS had sexually assaulted him.

P's affidavit

[133] P is [redacted]. She describes AM assaulting her in a small raised bath, by hitting her head off the bottom of the basin until her nose bled. AM often pulled P around the house by the ear.

[134] P describes an occasion at Christmas when visitors came with toys, which were removed from the children later. AM had a sister called Miss Melville. Her niece, Ann Melville, visited on one occasion. Ann Melville was wearing a bracelet that belonged to P, and which should have been kept in a safe. P often saw AM hit other children. She names a boy whose arm was broken when AM threw him downstairs. NS slapped her for stealing strawberries. She did not have much to do with him.

[135] When AM left, she was replaced by Mr and Mrs Smith, who were lovely. When they left, they were replaced by the Barries. They were very religious. MB was "not that bad", though she lost her temper with other children. WB was a "groper". He grabbed P's breasts and kissed her on the mouth. On one occasion she refused to eat Brussels sprouts, and he slapped her and threw to the ground and continued to slap her. At around that time,

Mr Wallace and Mr Douglas of the Sailors' Society visited the home. She told them about the abuse and showed them marks on her person. Shortly afterwards a rule came into effect that if children were to be disciplined, two members of staff had to be present. She remembers sailors visiting the home and building swings with tyres. She had good memories of the sailors.

[136] She left the home in 1977 [redacted]. She remembers an occasion when she saw WB about to hit H, and she intervened and threatened to report him.

Alf Goldberg's affidavit

[137] Mr Goldberg is a private investigator. Thompsons Solicitors instructed him on 17 June 2020 to trace former members of staff from Lagarie. He relates that he has confirmation that at least seven members of staff are still alive. He succeeded in tracing Robert Lyden, Letitia "Anne" Munro, Heather Skedd and Jean Clark. He had contact details for Carol McDonald, Linda Raitt, Sheila Lawson, Sandra Clark, Caroline Steele, Irene Johnstone, Edith Wilson, and Anne Grant.

Submissions

Defenders - law

[138] The defenders submitted that the legislation was not ambiguous. There was, therefore, no proper basis on which to have recourse to Parliamentary and government materials as an aid to construction: *Pepper* v *Hart* [1993] AC 593, 640. The minister responsible for promoting the bill had in any event declined to say more than that the provisions were concerned with striking a balance between the rights of pursuers and defenders, and that it would be for the courts to assess fairness and prejudice in the

circumstances of each case: Justice Committee, Limitation (Childhood Abuse) (Scotland) Bill, Response from the Scottish Government to the Justice Committee's Stage 1 report, pages 7-8; Official Report of the Scottish Parliament, Thursday 27 April 2017 pages 55-56; pages 58-59; Official Report of the Scottish Parliament, Thursday 22 June 2017 and page 85.

[139] The purpose of section 17A was to improve rights of access to justice for those who claimed to have suffered from child abuse. The limits to these improvements were set by section 17D. Section 17D(2) was concerned only with the defender. The pursuer had no right to insist on an unfair trial. Section 17(3) was concerned with striking a balance. Where the balance favoured the defender - where the prejudice to the defender was substantial and outweighed the interest of the pursuer - the action must be dismissed.

[140] The defenders characterised the policy and effect of the legislation in this way:

(a) To remove proceedings for child abuse from the scope of the limitation regime established by section 17 of the 1973 Act 6;

(b) To transfer to the defender the onus of demonstrating that such proceedings should not be permitted to proceed;

(c) Therefore, to relieve the claimant of the requirement to go through the painful process of explaining why the action was not brought earlier;

(d) To protect defenders (and not just in retrospective cases) who would through the passage of time be unable fairly to defend themselves;

(e) Short of the foregoing situation, to protect defenders who would be substantially prejudiced by the retrospective effects of section 17B or section 17C; and

(f) Where there is such substantial prejudice, to determine whether or not the action should proceed on a balance of the parties' interests.

[141] The legislation had been considered judicially only twice: *JXJ* v *De La Salle Brothers* and *M* v *DG's Executor*. In the latter the sheriff allowed a proof before answer although the alleged abuser had died. One of the factors that influenced her was the availability of a record of a police interview with him. She had not, however, elaborated on how that might assist with testing the pursuers' evidence.

[142] The jurisprudence relating to section 19A was still useful where it had involved discussion of the possibility of a fair hearing. It was useful also in the context of prejudice, and striking the appropriate balance between the parties. Care was required to ascertain whether and to what extent the discussion in the section 19A cases was "contaminated" by the policy of that legislation. The defenders submitted that the (Lord DY case).

[143] In *M* v *O'Neill* 2006 SLT 823, Lord Glennie had considered expressly whether it would be possible to have a fair trial of the issues raised by the pursuer, and had concluded that it would not: paragraphs 94-96. In *SF* v *Quarriers* 2016 SCLR 111, Lord Bannatyne addressed the question before him by reference to the policy considerations and the test for prejudice articulated in the Sisters of Nazareth cases. He had, however, concluded in terms that the defenders would not receive a fair trial. Lady Wolffe, in *K* v *Marist Brothers* [2016] CSOH 54, found, obiter, in the context of discussion of section 19A that no fair trial was possible. She decided that the right of action had prescribed. In the reclaiming motion (2017 SC 258) the Inner House declined to consider the merits of the reclaiming motion so far as prescription was concerned, because the Lord Ordinary had reached the only conclusion open to her on section 19A.

[144] The defenders submitted that the pursuers had a range of alternative remedies open to them so far as seeking justice and compensation. In cases under section 19A the

availability of an alternative remedy had often been an important factor influencing the exercise of the court's discretion: *McCabe* v *McLellan* 1994 SC 87, 95H.

[145] The English courts operated within the statutory framework of section 33 of the Limitation Act 1980. The onus was on the claimant to persuade the court to disapply the limitation period where it would be equitable to do so, and the court was directed by the provision to take into account certain enumerated factors. In the context of the exercise of the section 33 discretion in cases of sexual abuse, Lord Brown had observed that a fair trial, which must include a fair opportunity for the defender to investigate the allegation, was in many cases likely to be found impossible after a long delay: *A* v *Hoare* [2008] 1 AC 844, at paragraph 86.

[146] Section 17D(2) should be construed as meaning that the proceedings should be dismissed where, by the standard set by domestic courts, the defender would not receive a fair hearing. Parliament must have intended more than that the proceedings required to comply with Article 6 ECHR - a requirement that would apply in any event. So far as the Strasbourg Case Law was concerned, domestic courts had considerable latitude when setting the bar for what was considered to be unfair: eg *Dombo Beheer BV* v *Netherlands* (1993) A/ 274 A, at paragraph 32.

[147] In *JXJ* Chamberlain J heard a trial at which the claimant and other witnesses were cross-examined on the allegations made, with a view to assessing, as section 33 of the Limitation Act 1980 would have required him to, the cogency of the claimant's case. He had sought to reach "preliminary" conclusions on the reliability of the evidence without determining the substantive issues in the case.

[148] In the present case parties had agreed that no oral evidence would be led. The defenders asked me to approach the evidence presented to me by considering the extent to

which, on that evidence, the defenders were able to defend themselves. In particular they invited me to consider whether the affidavits provided by the pursuers and other potential witnesses presented opportunities to test their accounts. That would assist in understanding the forensic effect of the "missing" evidence. It was conceivable that the existence of supportive evidence would aggravate rather than mitigate the unfairness of the proceedings, bearing in mind the comments of Megarry VC in *John* v *Rees* [1970] Ch 345, at 402, and Lord Hoffman in *Secretary of State for the Home Department* v *AF (No 3)* [2010] 2 AC 269, at paragraph 73.

Pursuers - law

[149] The pursuers maintained that the cases decided by reference to section 19A were entirely irrelevant. The legislature had not "retained the same test" as under section 19A, and reversed the onus so that it lay on the defenders. Different policy considerations underpinned the new provisions. Section 19A required a pursuer to justify the reimposition of liability on a defender who would otherwise have escaped liability with the expiry of a limitation period. In the context of section 19A, therefore, actual prejudice to a defender, or the real possibility of significant prejudice, in defending an action would normally result in the action's not being permitted to proceed: *B* v *Murray (No 2)* 2005 SLT 982.

[150] By contrast, the starting point under the new provisions was that the claims were not barred by passage of time. Parliament expected claims involving the abuse of children to be heard in all but the most exceptional of circumstances. The better analogy was with cases dismissed due to inordinate or inexcusable delay, such as *Tonner* v *Reiach and Hall* 2008 SC 1 and *Hepburn* v *Royal Alexandria Hospital* 2011 SC 20. *Hepburn* was a clinical negligence case

in which the court had allowed the action to proceed although the allegedly negligent doctor had died.

[151] Another potentially useful analogy was with criminal cases. It was unusual in that context for the court to hold in advance of a trial that it would inevitably or unnecessarily be unfair: *HM Advocate* v *K (No 2)* 2013 SCL 901, paragraphs 20, 22.

[152] In looking at English cases care was again required, as they dealt with quite different legislative regimes. The focus of the courts of England and Wales was on the cogency of the claimant's evidence. Cases had been allowed to proceed notwithstanding the death of the alleged perpetrator: *A* v *The Trustees of the Watchtower Bible and Tract Society and Anr* [2015] EWHC 1722 (QB); *Raggett* v *Society of Jesus Trust of 1929* [2010] EWCA Civ 1002; *DSN* v *Blackpool Football Club* [2020] EWHC 595. The court could, in some cases, assume that the alleged perpetrator would have denied the allegations, but still be satisfied that the available evidence was so cogent that the denial would have carried little weight: *DSN*, paragraph 49. The English criminal courts would stay cases only where a fair trial was impossible, and any prejudice could not be remedied by the trial process: *R* v *F* [2012] QB 703; *R* v *D* [2013] EWCA Crim 1592.

[153] The only case in which the new provisions of the 1973 Act had been extensively considered was an English case, *JXJ* v *The Province of Great Britain of the Institute of Brothers of the Christian Schools ("the De La Salle Brothers")* [2020] EWHC 1914 (QB). The court was proceeding on the basis that Scottish law applied, and had before it evidence from a Scottish Queen's Counsel. The pursuers did not demur from the analysis by Chamberlain J at paragraph 101, save to the extent that he felt able to place any reliance on cases decided under section 19A. In the context of section 19A, the court required to consider whether there was a real possibility of significant prejudice to a defender, whereas under

section 17D(2), the hurdle for a defender was much higher. The question for the court was whether it "is not possible for a fair hearing to take place". What amounted to a fair trial depended on the context. The cases decided under section 19A did not distinguish between whether a defender would be significantly or unduly prejudiced and whether a defender would receive a fair trial. The pursuers pointed out that Chamberlain J had taken the view that some parts of an action might fall to be dismissed and others not.

[154] What was necessary for a fair trial was sensitive to facts and context. In many cases involving industrial disease, liability turned on events decades earlier. Often most of the potential witnesses were dead. In such cases both the wrongdoer and the injured party were dead at the time of the proof. The gravity of wrongdoing was relevant to whether a fair trial was possible. The trial of a Nazi war criminal would be different from the trial of a minor road traffic offence, and different lengths of delay were acceptable as a result.

[155] All the procedural safeguards with which Article 6 ECHR was concerned, namely an impartial tribunal and appropriate representation of parties, were in place. The pursuer bore the burden of proof.

[156] It was premature to reach a concluded view on the fairness of the hearing. There was a risk of making a decision in the abstract, based on speculation and inaccurate prediction: *M* v *DG's Executor* 2020 SLT (Sh Ct) 11, paragraph 34; *Transco plc* v *HM Advocate* 2005 1 JC 44, paragraph 44.

Evidence - defenders

B's case

[157] The defender recognised that B's affidavit and those of other witnesses contained some support for some of B's allegations about AM and NS. The defender might be able to

test the evidence of and for the pursuer by reference to the age of the witnesses at the material time; the delay since then; other factors which might affect the reliability of memory; contradictions and accounts which were inherently unlikely within the evidence of individual witnesses; prior statements inconsistent in some respects with the content of the affidavit; and contradictions between the evidence of a witness and other evidence in the cause. The defender was, however, limited to testing the evidence. The defender could not investigate the case in any meaningful way. Both the alleged abusers were long dead. Other possible witnesses, such as employees or social workers were dead or untraced. There was no adult witness who was present in Lagarie who might give evidence bearing on the standard of care and discipline in the home.

[158] Such documentation as was available, and such investigations as had been made at the time of the first action showed that the missing witnesses might have had useful evidence to give. The task of establishing with any degree of accuracy or likelihood the causal effect of any wrongdoing would be exceptionally challenging if not impossible. There was no prospect of a fair trial.

[159] If, contrary to that proposition, a fair trial was possible, the same factors would cause substantial prejudice to the defender. The following additional factors would cause substantial prejudice. The action would have a financial impact on the defender. That impact was the greater because of changes in the law of vicarious liability, and the effect of judicial interest. The proceedings would lead to serious financial difficulties for the defender, and its charitable activities worldwide. Such insurance provision as there was for this and related claims was likely to be inadequate.

[160] The defenders provided a detailed written submission setting out the respects in which they could test the evidence of the pursuer by reference to the sorts of matters set out

in paragraph 157 above. I do not repeat that part of the submission in detail. The defenders made submissions also about the affidavit evidence of particular witnessses. In summary, they again indicated that there were some ways in which the evidence of the other witnesses who had been residents in Lagarie could be tested. There were inconsistencies in some respects between their accounts and A's. Some elements of their accounts - for example E's account of AM's conduct involving sweets; F's account that his sister's fingers were broken; G's account of being woken and given sweets; her account that AM induced vomiting - were inherently unlikely.

[161] Some social work records were available. They contained entries which indicated that there were matters to which witnesses, had they been available, could usefully have spoken. I reproduce the defenders' written submissions about this matter in detail. They submitted that consideration of the social work records revealed a number of issues that, with witnesses to speak to them, might have been of importance at any proof on the merits, namely: the extent to which care generally within the home was scrutinised by social workers and other professionals; more specifically, the extent to which the care received by the pursuer and his family was subject to such scrutiny; what that scrutiny indicated; the extent to which there was any concealment of the regime within the home; the extent to which there were opportunities for the pursuer and others to complain about treatment they received; and whether assessments of the pursuer's behaviour and mental capacity at the time had the potential to cast any light on the credibility and reliability of the account he gives now.

[162] The records indicated that there was a high degree of social work scrutiny of the pursuer and his family before, during and after his time within the home. The records were incomplete. There were missing pages, and there were no records for some of the social

work contact evidenced in the discussions. There were little or no records of visits from, or contact with, any social workers from Dumbarton Council. However, a record of 18 September 1970 indicated that social workers from that council were regular visitors and knew the family well. Similarly, with one possible exception, there were no records of Home Office visits for the period in question. With one exception, none of the social workers or other professionals referred to in the records had been traced or was available. The exception was a social worker who shadowed one of the principal social workers for a spell. She appeared to have no relevant evidence to give.

[163] The entries disclosed that the family was seen within Lagarie on a number of occasions. The entries made in relation to some of these visits were of potential interest. On 9 July 1970, the pursuer's parents appeared to have made an impromptu visit to the social work office in [redacted]. The purpose of the visit was apparently to seek permission to take the pursuer on a trip. The note recorded that the pursuer's mother spent "most of the interview condemning the home at Rhu and the treatment the children received from the Matron." The note recorded the social worker in question as having given advice that any "positive information relating to cruelty" should be directed to Mr Robinson, as the children's principal social worker.

[164] In notes dated 28 August 1970 Mr Robinson expressed some doubts about the suitability of the home for the pursuer's family (the pursuer had left by this time). The background of the concern was a letter from the pursuer's mother alleging that one of the [redacted] had been seen with bruising on her body. The letter was not within the file.

[165] There was a record that Mrs Bruce, a social worker spoke with the pursuer's mother on or about 31 August 1970. The latter was recorded as having said that she wished the

children to come back to [redacted] because the journeys to Rhu from [redacted] were difficult for her. Reference was also made to the pursuer's mother considering that the children were not well cared for in the home and that Q had had bruise marks upon her.

[166] The notes of a visit by Mrs Bruce to Lagarie in 1970 contain no record of any concern on the foregoing matters. They bore to record discussions with AM and with a social worker from Dumbarton principally about the pursuer. Mrs Bruce had two discussions with the pursuer's mother shortly after her visit, but these seem to have been concerned with complaints about the pursuer's father's behaviour. Later records suggested that social workers may not have regarded her as an altogether truthful person. Writing, apparently, in November 1970, Mrs Bruce could see no reason why the children should be moved from Lagarie. By this stage, AM had retired. [redacted] E, a witness in this case, is noted to be missing AM. A note from 30 March 1971 indicated that E had not settled in with the new matron.

[167] Those entries give some context to the list of "missing" witnesses. The entries indicated that social workers might have had interesting and useful evidence to give on the matters listed above. The records indicated scrutiny of the level of care generally within Lagarie during the time of AM. There appeared to have been an investigation focused upon the pursuer's family in particular, against the background of a complaint. The records might provide a basis for thinking that social workers did not accept the account of the pursuer's mother. One could speculate that within the file ere clues as to why that may have been so. The social workers may have thought she was lying, possibly for self-serving reasons; or they may have been satisfied with what they saw within Lagarie. The problem is that without the social workers this was speculation.

[168] As to whether assessments of the pursuer's behaviour and mental capacity at the time had the potential to cast any light on the credibility and reliability of his account of events, the missing witnesses might have had something to say that would be relevant to whether the pursuer's account of the abuse is accurate or not. The pursuer appeared to have exhibited troubled behaviour while resident within Lagarie. Consequently he was seen by, or at least came to the attention of, a number of social work, education, psychology and psychiatric professionals, as well as police officers. Two incidents in particular culminated in the pursuer's departure from Lagarie. First, he [redacted]. Secondly, he [redacted]. The Home Superintendent had contacted social workers about these matters. The records also included a strange incident at an early stage of his time in Lagarie, whereby he [redacted].

[169] The pursuer was seen by psychologists, and he may have seen a psychiatrist. The reports and records of these investigations indicated a troubled boy of low intelligence. There were isolated references to his memory of events being less than accurate; of a tendency to tell tales; and possibly of a tendency to tell lies. Although it was possible that these "snapshots" of the pursuer as a boy said nothing about the accuracy of his memory today, it was possible that these records indicated that as a boy he saw a number of people with expertise in speaking to and treating troubled children; that this presented an opportunity to report abuse; and that he was a boy "not averse to making (not always truthful) allegations" against people. Without the authors of these reports, it was impossible to explore these issues in any meaningful way.

[170] It was clear from the affidavits of Mr Watson and Ms Warman that the defender had very little available documentation. There were no school records that cast any light on B's allegations. No police investigations took place while NS and AM were alive. There was no

prospect that the defender could adduce positive evidence at proof, and they had no positive basis for putting it to B that his allegations were untrue. No adult witnesses were available to give evidence as to what the practice was within the home as to care or discipline and whether AM departed from that practice. The defender and the court would have difficulty in distinguishing the effects of non-blameworthy institutional care from those arising from any blameworthy conduct.

[171] Although there could be no question of having to recreate the standards of the time so far as allegations against NS were concerned, it would be necessary to put those allegations in context. Information as to the extent to which children had access to NS's shed would be relevant. "Difficulties" with B's evidence raised the prospect that NS and other witnesses might have been able to offer cogent and exculpatory evidence. The availability of apparently supportive affidavit evidence from other witnesses did not mitigate the unfairness, but exacerbated it. There were difficulties in the accounts of those other witnesses also, and the defender did not have access to their social work or medical records.

[172] Even if the defender were able to receive a fair trial, the same considerations indicated that it would suffer substantial forensic prejudice. At the time of the alleged wrongdoing, the defender would not have been vicariously liable for much, if any, of it. It had arranged insurance at the material time. It now faced claims as a result of the change in the law in 2017. It was prejudiced not just by that change in the law, but the change in the law relating to vicarious liability, and the generous approach to judicial interest. The level of cover remained unchanged. Given the threat of other cases there was a real prospect that, even if the pursuers in these two cases were to reduce the sums sued for, the insurance cover would be insufficient.

[173] The pursuer made serious allegations, his claim was said to have a substantial value, and he might wish to have his story heard. These were common factors in litigation generally. Against that, the prejudicial features on which the defender relied were of an exceptional nature. It was relevant, as in section 19A cases to consider the availability of other remedies. There was to be legislation for a redress scheme. The experiences of B and others who had resided in Lagarie might be considered in the Scottish Child Abuse Inquiry.

C's case

[174] The defender made similar submissions in relation to a fair hearing and substantial prejudice to those made in B's case. In relation to C's case, in particular, there was doubt as to whether C had any reliable memory at all in relation to the incident involving sailors. C had given a number of statements to police, which indicated that her account had developed over time, and also that allegations had been the subject of discussion among former residents. Although C might be cross-examined by reference to her earlier statements, that did not mitigate the unfairness to the defender.

[175] There was no prospect of investigating the allegations of sexual abuse of C by A, R or S. It was not apparent how the pursuer would ever be in a position to adduce evidence showing a breach of duty on the part of anyone for whom the defender would be vicariously liable in respect of these assaults. The same could be said in relation to the conduct of the visiting sailors.

[176] The defender again made observations about the evidence of particular potential witnesses. What K described by way of corporal punishment was so extreme as to be unlikely. The scope for testing the evidence was limited. It was not possible to test what he said about denial of medical treatment without his medical records. Similar points could be

made in relation to L. According to L, staff were aware that the Barries were assaulting children, and that underlined the difficulty caused by the absence of evidence from staff. The evidence of witnesses about sexual abuse by WB was irrelevant in C's case. The defender commented on the literary narrative style of M's statement, characterising some of her descriptions as "florid". As with B's case, the defender made observations about internal contradictions in the evidence of witnesses and between the evidence of different witnesses.

[177] Much of the social work records for C related to the period after C [redacted] left Lagarie. It was unlikely that the records were complete. The file indicated that social workers knew C and her family well.

[178] C was not among those who made claims in 2001. The defender had no opportunity to investigate her claims with A, MB or Dr Campbell. There was no prospect that the defender would be able to lead evidence from any adult employed in Lagarie at the material time.

[179] The defender made essentially the same submissions in relation to the application of section 17D(2) and (3) as in B's case.

Evidence - pursuers

[180] The pursuers submitted that a consistent and compelling theme in the accounts of the witnesses was the cessation of abuse between 1 October 1970 and June 1972 when the Smiths were in charge of the home. That indicated that the allegations were not made indiscriminately.

[181] Ms Warman's supplementary affidavit mentioned that unnamed former residents had contacted the defender after [redacted]. She said that some of them wanted

to comment on the allegations in the [redacted], and that others wanted to be listened to and had been offered counselling. The pursuers pointed out that Ms Warman did not mention whether these individuals had confirmed or disputed the allegations, or why they had been offered counselling.

[182] The lack of records was largely irrelevant. There would be no record of abuse taking place. The onus was on the defenders to identify prejudice caused by missing records. There were in any event extensive contemporaneous social work and school records available and both pursuers had produced psychiatric and vocational reports.

[183] Both cases were intimated in October 2018 and it was surprising that the defender's evidence disclosed investigations only during and after summer 2020.

[184] So far as financial prejudice to the defender was concerned, the pursuers had reduced the sums sued for to £300,000 and undertook not to increase those sums. The allocation of interest was a discretionary matter and the court could decline to award interest for some or all of the period since the abuse. The defenders had substantial insurance cover for the periods in question, and had also set aside £775,000 for claims by former residents.

B's case

[185] Evidence supportive of B's case came from D, E, F, G, H, J, L, and O. F had not witnessed B being abused, but reported similar abuse by both AM and NS. Both L and O said that A had told them that NS had raped him. All described similar forms of abuse, such as fingers and soap in the mouth, and freezing cold baths.

[186] There was a police investigation in the 2000s following a newspaper report of abuse in 2001. Civil proceedings were instigated at around the same time. The defender

instructed medical reports in those proceedings. Mr Watson's affidavit disclosed only that reports were obtained in two cases, one of which was E's case. School records for B had been recovered.

[187] There was little information available about the police investigations from 2014 mentioned in Ms Warman's affidavit. The defender fixed a commission for recovery of police records only 7 days before the preliminary proof. It transpired there were extensive records, produced on the morning of the proof. They included a handwritten statement from DS Lappin. It was not clear whether the defender had precognosed him. Although the defender had provided evidence about attempts to trace former staff in recent months, they had not explained what investigations were carried out between 2001 and 2004. The 12 former staff named in Mr Goldberg's affidavit were still alive.

[188] AM died before B turned 19. Even if he had brought a claim within 3 years of turning 16 the defenders would still have been deprived of her evidence. It was therefore not an aspect of prejudice caused by the operation of the 2017 Act.

C's case

[189] C's evidence was supported by that of G, H, K, L, M, N and O. The defender had been invited to address supplementary questions to those witnesses, but had declined to do so. The defender had the benefit of the investigations carried out between 2001 and 2004. In addition to the pursuer's affidavit, there were four statements that she had made to police, and an account given by her for the purposes of a psychiatric report. Her social work records were available, as were her school records.

[190] There was hearsay evidence available in the form of the findings of the Industrial Tribunal in a case brought by Robert and Jean Clark, to the effect that there was a lack of

supervision and training in relation to corporal punishment. The decision contained further details of incidents that had taken place.

[191] The defender had had contact with MB in 2011. The affidavits produced by the defender said little about MB's evidence. At some point the defender seemed to have had sight of a statement given by MB to the police. There was no explanation as to what MB had said to James MacDonald, or whether anyone had attempted to speak to him. The defender's agent precognosed MB in 2004. MB admitted to DS Lappin that she used "physical chastisement" although the nature of that was not explained. There was no explanation for the absence of precognitions from MB, Dr Abernethy, DS Lappin, or A.

[192] There was no evidence that any of the social workers responsible for C's care had died.

[193] As in B's case, the explanations provided by the defender in relation to attempts to trace and precognose former staff were unsatisfactory.

Decision

Law

[194] I make the following preliminary observations as to the nature of this preliminary proof. When the Lord Ordinary decided that there should be a preliminary proof, he noted that in a proof of this type the pursuer's averments cannot be assumed to be true, and referred to the following passage in *Stubbings* v *Webb* 1992 QB 197, at 202H-203A, which relates to English section 33 proceedings on the basis of affidavit evidence, without cross-examination, but with the benefit of discovery:

> "This produces an unusual situation, since the facts pleaded by the plaintiff cannot for purposes of this proceeding be assumed to be true, and they are not common

> ground. … We must, it would seem, like the judge, draw such provisional inferences from the evidence before us as appear to be fair."

The Lord Ordinary also observed that pleadings in personal injuries actions are generally in abbreviated form, and there might be some difficulty in confining the assessment of the nature and prospects of the pursuer's case to the terms of the pleadings taken pro veritate. He rejected the contention that the pursuer's evidence would always be irrelevant to the issues that the court would require to determine under section 17D. He also was not persuaded that the cogency of the pursuer's case would necessarily be relevant to the court's assessment of those issues, on the view that only rarely could it be said that a pursuer's case was of such a nature that there was nothing that a defender could say by way of defence.

[195] In criminal cases the court has regarded it as impracticable, normally, to become engaged in an exercise of predicting the fairness of a trial, as it cannot know the extent of the available evidential material, or its relevance and weight, in advance of the trial itself: *HM Advocate* v *K*, paragraph 20. The purpose of the preliminary proof, however, is for the court to make an assessment in advance of any further proof as to whether it is satisfied that it is not possible for a fair trial to take place and whether the defender would be substantially prejudiced were the action to proceed. A variety of material has been produced, including affidavits from the pursuers and other former residents of Lagarie. There is evidence as to what documentary material is presently available, evidence about attempts to investigate matters, and evidence about the financial position of the defender.

[196] I have not reached a concluded view as to the credibility and reliability of the allegations. It would not be appropriate to do so. They are not the subject of agreement, and the witnesses have not been cross-examined. Some aspects of the evidence as disclosed in the affidavits do, however, raise issues as to the quality of the evidence,

particularly in C's case. I am not restricted to the terms of the pleadings, which are in abbreviated form. The pursuers themselves swore affidavits, and produced affidavits from witnesses who are also former residents of Lagarie.

[197] I have assumed that the oral evidence in chief for the pursuers at proof will be in accordance with the affidavits currently available and produced for them. I have accepted, as the parties have agreed that I should, the evidence in the affidavits of Mr Watson and Ms Warman. I have considered on the basis of that information, the submissions, and the productions referred to in them, whether the defenders have established that it would not be possible for a fair hearing to take place, and what prejudice if any there would be to the defenders as a result of the operation of section 17B or 17C.

[198] Since the preliminary proof in this case, the Sheriff Appeal Court has issued a decision in *M* v *DG's Executor* 2021 SLT (Sh Ct) 87. The sheriff had allowed a proof before answer on all issues, having not been satisfied at debate that a fair hearing would be impossible. The Sheriff Appeal Court recalled her interlocutor and allowed a preliminary proof, holding (paragraph 15) that the issue of a fair hearing in terms of section 17D(2) could not be held over until the end of the proof, and that the sheriff had erred by allowing the action to proceed to a proof before answer on all issues where a fair hearing "may not be possible".

[199] The court's task is to determine whether it is satisfied that it is not possible for a fair hearing to take place. If it is not so satisfied (leaving aside, for the moment, section 17D(3)), it will allow the case to proceed. It does not follow that any subsequent hearing will necessarily be fair. The court will always have be alert to the possibility that it transpires not to be, and may have to entertain submissions about that at the proof. There is a continuing duty to secure that the hearing complies with the requirements of Article 6 and is fair at

common law. A finding at a preliminary proof cannot foreclose consideration of whether those requirements are met in a later hearing. An assessment made on the basis of affidavit evidence on the basis on which it was presented to me, namely that the allegations are not the subject of agreement or admission, is necessarily a provisional one. A finding by reference to section 17D(2) which permits the action to proceed is a finding only that the court is not satisfied, on the basis of the information presented to it, that it is not possible for a fair hearing to take place.

[200] Both parties made submissions on the basis that similar fact evidence by way of mutual corroboration would be admissible in civil proceedings. I was not addressed in any detail on the admissibility of such evidence. I see no reason in principle why it should not be admissible. Where criminal conduct is alleged in civil proceedings, evidence of a single course of crime systematically pursued against a number of different alleged victims would appear to be relevant and admissible. I have therefore proceeded on the basis that the pursuers each would have available at proof the testimony of those witnesses who speak to evidence that might be capable of demonstrating a single course of crime, systematically pursued, where there are allegations of criminal conduct.

Construction of section 17D(2) and (3)

[201] Counsel suggested that the terms of section 17D(3) meant that there was ambiguity as regards section 17D(2). If all that a defender required to do was show substantial prejudice, then why, he asked, would a defender ever attempt to meet what must be the more stringent test of demonstrating that it is not possible for a fair hearing to take place. There was also a suggestion that section 17D(2) was on its face ambiguous, because there was no need for a provision to ensure that proceedings were fair. The Court was subject to

obligations by virtue of Article 6 ECHR. There was a question, therefore, as to whether section 17D(2), in referring to a fair hearing, meant something different from a hearing which was compatible with the requirements of Article 6.

[202] There is no ambiguity or want of clarity so far as section 17D(2) is concerned. If a defender succeeds in showing that a fair hearing is not possible, then that is an end of the matter. There is no question of attempting to balance the interests of the parties. If the defender merely succeeds in showing substantial prejudice, the court may still allow the case to proceed having considered the pursuer's interest in terms of section 17D(3)(2). There is an obvious advantage to a defender if it can satisfy the court that a fair hearing is not possible, because that will bring the case to an end without any need to balance the interests of parties.

[203] It also follows, looking at the language chosen by the legislature, that in order to satisfy the court that a fair hearing is not possible, a defender must do more than demonstrate that it would be substantially prejudiced were the action to proceed, as a result of the operation of section 17B or 17C.

[204] So far as the relationship between section 17D(2) and Article 6 ECHR is concerned it is true that the court has, by virtue of the latter, an obligation to ensure that a hearing is fair. It has an obligation to comply with Article 6 standards by virtue of section 6 of the Human Rights Act 1998, but it also has an obligation at common law to provide a hearing that is fair. I do not construe the words "fair hearing" as referring only to compatibility with Article 6 ECHR. It would be surprising if the Scottish Parliament used those words meaning only to incorporate a reference to Article 6 standards. In *R (Osborn)* v *Parole Board*, at paragraph 55, Lord Reed observed that the guarantees set out in the substantive articles of the Convention are mostly expressed at a very high level of generality, and have to be fulfilled at national

level through a substantial body of much more specific domestic law. He went on to point out that the guarantee of a fair trial, under Article 6 , is fulfilled primarily through detailed rules and principles to be found in several areas of domestic law, including the law of evidence and procedure, administrative law, and the law relating to legal aid.

[205] At paragraphs 57 to 63, he made a number of observations about the relationship between the Convention and the common law which protects human rights.

> "57. … The Human Rights Act 1998 has however given domestic effect, for the purposes of the Act, to the guarantees described as Convention rights. It requires public authorities generally to act compatibly with those guarantees, and provides remedies to persons affected by their failure to do so. The Act also provides a number of additional tools enabling the courts and government to develop the law when necessary to fulfil those guarantees, and requires the courts to take account of the judgments of the European court. The importance of the Act is unquestionable. It does not however supersede the protection of human rights under the common law or statute, or create a discrete body of law based on the judgments of the European court. Human rights continue to be protected by our domestic law, interpreted and developed in accordance with the Act when appropriate.
>
> ….
>
> 63. … the error in the approach adopted on behalf of the appellants in the present case is to suppose that because an issue falls within the ambit of a Convention guarantee, it follows that the legal analysis of the problem should begin and end with the Strasbourg case law. Properly understood, Convention rights do not form a discrete body of domestic law derived from the judgments of the European court. As Lord Justice-General Rodger once observed, 'it would be wrong … to see the rights under the European Convention as somehow forming a wholly separate stream in our law; in truth they soak through and permeate the areas of our law in which they apply' (*HM Advocate* v *Montgomery* 2000 JC 111, 117)."

[206] In line with that approach, it is necessary first to consider domestic principles of fairness, as the Supreme Court did in *Osborn*. It is not suggested in the present case that Article 6 ECHR would require a different or more stringent approach than the common law.

[207] Although both Article 6 and the common law requirements of fairness would apply absent section 17D(2), the function of the provision is to place beyond doubt what test the court is to apply, namely (a) that it is not possible for a fair hearing to take place, and (b) that

the onus lies on the defender to satisfy the court as to that matter. It cannot be said that section 17D(2) is otiose.

[208] Section 17D(3) makes provision for a situation in which the defender has failed to satisfy the court that it is not possible for a fair hearing to take place, but has satisfied the court that it would be substantially prejudiced. In that situation the court must then go on to balance the pursuer's interest in the action proceeding against the prejudice to the defender, in order to determine whether or not the action is to proceed. It is therefore apparent that even substantial prejudice to the defender is not determinative.

[209] The new provisions represent a significant change in the law. The starting point is that there is no time-bar. The onus lies not on the pursuer to demonstrate why an action should be allowed to proceed in the face of a time-bar, but on the defender to demonstrate why it should not, in the absence of a time-bar. Many of the policy considerations discussed at length in cases relating to section 19A fall away. In *AS*, for example, at paragraph 5, Lord Hope said,

> "The law of limitation of actions in Scotland is set out in Pt II of the Prescription and Limitation (Scotland) Act 1973 (cap 52). The limitation periods that it sets out are the product of the judgment of the legislature as to where the interests of justice lie in the case of delayed claims in the civil courts. Breaches of the criminal law are, except in the case of those that are to be prosecuted summarily, not normally subject to any time-limits. But in the case of civil justice the position is different. It has been observed repeatedly that where there is delay the quality of justice diminishes. Witnesses may have died, memories may have become dimmed and relevant documents may have been destroyed or lost. As time goes on these effects may become less easy to detect, and this in itself is apt to produce injustice. Times change too, and conduct which may seem reprehensible today may have been regarded as acceptable or even as normal many years ago. So, as McHugh J said in *Brisbane South Regional Health Authority* v *Taylor* (p 553), the public interest requires disputes to be settled as quickly as possible. A judgment has been made by the legislature where the balance lies between the demands of justice and the general welfare of society. The responsibility of the courts is to give effect to that judgment."

The position now is that the legislature has made a different judgment as to policy. The risk of injustice with the passing of time is dealt with, in cases of childhood abuse, not by requiring as a default, prompt litigation, but by means of section 19D(2) and (3).

[210] Parties' submissions were directed principally to the relevance or otherwise of dicta in criminal cases; cases decided by reference to section 19A; cases relating to inordinate delay; and cases from England and Wales in providing guidance as to what circumstances will cause a fair hearing to be impossible, and what will constitute substantial prejudice. I was referred also to two cases in which section 17D had been considered.

Criminal cases

[211] The approach of the criminal courts where it is said that a trial will be unfair, whether by reason of the passage of time or for some other reason, is to permit the matter to proceed unless it is inevitable, or practically certain, that no fair trial is possible: *Transco*; *HM Advocate* v *K*. The English criminal courts have taken a broadly similar approach: *R* v *F; R* v *RD*. The language of section 17D(2) reflects a similar approach. As I have already observed, a preliminary proof involves an assessment in advance as to the possibility or otherwise of a fair hearing in the future. In *HM Advocate* v *K*, at paragraphs 20-21, Lord Carloway, delivering the opinion of the court, said,

> "[20] … it is normally impracticable for the court to become engaged in an exercise of predicting the fairness of a trial, since it cannot know the extent of the available evidential material, or its relevance and weight, in advance of the trial itself. The court may accordingly be reluctant to sustain a plea in bar of trial on this type of ground. The law is clear. It is only if it can be established at this preliminary stage that the trial 'as a whole' will 'inevitably' or 'necessarily' be unfair that a plea in bar, based upon prospective fairness will be sustained […] It may still be anticipated that such cases will be relatively 'rare and isolated' […] albeit that Jackson LJ's dictum reminds the court that there are now art 6 considerations to bear in mind as well as the common law concepts of oppression and unfairness.

> [21] In determining the inevitability of unfairness, the court must ask itself whether, in a solemn case, any potential prejudice is 'so grave that no direction by the trial judge could be expected to remove it' […] It is true that here the sheriff did purport to apply this test, but it is difficult to grasp the reasoning behind his decision that in this case, as distinct from the many 'historic abuse' and other trials that have taken place in recent years at a time distant from that of the offence, a sheriff would not be able to give a jury appropriate directions on the prejudicial effects upon the accused's defence of the passage of time, and the need for the jury, in such circumstances, to scrutinise the evidence of the complainers with particular care […]"

[212] In the same case at paragraphs 22 and 23, he continued:

> "[22] Although the court agrees with many of the dicta of Lord Drummond Young in *B* v *Murray* (No. 2) about the incidence of prejudice arising from historic claims, it does not find a comparison with civil cases concerning limitation of actions of much assistance. Such cases involve a different standard of proof. The court is not considering where the equities lie between private parties in permitting a litigation to proceed notwithstanding such prejudice. It is determining whether, in the context of a public prosecution, there will inevitably be an unfair trial.
>
> 23. The court notes the decisions of the Court of Appeal in England (in *R* v *F*; *R* v *Joynson*; and *R* v *B).* Certainly, the dictum of Lord Woolf in the latter case […] is strongly suggestive of a situation whereby, if all contemporaneous material is lost, then an unfair trial must be regarded as inevitable. The court doubts whether that can be an absolute proposition. It must be of some significance that the decisions in England are all in the context of appeals after trial and address the court's concerns over the 'safety' of a verdict rather than pre-trial judgments of prospective unfairness. There may, for example, be different considerations where, as here, the court is dealing with multiple complainers and not just a single alleged victim. The need for corroboration in Scotland is also a factor to be borne in mind."

[213] The 2017 Act dismantles in large part, if not completely, the distinctions drawn in that passage and the one already quoted from *SA*, at least so far as section 17D(2) is concerned. Although the standard of proof still differs as between criminal and civil proceedings, the task now allocated to the civil court by the legislature is to determine whether the defender has satisfied it that it is not possible for a fair hearing to take place. The use of preliminary proof procedure envisages an attempt by the court, on the basis of evidence, to predict the fairness of a future hearing to the extent of determining whether it is not possible for a fair hearing to take place. What is required for a fair hearing depends on

the context, and there may be differences of relevance between criminal and civil proceedings. I am, however, cautious about overstating the significance of those differences.

[214] While the passage of time causes difficulties, it must be recognised that it is not uncommon for criminal trials to involve allegations of physical and sexual abuse dating from, for example, the 1970s or even earlier. Jurors are expected to assess the credibility and reliability of middle-aged and sometimes older adults who are describing things that happened to them when they were pre-pubescent children, or teenagers, and they do so. It is difficult to maintain that a fair civil trial before a professional judge will be impossible simply because of the lapse of time, in a case of this sort, when such matters are commonly the subject of adjudication in solemn criminal proceedings. It is not a sufficient answer to say that the standard of proof is different. That does not affect the quality of the evidence or the jury's assessment of it as credible and reliable, or the task of deciding which evidence to accept and which to reject. Proof beyond reasonable doubt is an additional safeguard because of the penal consequences of a conviction, and one which applies in every criminal case, just as the standard of proof is on the balance of probabilities in every civil case. The fact finder in whichever context assesses the evidence for what it is worth, and applies the appropriate standard of proof. The absence of the more rigorous standard of proof beyond reasonable doubt in civil proceedings does not render civil proceedings unfair.

[215] I am, therefore, very reluctant to hold that the different standard of proof, on its own, is sufficient reason for distinguishing the authorities relating to whether it is inevitable that a criminal trial of alleged historical sexual or physical abuse will be unfair. Assuming all other things were equal, there would be no logic in finding that there was the potential for a fair trial of such allegations in a criminal court, often involving lay jurors, subject to direction in law, but that there was no such potential in civil proceedings.

[216] The requirement for corroboration is clearly an additional safeguard in criminal proceedings which does not feature in civil proceedings. The availability of corroboration in any given civil case may, however, be a relevant factor when considering whether a fair hearing will not be possible.

[217] Civil cases such as the present, in which the alleged wrongdoers are dead, are obviously not precisely analogous with criminal cases involving historical sexual abuse. Where individuals are accused, and face trial, they are alive, and able to give instructions. If they wish to, they can give evidence.

[218] If they are alive, but are not fit for trial and unable to give instructions a different procedure will be adopted, under section 55 of the Criminal Procedure (Scotland) Act 1995, but it is not one which results in a conviction. A judge, sitting without a jury, requires to determine whether she is satisfied (a) beyond reasonable doubt, as respecting any charge on the indictment or complaint, that the accused did the act or made the omission constituting the offence; and (b) on the balance of probabilities that there are no grounds for acquitting him. A finding under that provision that the judge is so satisfied is not a conviction. The procedure, while it has some of the features of a trial, is not a criminal trial, but an examination of facts: section 54 of the 1995 Act. Although deprivation of liberty may follow upon a finding under that procedure, the deprivation of liberty is not one imposed by way of penal sanction, but by virtue of orders authorising the detention of persons with mental disorders. Once orders of this sort are imposed, their continuing lawfulness falls to be reviewed by the Mental Health Tribunal for Scotland under the Mental Health (Care and Treatment) (Scotland) Act 2003. The House of Lords, in relation to a broadly analogous, but not identical, procedure under the law of England and Wales, found that the criminal limb of Article 6 did not apply: *R* v *H* [2003] 1 WLR (insert). A court making a decision to

deprive an individual of his liberty must provide "the fundamental guarantees of procedure applied in matters of deprivation of liberty": eg *De Wilde, Ooms and Versyp* v *Belgium*, paragraph 76. One additional safeguard which may be required - as it is in the Scottish procedure - is the appointment of lawyers for the person facing a deprivation of liberty. Procedure of this sort must be fair at common law, bearing in mind the nature of the matters at stake, namely deprivation of liberty.

[219] The unavailability of an alleged wrongdoer to give evidence because he or she is dead is an obvious point of distinction between civil proceedings, such as these cases, and criminal cases. The procedure for examination of facts is not precisely analogous. Another point of distinction is that criminal proceedings rarely require the fact-finder to examine the causation of a range of losses and damage allegedly flowing from wrongdoing.

Cases decided under section 19A

[220] As I have already observed, the 2017 Act effected significant change in the law, placing the onus on the defender to satisfy the court as to the matters specified in section 17D(2) and (3)(a). So far as consideration of prejudice is concerned, the position in section 19A cases was the fact, or real possibility, of significant prejudice to a defender was decisive in the defender's favour: eg *B* v *Murray (No 2)*, Lord Drummond Young, paragraph 124, citing *Brisbane Regional Health Authority*. The defender must now establish that he would be substantially prejudiced, not merely of a "real possibility" of "significant" prejudice. If he does, the court must balance that against the pursuer's interest in the action proceeding.

[221] Submissions came to focus on whether or not anything in section 19A decisions might usefully inform the application of the 2017 Act provisions. The defender maintained

that that was possible, and that while the section 19A cases had to be approached with caution, some aspects of the decisions held good even outside the policy and legislative context in which they were made. In particular, judges had in some cases expressed the view that it was impossible for the defender to have a fair trial and those observations provided useful guidance. They could be divorced from the immediate context in which they were made.

[222] In *M* v *O'Neill*, which related to non-sexual abuse in an institutional setting, at paragraph 94, Lord Glennie said the following in relation to documents

> "… In some types of case, where the allegations can be cross checked against documents, this may be less of a disadvantage, though I would hesitate before saying that there could be no prejudice even in such a case. In a case such as this, documentary evidence will seldom be central to the issues. In so far as it may have existed, I am satisfied that it is no longer available in any meaningful or helpful sense. […]
>
> [95] However, it has to be recognised that this type of case is unlikely to turn on documents. It will turn upon an assessment of the credibility and reliability of the principal protagonists, namely the pursuer and, if available, Sister X and the lay helper, Y. Even if all three individuals were available to give evidence, it is difficult to see how a court could approach the task of making that assessment with any degree of confidence. But, although this is not accepted on behalf of the pursuer, I accept that Sister X is dead. So only two of the principal characters are available to give evidence. I heard evidence about the availability of other witnesses. I am satisfied that some other former residents might be able to give evidence, but how many can be contacted and what they are likely to remember is unclear. The pursuer's brother has died. Her sister could give evidence, but (I am told) sat through the pursuer's evidence during this preliminary proof. One difficulty is that the home was divided into individual houses, and Roncalli (where the pursuer was looked after) was run almost as an autonomous unit. This limits the number of former residents who might be available to assist. It also means that, on the defenders' side, there will be little direct evidence that they can lead from other staff: no sister or lay helper from other houses will be able to help. The two mothers superior, who might have given evidence as to the policies adopted at the home in respect of discipline or food, or in respect of visits, are both dead.
>
> [96] Ultimately the case will turn, therefore, on the word of the pursuer against that of the lay helper, Y. Neither side will be able to support their case by as much evidence as they would wish. But this is not something which balances out. The relevant question, to my mind, is whether the defenders would be prejudiced in their

> defence of a case such as this brought against them in such circumstances. I am satisfied that they would be severely prejudiced. The assessment of credibility, which is crucial, in a case such as this, is inevitably hampered by the passage of time. I accept the analysis, in the cases to which I was referred, about the inevitable loss of evidence and decline in the quality of evidence after so long a delay: see in particular *T* v *Boys & Girls Welfare Service*, *Brisbane Regional Health Authority* v *Taylor* and *B* v *Murray (No 2)*. I do not consider that it would be possible to have a fair trial of the issues raised by the pursuer at this far removed from the events which she alleges took place. Whilst it might be said that the defenders would have suffered prejudice even if the case had been brought within time, ie by 16 January 1984, I consider that I am entitled to assume that the passage of a further 16 years before proceedings were brought has increased that prejudice."

[223] It is difficult with any real confidence to "strip" the observations here, about the difficulty of assessing the credibility and reliability of witnesses, from their context. The references in paragraph 96 to the cases cited there are precisely to the policy reasons for having a time-bar and the need for caution about over-riding it, including a view on the part of the legislature about a decline in the quality of evidence by reason of the passage of time. As I have already explained, credibility and reliability routinely have to be assessed in historical cases in the criminal courts. I do not accept as a general proposition that a court cannot confidently assess credibility and reliability in historical cases. If a court comes to a conclusion that it cannot for any reason rely on or believe evidence, then it will have to reject that evidence.

[224] In *SF* v *Quarriers*, which, again, involved non-sexual abuse, the allegations were made against a single individual who had died. At paragraph 149 Lord Bannatyne said the following:

> "I am persuaded that it is difficult to envisage a more highly material loss of evidence to the defenders than the denial to them of the evidence of Miss D. I accept senior counsel for the defenders' submission that the loss of Miss D's evidence is more grave than the loss of evidence in the *AS* v *Poor Sisters* case where some of the alleged abusers were still alive. It appears to me that where the allegations of abuse are made against a single person and that person's evidence has been lost to the defenders then it is really impossible for the defenders to have a fair trial. The defenders are denied the evidence of what would have been their most important

> witness. They are not able to properly defend themselves. They cannot, without Miss D's evidence, properly cross-examine the pursuer as to the merits of his claim. Nor can they properly cross-examine any witness he may produce in support of his claim such as Mr J."

There is more force in the defender's submission in relation to this passage. The relevance of the death of the sole wrongdoer is plainly a significant matter in the context of a fair hearing for the reasons that he articulates, and I accept that it is a passage of reasoning which can be read independently of the section 19A context of the case. It is obiter, to the extent that the Lord Ordinary did not require to go so far as to determine that a fair trial was impossible in order to dispose of the matter. I regard it, however, as persuasive.

[225] *K* v *Marist Brothers* related to allegations of sexual abuse, and again, was a case in which the alleged abuser was dead. Lady Wolffe, at paragraph 91, followed the same approach as Lord Bannatyne had done in *SF*, saying,

> "Lord Bannatyne's observations in the case of *SF* v *Quarriers* are apposite here. This, too, is a case involving allegations against a single abuser who was long dead. That circumstance alone meant that the defenders could never know what Brother Germanus' response would have been to the allegations. They could not, as Lord Bannatyne aptly put it, 'properly' advance a case that Brother Germanus did not do these things. In the absence of knowing Brother Germanus' position, the defenders could do no more than put the pursuer to his proof. They could not properly lead a positive case if they had no basis to so do. The several rationales considered in detail by Lord Drummond Young in *B* v *Murray* (no. 2) applied with particular force to a case such as this, where an extraordinary length of time had passed. In all of these circumstances, no fair trial was possible. In the whole circumstances, I refuse to exercise the discretion under section 19A in favour of the pursuer."

[226] Lady Wolffe's conclusions about section 19A are obiter, as she had determined the case on the basis that any obligation to make reparation had been extinguished by long negative prescription. The Inner House declined to deal with arguments relating to the Lord Ordinary's approach to prescription, as it found that she had reached the only conclusion open to her on section 19A (Lord Justice Clerk, paragraph 8):

> "As to sec 19A, the Lord Ordinary concluded that the respondents could not but be materially prejudiced were the reclaimer's case permitted to proceed out of time. More than five decades have passed since the alleged abuse. No complaint was made until 2014. The school closed over 34 years ago, in June 1982; there was unchallenged evidence that attempts to trace records had been unsuccessful; Brother Germanus died in 1999. The Lord Ordinary was correct to note that any assessment under sec 19A required to consider the issue of possible prejudice to the respondents. No compelling reason was advanced to counterbalance the severe risk of prejudice, and there is no basis upon which it might be said that the Lord Ordinary erred in the exercise of her discretion. In fact, on the material before her, in our view the Lord Ordinary reached the only conclusion which was reasonably open to her."

In the passage just quoted, the Inner House endorses the approach of the Lord Ordinary, but expressly does so under reference to "material prejudice", and "severe risk of prejudice". It does not expressly endorse the conclusion that no fair trial would have been possible. It did not require to consider whether no fair trial was possible in the context of section 19A.

[227] The unavailability of an alleged wrongdoer to give evidence has been the subject of consideration in one of the cases relating to inordinate delay, in some of the English cases, and also in the two cases to which I was referred relating to section 17D.

Inordinate delay cases

[228] Whether or not a case will require to be dismissed on the grounds of inordinate delay turns on the facts of each case. The facts of *Tonner* do not assist in determining whether there could be a fair hearing in the present cases. In *Hepburn* adjustments were lodged more than 9 years after a clinical negligence action, in which there had been no real progress until then, had been raised. One of the impugned clinicians had died, and the case against him and against one still living had been altered entirely. The court was not satisfied that no fair trial was possible. Although one of the clinicians had died before the new allegations were made, the case would turn largely on expert evidence as to proper medical practice at the

time. Although aspects of the case turning on the terms of discussion between the pursuer and the clinician would present difficulties if there were no relevant medical records, the prejudice to the defender should not be exaggerated. If there were no records, the clinician might not have had any recollection of the conversation even when the action was raised. The onus lay on the pursuer and the court in assessing her evidence could take into account the passage of time any prejudice that the respondents might have sustained in seeking to rebut her testimony: paragraph 42.

[229] The decision in *Hepburn* is an example, like some of the English cases, to which I now turn, of a situation in which the death of an alleged wrongdoer will not inevitably mean that a fair hearing is impossible. It is, however, an example in the field of clinical negligence. In that area, if factual matters are not significantly in dispute, the resolution of the case will turn on expert evidence, and is not directly analogous with a case involving allegations of criminal conduct by individuals.

Cases under section 33 of the Limitation Act 1980

[230] The pursuers relied on dicta in some of the English cases in which the wrongdoer or alleged wrongdoer had died to the effect that the unavailability of a denial on the part of a deceased was unlikely to have carried much weight: *Raggett*, paragraph 18; *DSN*, paragraph 49. They referred also to *Watchtower Bible and Tract Society.*

[231] These cases involved the exercise of the court's discretion in terms of section 33 of the Limitation Act 1980 to disapply the time-bar that would otherwise apply. In exercising that discretion, the courts of England and Wales are required to have regard to, amongst other things, the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the

action had been brought within the time allowed by the relevant, earlier, sections of the act: section 33(3)(b).

[232] In *Watchtower Bible and Tract Society* the deceased had been convicted of offences against children other than the claimant. The case was of vicarious liability for the assaults, and for failure to protect the claimant. The abuse had occurred between 1989 and 1994. The defendants accepted that the deceased sexually abused the claimant, and accepted that he had done so in the claimant's home and in his own home. He had written a letter to the claimant's mother admitting the abuse. There was, however, an issue about the accuracy of her account so far as it included allegations about other locations at which the abuse occurred. Given this context it is not difficult to see why the death of the wrongdoer was not regarded as having affected the cogency of the evidence available to the defendant.

[233] In *Raggett,* the Court of Appeal adhered to the judgment at first instance of Swift J. In particular, at paragraph 18, the court considered the conclusions she had reached at paragraphs 123 of her judgment ([2009] EWHC 909 (QB)), which I quote here, together with paragraph 124:

> "123. As judges have previously pointed out, allegations of sexual misconduct are easily made and can be difficult to refute. Complainants may have many reasons for inventing or exaggerating allegations. It is therefore necessary to exercise caution when assessing the likely cogency of a claimant's evidence for the purposes of section 33(3)(b). However, the claimant in this case has made allegations which do not bear the hallmarks of exaggeration. This is not a case where he has 'jumped on a bandwagon' of other similar complaints. It is difficult to see what motive he could have had for misrepresenting what occurred. Moreover, his allegations were supported to a remarkable degree by a number of his contemporaries. Many witnesses described Father Spencer's obvious sexual interest in young boys, his habit of looking at and touching their genitals under various pretexts and his preference for the claimant. One witness actually saw Father Spencer filming the claimant. Other witnesses had been filmed themselves. One of the witnesses had, like the claimant, been invited to football training sessions at which only he was present. A most striking feature was the fact that, despite the delay that had occurred, six witnesses came forward spontaneously shortly before the trial started. Some of them were unaware when they did so of the identity of the claimant and

> none appeared to have any particular axe to grind. In the face of evidence such as this, the second defendants were always going to experience great difficulties in persuading a court that the claimant's allegations were untrue or exaggerated.
>
> 124. The main source of prejudice to which the second defendants point is the death of Father Spencer and his consequent unavailability as a witness. Viewed realistically, however, it is difficult to envisage circumstances in which a denial of the abuse by Father Spencer (assuming he had denied it) would have prevailed over the evidence of the claimant and his witnesses. In particular, he could have had no plausible innocent explanation for the contents of his letter of 28 June 2000. Nor would a denial from other members of staff at the College (in addition to Father Edwards, who provided a witness statement) have been likely to be determinative. They may have been understandably reluctant to admit having any knowledge of Father Spencer's activities. They may genuinely not have been aware of them - as Mr Malone was apparently unaware of the deeply unsatisfactory behaviour of Father Spencer which led to Father Wren's letter requesting his removal from the College. I regard it as highly unlikely that the availability of other members of the staff of the College would have improved the second defendants' prospects of succeeding on the issue of liability. As to documents, most of the second defendants' documentation was still in existence and they were not able to point to any specific document(s) which were unavailable and would have been likely materially to have affected the outcome on liability."

Swift J's conclusions must be read in the context of the case before her. She was presented with a good deal of consistent evidence from witnesses other than the claimant, as she narrated in paragraph 123. The letter of 28 June 2000 to which she referred was, although not a direct admission, in highly compromising terms. The Court of Appeal referred at paragraph 21 to the position of the defendant as recorded by Swift J; the defendant did not seriously dispute that the individual had been guilty of abuse by filming the claimant naked, and fondling him sexually, but did not accept the abuse was as long lasting or as severe as the claimant had described.

[234] *DSN* involved allegations of sexual abuse. The alleged abuser, Frank Roper, had died. He had convictions for sexual offences, including offences against boys, dating from the 1960s and 1984. The claimant first met Roper in 1985. Griffiths J heard evidence from the claimant and from other witnesses, some of whom said Roper had abused them in

circumstances similar to those alleged by the claimant. In deciding that it was equitable to allow the action to proceed, Griffiths J said this, at paragraph 49:

> "The evidence of the claimant (which I consider in more detail below) was cogent, circumstantial and convincing, quite apart from the strong plausibility given to it by Roper's track record as a convicted paedophile, and the evidence of 5 other witnesses who gave evidence at the trial of very similar, and in some cases worse, sexual abuse, committed in similar circumstances, using similar tactics, by Roper. I recognise that, because Roper is dead, I have not heard from him, and there is no possibility of obtaining his reaction to DSN's allegation, which might have included a denial. But I regard the evidence against Roper as cogent, indeed compelling, even bearing that in mind. Any denial by Roper would have carried very little weight given the cogency of the evidence against it. He would have had to accuse DSN of lying. Having heard DSN give evidence, and being cross examined, I am confident that such an accusation would have had no prospect of succeeding, whatever Roper might have said."

Cases relating to section 17D

[235] I was referred to two decided cases, *M* v *DG's executor* and *JXJ*.

[236] In *M* v *DG's Executor* the case came before the sheriff by way of debate, rather than preliminary proof. She appointed a proof at large as she was not satisfied that there could be no fair hearing. As I have mentioned, the Sheriff Appeal Court recalled her interlocutor and allowed a preliminary proof (2021 SLT (Sh Ct) 87). Hearsay evidence of the deceased in the form of a police interview was available. While an account of that sort is not given on oath, and cannot be subjected to cross-examination, and may therefore be afforded less weight than testimony in court, it is evidence that is available to a defender and which provides a proper evidential basis on which to assert that conduct did not take place, and to cross-examine witnesses on that basis. It was against that background that the sheriff held that the fairness of the hearing in terms of section 17D(2) could not be determined in advance of the proof.

[237] The claim in *JXJ* had, as Chamberlain J explained at paragraph 5, three elements. The claim related to abuse at a school in Stirlingshire operated by a monastic order. A lay member of staff (McKinstry), at the school the claimant attended, had been convicted of sexually assaulting the claimant. The claimant alleged that the defendant was vicariously liable for those assaults. The claimant alleged that the defendant was liable for the acts and omissions of the headmaster, Brother Alphonsus, in exposing the claimant to the risk of abuse and failing to protect him from abuse. The claimant also sought reparation for assaults committed by named religious brothers (including Brother Alphonsus), and including assaults committed by them together with the lay member. The defendant accepted that the assaults to which the conviction related occurred, but did not accept that it was vicariously liable, and raised a limitation defence. It did not admit that any other assaults had taken place, or that the headmaster had breached any duty incumbent on him.

[238] The claimant sued in England, on the basis of the domicile of the defendant and the defendant accepted that the English court was the appropriate forum. The English court determined that it required to apply Scots law. It therefore came to consider the provisions of the 2017 Act. Parties jointly instructed Scottish senior counsel to provide an opinion on the Scots law of limitation. The approach of the courts of England and Wales to findings of fact in cases where limitation is in issue is set out at paragraph 38. In *JXJ* the court made preliminary findings on the reliability and cogency of the claimant's evidence.

[239] Chamberlain J expressed his conclusions as to the relevant law at paragraph 101, in the following way:

> "(a) In cases to which s. 17A of the 1973 Act applies, the disapplication of the triennium means that there is no time bar to be disapplied, no presumption that stale actions should not be brought and no onus on a claimant to demonstrate a good reason for delay in raising an action.

(b) A defender who relies on s. 17D(2) bears the burden of showing that 'it is not possible for a fair hearing to take place'.

(c) In assessing whether that test is met, the cases interpreting s. 19A will be relevant to the extent that the reasoning in those cases turned on whether it was possible for the defender to have a fair hearing. It is therefore likely to be helpful and instructive to compare the facts of the case with those in *M* v *O'Neill*, *SF* v *Quarriers and K* v *Marist Brothers*, in each of which the judge decided (among other things) that it was not possible for a fair hearing to take place.

(d) However, caution must be exercised in reasoning by analogy from other case law which turns on the application of the 'real possibility of significant prejudice' test enunciated by Lord Drummond Young in *B* v *Murray (No. 2)* and approved by Lord Hope in *AS* v *Poor Sisters of Nazareth*. The Scottish Parliament was aware of that test and chose not to adopt it for the purposes of s. 17D(2).

(e) In a case where the right of action accrued before the coming into force of the new provisions, s. 17D(3) applies if the court is satisfied of two things: first, that as a result of the retrospective operation of s. 17A, the defender can show that he 'would be substantially prejudiced' if the action were to proceed; second, that this prejudice outweighs the pursuer's interest in the action proceeding.

(f) The test required by the first limb of s. 17D(3) is more stringent than that in *B* v *Murray (No. 2)* and *AS* v *Poor Sisters of Nazareth* in two respects. First, it requires the defender to show that he would be substantially prejudiced, not just a 'real possibility' of that. Secondly, the prejudice has to be 'substantial', rather than merely 'significant'.

(g) The second limb of s. 17D(3) reflects the Scottish Parliament's view that there may be cases where the defender would suffer substantial prejudice, but the pursuer's interest is such that the action should proceed anyway. This means that it will no longer be appropriate to focus on prejudice to the defender as a factor likely to be determinative in most cases.

(h) In assessing the extent of the pursuer's interest, the seriousness of the abuse which the pursuer claims to have suffered and the claimed effects of that abuse will certainly be relevant. Read in context, however, the reference to the pursuer's 'interest' does not seem to me require consideration of his or her reasons for delay. A review of the legislative history shows that one of the aims of the new provisions was to relieve pursuers of the need to establish good reason for delay by disapplying the triennium. Against that background, it would in my judgment be wrong to read s. 17D(3)(b) as re-importing a requirement to justify delay as part of the balancing exercise required in any case where a defender can show that substantial prejudice would be caused."

Chamberlain J made a further point in relation to Australian jurisprudence, which I need not repeat. In the present case parties agreed that that jurisprudence did not cast light on the Scottish provisions and did not cite any of it. Chamberlain J then went on to consider whether the law could be applied separately in relation to each of the causes of action in the case before him, and concluded that it could. He allowed the first branch of the case to proceed. Certain assaults by McKinstry were the subject of convictions, and admissions. In relation to the second and third, however, he found that section 17D(2) applied. It is clear that the circumstance of the alleged wrongdoers' being dead was a very significant factor in his reaching that view.

Summary

[240] It will be apparent from my analysis of the legislation and consideration of the section 19A cases that I concur almost entirely with Chamberlain J's analysis in *JXJ*. I adopt it, save in the following respects. As to point (c) in his analysis I regard the case of *O'Neill* as rather less helpful than he does, because I consider that the reasoning in that case is very difficult to divorce from its statutory context, and the presumption that stale claims should not be brought. It is important also to remember that in none of the section 19A cases did the judge require to address whether a fair hearing was possible, and a degree of caution is therefore required in relation to observations to the effect that it was not. In relation to point (d) I would go further. The law now imposes a different test from that articulated by Lord Drummond Young and approved by Lord Hope in *AS*, and the section 19A cases provide no useful guidance in relation to what constitutes substantial prejudice.

[241] There is little to distinguish historical civil claims for child abuse from historical criminal prosecutions based on similar facts, so far as the possibility of a fair trial is

concerned, at least in respect of the court's capacity to assess the credibility and reliability of the evidence of witnesses who speak to such abuse.

[242] Whether the death of a wrongdoer will mean that a fair hearing is impossible, or mean that there is substantial prejudice to a defender, will depend on all the circumstances of the case. I am extremely cautious about proceeding on the basis that the strength or cogency of a pursuer's case can be such that the absence of evidence from someone whose alleged conduct is so central to the case simply could not affect the outcome. In the context of determining what will be a fair hearing, it is not good enough to say, ab ante, that a denial would make no difference. To do so leaves out of account information that the individual may be able to provide about particular aspects of the pursuer's case, which may cast doubt on the truthfulness or reliability of all or part of the allegations. It also leaves out of account the difficulty a defender faces if it has no proper basis in the evidence available to it positively to advance a defence that the abuse never happened, or cross-examine the pursuer on that basis.

[243] The apparent cogency of a pursuer's case may be of more assistance in determining whether or not a defender is being prejudiced substantially by requiring to answer after many years a case which is obviously very unlikely to succeed.

Application of law to facts

[244] I deal in each case with the factors on which the defender relied in maintaining that it was not possible for there to be a fair hearing and that he would be substantially prejudiced by the operation of the 2017 Act.

[245] In relation to both cases, I accept that there are there are some avenues of investigation that have not yet been exhausted so far as the possible identification and precognition of witnesses is concerned.

B's case

[246] The defender's submissions fall under the following broad headings (a) criticism of the quality of the evidence from witnesses advanced for the pursuer; (b) missing documentation; (c) missing witnesses; (d) in relation to allegations of physical abuse, the difficulty in establishing what went beyond acceptable corporal punishment at the time; (e) difficulties associated with establishing the causal effect of any wrongdoing that was established; and in relation to substantial prejudice, (f) the effects of changes in the law since the 1970s taken in conjunction with the defender's quite limited insurance cover; and (g) the availability of alternative remedies.

(a) Quality of the evidence from witnesses

[247] As senior counsel for the defender recognised, criticism of the quality and consistency of the evidence for the pursuer was double edged. It involved acknowledgement that the pursuer might face difficulties in proving his case, and that there were some respects in which the defenders could test the evidence by cross-examination. There were also respects in which the quality of the evidence was a matter for comment in submissions at a proof.

[248] The evidence produced for the pursuer as it appears from his affidavit and those of other former residents who speak to a period when AM was matron and NS was gardener at Lagarie, contains accounts that are, in some respects, consistent among the witnesses and which in others are not. That is not uncommon in any litigation. It is within judicial

knowledge that it can occur in criminal trials dealing with allegations of similar crimes. In both civil and criminal pleadings fact-finders have to direct themselves, or be directed, as to how to approach consistencies and inconsistencies of this sort.

[249] Senior counsel submitted that some aspects of the accounts involved unusual behaviour, to the extent of appearing inherently unlikely or implausible. Again, looking at the evidence as it appears in the affidavits, without the benefit of hearing from the witnesses in person, or hearing their evidence tested, while it was properly open to him to make that submission, it might equally be submitted that the events were events that an individual would be unlikely to invent. It is to be expected that at any proof on the merits counsel could, and would, make competing submissions as to how they are to be viewed. Some care is required before reaching any preliminary assessment that accounts of child abuse, whether sexual, physical or psychological are inherently unlikely. They are by their nature accounts of behaviour that deviates from the norm. The sexual abuse of children is inherently behaviour of a peculiar and unusual nature: *Adam* v *HM Advocate* [2020] HCJAC 5, paragraph 34. The material in B's case is not of such a character that I can conclude from reading the affidavits that the accounts either of physical or sexual abuse are inherently unlikely or implausible.

[250] The circumstance that witnesses may have spoken to each other about their allegations is something that can properly be tested in cross-examination.

[251] The accounts contain sufficient features in common as to indicate, at least on a preliminary assessment, based on the papers, that the pursuer's action is not obviously ill-founded. It is not obvious at this stage of the case that his claim will fail because he cannot prove the facts on which he relies. So far as AM is concerned, the accounts of inducing vomiting and of the use of cold baths are elements that recur in the accounts of

various witnesses. There are repeated references to sexual assaults by NS. There is support for B's account of running away, naked, from the home.

(b) Missing documents

[252] The onus is on the defender to identify what documents are missing, and why that renders a fair hearing impossible, or would give rise to substantial prejudice. There is no doubt that there are very few records available. There is no real prospect that the records of Lagarie will become available. Their whereabouts has not been known for many years, and the information available suggests they may well have been destroyed in a flood in the 1980s. Ms Warman's affidavit contains a detailed schedule of what I accept have been extensive attempts to locate the records, through inquiries made over a number of years with many different individuals and institutions.

[253] As far as B's school records are concerned, these are limited. There is a single entry from the register of Rhu Primary School, disclosing his date of admission and date of leaving. Otherwise, the earliest of them dates from May 1970, just before B left Lagarie, although the records do contain some references to B's behaviour when he had been at Lagarie.

[254] In relation to the allegations of sexual assault, it is unlikely that records would assist. There will be no record that indicates that such assaults did or did not take place. In relation to allegations of physical assault, there may have been some assistance to be had from punishment books, and from any code of practice regarding punishment. It is, however, unlikely that any punishment that went beyond accepted chastisement at the time would be recorded.

(c) Missing witnesses

[255] Both AM and NS had died before actions were raised in 2001. There can be no criticism of the defender for not having investigated matters with them. There is no record of any kind indicating what either of them would have said if confronted with the allegations that B now makes. There is no evidential basis on which the defender can advance the proposition that the abuse of which B complains did not happen.

[256] Senior counsel also submitted that the content of the social work records indicated that the absence of social worker witnesses was also of significance. There were matters in the records that might assist the defence of the case, but there was no-one to speak to the records. The first point was in relation to the complaint made by the pursuer's mother. The records provided a basis for thinking that the social workers thought she was dishonest. The content of the records here is, at best, double-edged so far as the defender is concerned. It supports what the pursuer says about his mother trying to have him [redacted] removed. It provides a basis for suggesting to the pursuer that his recollection may have been influenced by what he was told by others, or what he had become aware of from the records, and that he has no genuine or reliable recollection personally that his sister had bruising. The records to which the defender refers contain two separate references (from 28 August 1970 and 31 August 1970) to B's mother having raised concerns about bruising on his sister. The latter is in a record of a discussion with Mrs Bruce, a social worker. The records then disclose that Mrs Bruce visited the home in September. There is no record of her having raised the complaint made by B's mother. One possible reading of the records is that the social workers dismissed B's mother as a manipulative liar and on that basis were entirely uninterested in doing anything to investigate whether there was any basis for the

allegations she made. Any opinion offered by a witness that the pursuer's mother was dishonest would in any event be irrelevant evidence, and not admissible.

[257] The records also support B's account (and that of some of the other witnesses) that there was an occasion on which he left the home naked and had made his way along the main road towards Arrochar.

[258] I turn now to the submission that assessments disclosed in the social work records as to the pursuer's behaviour and mental capacity at the time had the potential to cast light on the credibility and reliability of his account of events.

[259] I accept that the defender would be entitled to ask the pursuer why he did not report the alleged abuse to any of the professionals involved in his care when he was a child. Insofar as the defender says that there might have been evidence about the pursuer's being "troubled", that others recorded that they thought him prone to dishonesty, or about his conduct in the home (other, perhaps, than where relevant to allegations of excessive chastisement following on his conduct), I do not consider that the evidence, if available, would be admissible.

[260] I raised that issue, framed as one relating to the collateral nature of the evidence, in the course of senior counsel's submissions. The circumstance that somebody has lied on an earlier occasion about something that is not the subject matter of the action is usually collateral and not admitted as evidence. Although *CJM (No 2)* v *HM Advocate* 2013 SLT 380 is a criminal case, the observations at paragraph 27 and following, about the lack of relevance of evidence that a complainer had told a lie in making an allegation other than that to which the proceedings related, seem to be directly in point. Evidence of either the good or bad general character of a person making an allegation is not normally admissible, because it is collateral. Anything short of medical evidence concerning illness or

abnormality of mind affecting the mind of a witness and reducing his ability to give reliable evidence will not be admissible: *CJM*, paragraph 37, citing *McKinlay* v *British Steel Corporation* 1988 SLT 810, at 813.

(d) Difficulty establishing what went beyond acceptable corporal punishment

[261] In relation to cases alleging sexual abuse, there can be no difficulty arising from differing expectations, across time, as to what is acceptable behaviour towards a child. The conduct alleged is criminal now and was criminal at the material time. The defender submitted that one factor militating against the possibility of a fair hearing, and indicating substantial prejudice, was the difficulty, where physical abuse was alleged, of determining what went beyond reasonable chastisement by reference to the standards at the relevant time. This difficulty is a factor to which Lords Ordinary adverted in some of the cases decided under section 19A: *B* v *Murray (No 2),* paragraph 22; *SF*, paragraph 163).

[262] In the first place, the approach taken in those cases was in the context of section 19A, where the law embodied a presumption that stale claims should not be brought, and defenders, generally, could expect not to face claims in which this difficulty arose. The law has changed, however, as I have already observed.

[263] Issues of historical physical abuse arise in criminal proceedings. Judges require to direct juries (or themselves, when sheriffs deal with such allegations in summary proceedings) as to how to approach reasonable chastisement in the context of historical allegations. The Jury Manual contains a suggested form of words for such a direction. The difficulty is one that can be dealt with by the fact-finder directing him or herself correctly in law. The onus to establish that anything that happened went beyond reasonable chastisement at the time is on the pursuer. With that in mind I am not persuaded that the

difficulty that arises in that connection is such as to preclude a fair hearing, or that it amounts to substantial prejudice.

(e) Establishing the causal effect of any wrongdoing

[264] I accept that the exercise of establishing what losses, if any, are attributable to actionable wrongdoing will be a complex one. A long time has passed between the alleged wrongdoing and the date at which damages will be assessed. The pursuer's childhood was disrupted by the fact of being in institutional care, quite apart from any harm that he may have sustained as a result of wrongdoing for which the defender is liable. The pursuer pleads that he suffers from complex post-traumatic stress disorder and has suffered from alcohol use disorder. His educational opportunities and attainment were negatively affected by "his deprivation and response to abuse". He has retired earlier than he otherwise would have done. He claims solatium, past and future loss of income, loss of employability and the cost of 30 psychological treatment sessions.

[265] The onus will be on him to establish that his losses are causally connected to the abuse which he says occurred. Although the exercise of examining causation of loss is one of the more difficult ones that the court might have to perform, the court is used to carrying out exercises of this sort and is equipped to do so. The defender will need to address this complexity. The defender has the potential for assistance in this regard, as does the pursuer, from appropriately qualified expert witnesses, whose opinions will no doubt be of some significance. It is not correct to say that there is no prejudice to the defender because the onus of proof is on the pursuer, but the pursuer will require to prove quite extensive claims, and that may well be quite a difficult task. It is relevant to take that into account in considering the extent of the prejudice to the defender: *Raggett*, paragraphs 23-26.

(f) Changes in the law/insurance cover; and

(g) Alternative remedies

[266] I am satisfied that the defender is substantially prejudiced by the operation of the provisions of the 2017 Act. The defender is exposed to liability which was not of a type or an extent that was envisaged when the defender made arrangements for insurance in the late 1960s and early 1970s. The law relating to vicarious liability for the criminal acts of an employee has changed. The potential effect of judicial interest is, parties broadly agreed, to double the value of claims.

[267] I accept that the operation of those provisions is not responsible for the prejudice associated with the death of AM, looked at in isolation, as the claim, if brought timeously under the previous legislation, might still have been brought after her death. The same cannot, however, be said in relation to NS.

[268] The pursuers in each of these two cases have undertaken to "cap" their claims at the figure of £300,000. The defenders have identified a sum of £775,000, which they acknowledge can be realised from investments, to deal with uninsured elements of 18 claims. It is shown as a liability in their balance sheet. The position as to what liabilities insurers will meet is not entirely clear from Ms Warman's affidavit. No evidence or legal submission has been offered as to what the defenders say the insurers should be liable to pay in respect of any given claim, in terms of the contract of insurance. Ms Warman, for what it is worth, seemed to envisage that cover would be exhausted in B's case if the claim exceeded £300,000. While I accept that she offers that opinion genuinely, I am not satisfied on the basis of her evidence that that will necessarily be the case. Her opinion that cover would be exhausted in that way in B's case does not appear consistent with the view that she also offered, to the

effect that the limit of cover was per abuser, per year. In B's case there are two alleged abusers.

[269] Even if Ms Warman were correct, and liability in B's case would be exhausted once a limit of £300,000 was reached, the prejudice would be mitigated by the pursuer's undertaking to cap the sum sued for at £300,000. The defender also has the potential of realising investments worth £775,000 to meet uninsured elements of the claim.

[270] While I am told that there are other claims against the defenders, I am dealing here with B's case. The language of the statute directs me to consider whether the defender would be substantially prejudiced if "the action" - that is the action which I am presently considering - were to proceed. The only other claim about which I have information in this process is C's which relates to a different period so far as insurance cover is concerned, although it also potentially places demands on the defender's "reserve" of £775,000.

[271] The pursuer has an obvious and significant interest in the action proceeding. He says he has been the victim of physical and sexual abuse in childhood, and his claim is that this has had enduring effects on him, with financial consequences.

[272] I accept that the availability of an alternative remedy is a relevant matter when considering the pursuer's interest in the action proceeding. Lagarie House is amongst the institutions listed in the Scottish Child Abuse Inquiry's investigations. There is the potential for the inquiry to make findings as to whether children at Lagarie suffered sexual and physical abuse, and to consider evidence from B. That would not provide any financial remedy, but could provide a means for B and other former residents to be heard and considered. Counsel also referred to the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill. The legislation now enacted contains provisions for redress payments, either at a fixed rate of £10,000 or as an individually assessed payment which cannot

exceed £100,000. The applicant would require to abandon any civil proceedings and waive any right to bring civil proceedings against any body which is a contributor to the scheme. While these are "remedies" which are or may become available to the pursuer, neither provides a remedy equivalent to that which he seeks in this court, which has the power to award damages in excess of £100,000 if that is necessary to compensate him for loss, injury and damage which he can prove was caused by the wrongful acts of which he complains.

Conclusion - B's case

[273] In summary, I am not persuaded that the matters raised by the defender which I have set out at (a), (b), (d) and (e) support the contention that it will be impossible to have a fair hearing. So far as point (c) - missing witnesses - is concerned, the deaths of the alleged wrongdoers AM and NS is a very significant matter. This is not a case like *Watchtower Bible and Tract Society, DSN*, or the first element of the claim in *JXJ* in which either of the alleged wrongdoers was convicted of analogous wrongdoing (whether in relation to the pursuer or anyone else). It is not, like *Raggett*, a case in which the deceased wrongdoer had written a compromising letter. I recognise that there are number of witnesses who describe similar abuse, both physical and sexual, and that the availability of corroboration may mitigate to some extent the risk of unfairness. I am not, however, prepared to hold that the evidence of NS or AM could make no difference. There is no account available from either of them. There is no evidence deriving from either of them which could inform the preparation of the defender's case, whether that be evidence of admission, denial, or partial admission. There is no basis on which the defender can properly assert that the alleged abuse did not occur. The defender cannot be criticised for failing to gather evidence from NS or AM. Both were dead before any claim was intimated. More generally, so far as investigations in the 2000s

are concerned, there is no real basis on which to criticise the defender for not having carried out more full investigations, given that the claims were abandoned and there was no reason at that time to think they might be revived.

[274] Some former members of staff may yet be traced and be willing to provide statements. The possibility that some evidence may yet become available from them does not remedy the fundamental difficulty caused by the absence of evidence from AM and NS.

[275] It is difficult to express a view on the application of section 17D(3) having reached the conclusion that it will not be possible for a fair hearing to take place. That means that the defender has satisfied a test which is a more rigorous one than that of substantial prejudice. Having reached that view, it is difficult then to characterise the factors that support it as a type of substantial prejudice that is capable of being outweighed by other considerations.

[276] Had I not been satisfied as to the issue raised under section 17D(2), I would have taken into account the following. Prejudice to the defender in this case is mitigated by the pursuer's undertaking not to increase the sum sued for above £300,000. The pursuer has the obvious interest in the action proceeding which I have already described. The potential alternative sources of redress identified by the defender are not immediately available, and are not equivalent to an action for damages in this court.

C's case

[277] The defender's submissions were generally structured in a similar way to those advanced in B's case. They made additional submissions based on the grounds on which C sought to establish liability.

(a) Quality of the evidence from witnesses

[278] As in B's case there are features of the available evidence that suggest that it would be possible to test the evidence of C and the other witnesses who resided in Lagarie at around the same time. There are four statements given to police, which can be examined for consistency or otherwise with the evidence she now offers. They contain reference to some discussion among former residents.

[279] The various criticisms made by the defender of the evidence of the potential witnesses again are largely a submission that there are areas of contradiction and inconsistency between witnesses, and within the evidence of individual witnesses. A number of the witnesses, unlike C, speak to sexual abuse perpetrated directly by WB. It is not clear that that evidence is relevant evidence in C's case.

[280] The defender's submission about the account given by C regarding the incident involving the sailors is in a different category. Her account is not one which purports to be of a clear memory of the event. [redacted] On the face of the affidavit, the evidence is not based on a memory of an incident or incidents, as all the other accounts from former residents bear to be.

[281] I do not accept the defender's submission that descriptions of unusual or extreme physical abuse are so extreme as to be unlikely or implausible.

(b) Missing records

[282] As in B's case, I accept that the defender's records are missing. Some social work records are available, and are reasonably detailed. They do not, however, cover the period from 1974 to 1978. It is, for the reasons I have already given, unlikely that the defender's

records or the social work records would either disclose that the abuse the alleged by C had occurred, or demonstrate that it did not.

[283] I do not regard the availability of the decision of the Industrial Tribunal in the case concerning Mr and Mrs Clark as of much relevance, other than as a resource naming potential witnesses. The decision of the Industrial Tribunal was to award compensation to both Mr and Mrs Clark, who had brought claims for unfair dismissal. Among those who gave evidence at the hearing was MB. It is not strictly correct to say that it contains detail of "incidents that took place". There was a disputed allegation that Mr Clark used excessive force on an occasion by way of corporal punishment, as to which the tribunal was not satisfied. There is a finding that the Clarks did not receive training as to discipline and corporal punishment. There is information about the children receiving a questionnaire inviting their views about staff members, and information that children made complaints about expressions used by Mr Clark. The tribunal found that allegations that the Clarks were unsuitable were unsubstantiated. It was not satisfied that they were subject to a probationary period. It found that the defender had acted in a procedurally unfair manner. It does not cast light on the allegations in C's case.

(c) Missing witnesses

[284] WB died before any claims were intimated. MB, however, was spoken to regarding earlier claims. C had not made a claim at that time. The onus is on the defender to demonstrate that a fair trial is not possible. It may be that the information deriving from MB is not in a form such that it would be admissible evidence. If that is so, I would have expected the defender to explain that. If it is in a form which would constitute admissible hearsay, I would expect the defender to inform the court more fully of its content with a

view to demonstrating that its content could not assist in providing a fair trial in this case. The information about the form and content of the information from MB was very limited indeed. The information appears to have been gathered in contemplation of litigation, but a defender may have to disclose information of that sort in order to demonstrate that a fair hearing will not be possible. There is no explanation as to why there is no statement by Dr Abernethy, who might have spoken to what MB said.

[285] A died on 25 September 2018, before this action was raised. He had been spoken to in the context of the earlier claims, but at that time there was no accusation that he had assaulted C.

(d) Difficulty establishing what went beyond acceptable corporal punishment

(e) Establishing the causal effect of any wrongdoing

(f) Changes in the law/insurance cover

(g) Alternative remedies

[286] I have nothing to add to the analysis in relation to these matters in B's case, save that in C's case, if the action had been raised timeously under the previous legislation both MB and WB would have been alive at the time.

(h) The grounds of action in C's case

[287] It is not easy to discern from the pleadings as they currently stand how C hopes to establish liability on the part of the defender for assaults perpetrated by A, R and S. There is no clear indication in the pleadings how WB and MB enabled this alleged abuse, or what they should have done to prevent it. This may not, of itself, mean that a fair hearing is impossible. If the pursuer cannot establish liability on the basis of the facts proved by her,

then she will fail. It is however, correct to say that but for the operation of the 2017 provisions, the defender would not require to answer this claim.

[288] So far as the allegations of abuse by sailors are concerned, the pursuer's case is that WB brought the sailors to the home, and arranged for them to have access to girls including the pursuer. She pleads that [redacted]. It is possible to discern potential grounds of action, in that WB should not have allowed the sailors unsupervised contact with the girls (subject to evidence about contemporary standards regarding such matters). If he provided access to the girls in the knowledge and intention that they would engage in sexual activity with them, that would constitute a crime.

[289] The evidential basis for this part of the claim is, as I have already indicated, of doubtful quality.

Conclusion

[290] I am satisfied that it will not be possible for there to be a fair hearing in this case. The absence of evidence from MB and WB is a fundamental barrier to a fair hearing. Although I have commented on the limited character of the evidence as to the available information deriving from MB, I bear in mind that C did not make a claim in the early 2000s. Had her claim only been of physical abuse, that matter would have been of more significance. As it is, it is impossible for the defender to obtain the response of the two individuals who managed Lagarie at the material time, and whose acts and omissions are the subject of the action, to the allegations made by C in the present action.

[291] Although the risk of unfairness is mitigated by the availability of some corroboration so far as the claims of physical abuse are concerned, C's claim about abuse at the hands of

sailors and other residents is not directly comparable with the claims made by others about abuse by WB personally. The only possible exception, at least so far as the claim of abuse by sailors is concerned, is M's claim that WB and MB facilitated abuse of her by others.

[292] In C's case, I would have regarded the following as relevant to the exercise required by section 17D(3). I have already identified matters which give rise to substantial prejudice in B's case, and they apply mutatis mutandis to Cs' case. The mitigation of prejudice by the undertaking to "cap" the sum sued for is a relevant factor in this case also. There is, however, additional prejudice to the defender in C's case in requiring to answer claims in respect of which it is very unclear on what basis the defender is said to be liable (the sexual assaults by A, R and S), and in respect of which the evidence does not appear to be of good quality (the sexual assaults by sailors). Those are matters that indicate that certain aspects of the claim may have relatively poor prospects of success. That is a relevant matter in assessing the pursuer's interest in the action proceeding. I would therefore have been satisfied that, having regard to the pursuer's interest in the action proceeding, the prejudice to the defender was such that the action should not proceed.

Disposal

[293] I therefore dismiss both actions.