SHERIFFDOM OF LOTHIAN AND BORDERS

IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2023] SC EDIN 27

PIC-PG32-21

JUDGMENT OF SHERIFF G.S. PRIMROSE K.C.

in the cause

GD

Pursuer

against

SISTERS OF NAZARETH

Defender

Pursuer: Langlands, Advocate; Jones Whyte LLP
Defender: Brown, Advocate, Clyde & Co LLP

Edinburgh 19 June 2023

The Sheriff, having resumed consideration of the Preliminary Proof, finds the following facts admitted or proved:

Findings in fact

[1] The pursuer is GD. The pursuer was born in February 1962. She has three sisters and two brothers. One of her sisters, SM, is two years younger than her.

[2] The defender is The Sisters of Nazareth, an international Roman Catholic Congregation.

[3] The defender was responsible for running a care home known as Nazareth House in Bonnyrigg, Midlothian in the 1970s.

[4] The Home was known as Nazareth House, Lasswade.

[5] Together with her siblings, the pursuer was a resident at Nazareth House for a period of approximately three weeks between 13 July 1973 and 4 August 1973. She was eleven years of age at that time.

[6] That during 1973/1974 the children cared for at Nazareth House were organised into separate houses or groups. There were five groups in total, with three groups being cared for in a building known as 'the main house' and two groups being accommodated in a separate building known as 'Hollycot'.

[7] The groups of children could comprise of a mix of boys and girls.

[8] The children would be kept in family groups.

[9] That each group of children was under the supervision and control of one of the defender's Sisters. The groups were looked after separately. The Sisters looked after their individual groups, assisted by lay staff. The Sisters and lay staff were not generally involved in the care of other groups.

[10] The groups were cared for separately, but mixed for leisure and schooling.

[11] Sister Y, named by the pursuer as one of her abusers, was in charge of one of the two groups of children cared for in the Hollycot building.

[12] There are no childhood social work records pertaining to the pursuer held by either Midlothian Council or City of Edinburgh Council.

[13] The visitors' book for the 'main house' at Nazareth House did not show any visiting priests between 13 July and 4 August 1973.

[14] Of the eighteen Sisters present at Lasswade House during 1973, twelve were present during the time of the pursuer's stay between 13 July and 4 August. Of those twelve, nine are dead and three survive.

[15] Sister Y is alive and presently capable of giving evidence.

[16] Of the other two Sisters named in the pursuer's pleadings as having witnessed the sexual abuse to which she was subjected, one is deceased and the other cannot be identified.

[17] It has not been possible for the defender to identify the male priest or other adult male whom the pursuer avers perpetrated the sexual abuse against her.

Findings in fact and law

[18] The defender has not satisfied the court that it is not possible for a fair hearing to take place in this action.

[19] The defender has not satisfied the court that it will be substantially prejudiced were the action to proceed.

Finds in Law

[20] That the defender's averments in Answer 6 sub-paragraph (xv) regarding the difficulties in reconstructing social attitudes of the time are irrelevant in so far as they relate to the allegations of sexual abuse pled by the pursuer.

[21] Repels the defender's first and second pleas-in-law.

[22] Sustains the pursuer's sixth and seventh pleas-in-law.

[23] Sustains the pursuer's fourth and fifth pleas-in-law but only in so far as they relate to the defender's averments regarding the difficulties of reconstructing the social attitudes of the time in respect of the allegations of sexual abuse made by the pursuer.

NOTE

Introduction

[24] In this action the pursuer ("GD"), whose date of birth is 11 February 1962, seeks damages by way of *solatium* only from the defender, the Sisters of Nazareth. Sisters of Nazareth is an international Roman Catholic congregation which was responsible for running a care home known as Nazareth House in Bonnyrigg, Midlothian in the 1970s. The home was known as "Nazareth House, Lasswade".

[25] The pursuer seeks damages in respect of alleged acts of abuse which she suffered whilst a resident in Nazareth House for a period of around three weeks between approximately 13 July 1973 and 4 August 1973. During that period, she resided at the facility with her two sisters and two brothers. The facility has since closed.

[26] The case called before me for preliminary proof on the issue of limitation. No oral evidence was led, the proof proceeding by way of submissions only, all evidence having a bearing on the matter being contained within affidavits and statements lodged in process or within the relevant productions, the contents of which had been agreed between the parties within an extensive Joint Minute.

[27] Although the alleged abuse occurred in 1973, almost fifty years ago, the pursuer is able to bring the current action as a result of reforms to the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act") made by the Limitation (Childhood Abuse) (Scotland) Act 2017 ("the 2017 Act").

[28] The 2017 Act amends the 1973 Act by inserting new sections 17A-D therein. These sections remove the limitation period otherwise contained within section 17 of the 1973 Act in defined circumstances (section 17A(1)). These circumstances include where the action seeks damages for personal injuries arising out of childhood abuse. By virtue of section 17B,

Section 17A has retrospective effect.

[29] Section 17A provides:

"**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 of 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"

Section 17D of the 1973 Act as amended by the 2017 Act contains two qualifications in favour of defenders. These are as follows:

"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 subsection (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) section 17C, the defender would be substantially prejudiced were the action to proceed, and
(b) Having 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."

Motions for the parties

[30] The defender moved the court to sustain its first plea in law to the effect that a fair

hearing was not possible, failing which their second plea in law, that there existed substantial prejudice to the defenders such that the action should not be allowed to proceed, and to dismiss the action accordingly. The parties having agreed that the onus was on the defender to establish to the satisfaction of the court that either section 17D(2) or 17D(3) applied, the defender led at proof.

[31] The pursuer invited the court to repel the defender's first, second, third and fourth pleas in law, and to sustain the pursuer's fourth to seventh pleas in law, excluding all of the averments in relation the defender not being able to obtain a fair trial and being substantially prejudiced from probation.

The Allegations of Abuse

Sexual Abuse

[32] In Article 4 of condescendence the pursuer makes averments in respect of the sexual abuse which she alleges to have suffered. These allegations, which are denied, are of the utmost severity. I have, accordingly, omitted the names of those accused of the abuse:

> "She was abused at Nazareth House. She was sexually abused by a Priest or other male adult at the home. This abuse took place within the showers. When the pursuer was in the showers, a male adult or a Priest washed the pursuer, fondled her private parts and digitally penetrated her vagina and anus. The abuse in the showers took place in the evening. The pursuer and a few other girls were taken to a communal shower by two or three of the defender's Sisters. The Sisters the pursuer remembers being present on various occasions were Sister W, Sister X, and Sister Y. Sister Y was present on most occasions. The Sisters remained in or near the showers whilst the abuse took place. A male Priest or adult was permitted access to the showers. On at least one occasion, Sister Y directed a Priest or male adult to wash the pursuer. The Priest or adult then sexually assaulted the pursuer and the other girls one at a time. He inserted his fingers into the pursuer's vagina. He inserted his fingers into her anus. This happened on approximately four or five separate occasions. The defender's Sisters named above knew or ought to have known that the Pursuer was being sexually abused within the showers."

Physical abuse

[33] The pursuer continues in Article 4 of condescendence to make averments regarding the non-sexual abuse to which she alleges she was subjected. She pleads:

> "The pursuer was also frequently assaulted by the Sisters. She was most often assaulted by Sister Y. Sister Y was particularly violent. She would smack the pursuer across her face and body. These assaults occurred for seemingly no reason. On several occasions, Sister Y rubbed the pursuer's face in her dirty underwear."

Losses claimed

[34] In Article 5 of condescendence, the pursuer makes averments about the loss, injury and damage she alleges to have sustained as a consequence of the abuse referred to above. She pleads *inter alia*:

> "The sexual and physical abuse amounted to deliberate assaults upon her. They were a violation of her bodily integrity. They caused her physical and emotional pain. She has suffered from post-traumatic symptoms including nightmares and recurrent intrusive memories or flashbacks of the abuse. She is embarrassed and ashamed by the abuse she has suffered. She claims for solatium."

The Basis of Liability

[35] The pursuer seeks to hold the defender both directly and vicariously liable for the abuse. She avers that direct liability arises from the defender's failure to have proper systems in place, such that it was possible for the abuser to have access to the showers and perpetrate the acts of abuse. Vicarious liability arises from the fact that the three named Sisters knowingly permitted the sexual abuse to happen and did nothing to prevent it, and in respect of the assaults allegedly perpetrated by Sister Y.

[36] The pursuer accepts that during the course of the action her pleadings have changed, the case initially having been drafted by her solicitors on what is described in the

written submissions presented on her behalf as "general" and "broad" basis. The pleadings were said to have been further adjusted by counsel following his instruction, such adjustment being on the basis of further information provided by the pursuer.

[37] The pursuer submitted that following the decision in *B* v *The Congregation* of *the Sisters of Nazareth* [2022] CSOH 8, advice was given to the pursuer that she should restrict her case to allegations where she could name her abusers. Certain allegations were deleted at that point and the case on damages was restricted on the basis that the pursuer could not link her current medical condition with the alleged abuse in 1973.

[38] These factors were said to explain why there had been a change in the averments as they first appeared in the Initial Writ and how they now appear in the Record.

The Defender's Response

[39] The defender admits that from approximately 13 July 1973 to 4 August 1973, the pursuer was in the care of the defender at Nazareth House along with her two sisters and two brothers. The defender avers that during 1973/1974 the children cared for at Nazareth House were organised into separate houses or groups and that there were five separate groups of children. Three were grouped in the main house and two were accommodated in a separate building, known as Hollycot. The groups were not separated by gender, and each had their own areas including dining, bedrooms and bathrooms. Each house or group had a housemaster and lay staff.

[40] The defender avers that it holds limited records pertaining to the pursuer's time at Nazareth House. Such records as are available are said to contain no detailed contemporaneous information regarding the pursuer's childhood. These records show that the pursuer and her siblings were taken into care because their parents were "in desertion"

and that they were under the care of Midlothian Social Work Department.

[41] The defender further avers:

(i) that it does not know which group the pursuer was in, nor what group her siblings were placed in;

(ii) that it is a religious order of nuns, and that priests were not members of their order;

(iii) that its visitors' book for 13 July 1973 to 4 August 1973 does not include details of any visiting priests;

(iv) that it has been unable to identify any male members of staff who worked with children in 1973;

(v) that the available records indicate that the pursuer was discharged back into the care of her family on 4 August 1973, her father having signed a discharge form stating that she had been received back into his care in a perfect state of health and cleanliness.

[42] The defender further calls upon the pursuer to aver the identities of those whom she alleges abused her. The defender pleads that it is unaware of any criminal investigations in respect of her allegations, that she has given numerous differing accounts of that abuse, and that her allegations have evolved during the course of the present action. It is further averred that the pursuer's allegations of abuse are in some respects implausible, in particular regarding the involvement of nuns in sexual abuse.

[43] The defender pleads that the action ought not to proceed in terms of section 17D of the 1973 Act (as amended) because it is not possible for a fair hearing to take place in terms of section 17D(2). In the alternative it is averred that the defender would be substantially prejudiced were the action to proceed and, having regard to the prejudice to the pursuer in

the action not proceeding, the prejudice to the defender is such that the action should not proceed in terms of section 17D(3).

The Interpretation of the Legislation

[44] It was a matter of agreement between the parties that there were two stages to the analysis required by s17D. The first stage is for the court to consider whether, under s 17D(2), a fair hearing is possible. The onus of establishing that a fair hearing is not possible is on the defender: see *B* v *Sailors' Society* 2021 SLT 1070. If the defender establishes that it is not possible for a fair hearing to take place, that is the end of the analysis, and the court may not allow the action to proceed.

[45] If the court is not satisfied by the defender under s 17D(2) that a fair hearing is not possible, then it requires to undertake the second stage of the exercise under s 17D(3). The first is to consider whether the defender would be substantially prejudiced were the action to proceed. Again, as with the issue of the possibility of a fair hearing, the onus is on the defender to establish substantial prejudice: see *AB* v *The English Province of the Congregation of Christian Brothers* [2022] SC Edin 7 at 224. If the defender does not do so, there is no need to undertake the second limb of the analysis.

[46] If the defender does establish substantial prejudice the second limb of the analysis under s17D(3) is to consider, having regard to the pursuer's interests in the action proceeding, whether the court is satisfied that the prejudice is such that the action should not proceed. This is accordingly an exercise in balancing competing considerations and there is no onus on either party at this stage. The balancing exercise is a matter for judicial determination having regard to all relevant factors: see *A* v *XY Limited* 2021 SLT p 399 per Lord Woolman at paragraph [39].

Assessment of the Evidence

[47] The parties were also in agreement as to the correct approach to be adopted by the court in assessing the facts in the context of a preliminary proof such as this.

[48] Essentially, subject to the qualification raised by the pursuer's counsel, to which I refer below, both parties agreed that the correct approach to take was to follow the analysis outlined by Lord Harrower in the unpublished Note appended to his interlocutor of 18th June 2020 in terms of which his lordship allowed a preliminary proof in *B* v *Sailors' Society*. The relevant part of Lord Harrower's conclusion was set out in the defender's written submission, and is as follows:

> "It seems to me there is an obvious tension between taking the pursuer's averments *pro veritate* on the one hand, and, on the other, being unable to reach any "concluded view" of the credibility and reliability of the pursuer's evidence in support of these averments. The tension was neatly expressed by Lord Justice Bingham, in the context of English s33 preliminary hearings dealt with 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 plantiff 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"* (*Stubbings* v *Webb* CA, 1992 QB 197, at 202H-203A, emphasis added).
>
> It may be doubtful whether it is appropriate to take the pursuer's pleadings *pro veritate* when, as Lord Bingham said, they cannot be assumed to be true at the preliminary stage, and the best that can be done is reach such provisional inferences as seem fair. In any event, I would also doubt whether it is now appropriate to confine the assessment of the nature and prospects of the pursuer's case, to the extent that it is relevant to do so, to the abbreviated pleadings now adopted in Scottish personal injury actions. As I explain below, however, it does not follow that oral evidence from the pursuer will be required, since it is open to the pursuer, and it may be more appropriate, for his evidence to be before the court, at the preliminary stage, by way of sworn affidavit or witness statement."

[49] Counsel for the pursuer broadly agreed with this approach, although he also submitted that the court should not assume from the available written material in this case

that the pursuer will not establish her case, because at the stage of a preliminary proof proceeding on affidavits and agreed productions, nothing has been tested. He reminded the court that the question at issue was not whether the pursuer will establish her case, but whether the defender can obtain a fair trial and whether they are substantially prejudiced.

[50] Counsel for the defender submitted that in due course he would invite the court to reach firm conclusions on the evidence. He submitted that there is clear and cogent evidence about which Sisters were present in 1973; and there is agreed evidence about which Sisters have died in the intervening period. There is also evidence of a careful, thorough and comprehensive investigation, and of the limits of what is realistically possible in that regard.

[51] Counsel also indicated that he would be inviting the court to conclude that there are serious doubts about the cogency of the pursuer's account of events. Whilst, in light of the approach which the defender invited the court to take to the evidence generally, it would not be appropriate for the court to reach definite conclusions on the reliability of the pursuer's account without there having been cross-examination. It was, nonetheless, counsel submitted, open to the court to notice obvious and very significant areas of concern, and to reach at least a provisional view on the cogency of the pursuer's case, since this was a factor in any balancing exercise required.

The Policy of the Legislation

[52] Again, the parties were in broad agreement as to the policy objectives behind the legislation introducing the new sections 17A – D into the 1973 Act, which were to remove claims arising from childhood abuse from the limitation regime which would otherwise

apply under s. 17 of the 1973 Act and further to remove the onus from the pursuers of defeating limitation whilst at the same time relieving them of the unpleasant task of explaining why the action had not been raised earlier with reference to the silencing effect of abuse. At the same time the legislation protected defenders who could demonstrate that they could not obtain a fair hearing and allowed the court to strike a fair balance between the competing interests of the parties in cases where defenders could demonstrate that they would be substantially prejudiced by the retrospective effects of the legislation.

[53] Under reference to the observations of Lord Woolman on s 17D(3) in the case of *X* v *XY Ltd*, counsel for the defenders submitted that the 2017 Act introduced "a new line of jurisprudence" and that there was thus no need to engage in what his lordship had called "an arid discussion" about whether the phrase "substantially prejudiced" in s17D(3) was synonymous with the phrase "significant prejudice" used by Lord Drummond Young in *B* v *Murray* (No. 2) 2005 SLT 982. Counsel for the defender submitted that it was evident that at least part of the rationale for the introduction of the 2017 Act was the recognition that Lord Drummond Young's "real possibility of significant prejudice" test, subsequently endorsed by the House of Lords (reported as *AS* v *Poor Sisters of Nazareth* 2008 SC (HL) 146) in combination with the onus placed on the pursuer, made it unduly difficult to pursue childhood abuse cases.

Submissions for the Defender

[54] Against the foregoing background, counsel for the defender went onto address the principles which governed whether it would be possible for a fair hearing to take place under reference to the facts of this case.

[55] Counsel began by recognising that an assessment of whether a fair hearing will be

possible in any case would inevitably be fact sensitive.

[56] It was submitted that in the present case the pursuer was only in the care of the defender for twenty-two days in July and August 1973. Her initial allegation, made by way of a letter sent in December 2018, was of non-sexual abuse, more than forty-five years after the alleged abuse. By further letters in May and June 2019, the pursuer added further allegations of sexual abuse by unidentified males, possibly priests. The preliminary proof was taking place forty-nine years after the alleged events and realistically any proof on the merits would be at least fifty years after those events. The pursuer was eleven years old at the time of the material events and the alleged perpetrators were unidentified. It was further submitted that the defender had been unable to trace any witnesses who remembered the pursuer, which was not surprising given the extensive passage of time and the short period for which the pursuer was in the defender's care.

[57] Counsel referred to the fact that the defender's task in investigating and meeting the pursuer's claims was made all the more difficult by the absence of records. A specification seeking relevant documents in the hands of Midlothian Council had not resulted in any recoveries and the only records the defender had been able to obtain of any significance were from Doncaster Council, the pursuer having spent some of her childhood in Doncaster. Although the defender did not have the Midlothian Council records, a social work report into the family had found its way into the Doncaster records. This narrated the circumstances in which the pursuer came to be resident at Nazareth House, Lasswade, and confirmed the dates of her residence there but gave no other detail on the circumstances of her stay.

[58] Against this background, counsel for the defender went on to refer to three

authorities which he submitted provided useful guidance to the court in considering whether a fair hearing was possible in any given set of circumstances. Whilst mindful that the 2017 Act represented "a new line of jurisprudence" for the reasons explained by Lord Woolman in *A* v *XY Limited*, and thus that it was not appropriate to extrapolate generally from case law on the 1973 Act as it stood before the amendments to it made by the 2017 Act, Mr Brown submitted that, nonetheless, some of that case law was still relevant. This was because some of that case law considered the question of whether, in any given set of circumstances, a fair hearing was possible, and there were three decisions to that effect concerning allegations of historic abuse.

[59] In the first of those *M* v *O'Neill* 2006 SLT 823 the pursuer was resident in a children's home as a young child between 1966 and 1970. The action was raised in 2000. By the date of the preliminary proof, at which oral evidence was led, many of the material witnesses were dead and documents had been lost. Lord Glennie declined to exercise his discretion in favour of the pursuer, holding that "it would not 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."

[60] Under reference to that decision counsel for the defender reminded the court that in this case the defender suffered from a lack of objective documentation relative to the day to day running of the home and as to which personnel had dealt with what tasks, and that the loss of that general body of evidence was inevitably prejudicial.

[61] Next, reference was made to the case of *SF* v *Quarriers* 2016 SCLR 112, in which the pursuer alleged abuse whilst resident in a children's home between 1965 and 1971. The action was raised in December 2004. The alleged abuser was dead, and no claim had been intimated prior to her death. Lord Bannatyne held (at paragraph [149]) 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……it really is impossible for the defender to have a fair trial."

[62] Counsel accepted that the loss of the evidence of the single person accused of abuse in that case was graver than in the Poor Sisters case, where some of the alleged abusers were still alive, but noted that the court had declined to exercise its discretion in favour of the pursuer when it was to be denied the opportunity of hearing the most important witness.

[63] Finally, in this respect, reference was made to *K* v *Marist Brothers* [2016] CSOH 54 in which the pursuer alleged that he had been abused as a young child whilst at a boarding school between 1962 and 1964 or 1965. The school had closed in 1982 and the alleged abuser had died in 1999. No claim had been intimated prior to his death. Only very limited records survived. Lady Wolffe followed Lord Bannatyne *in SF* v *Quarriers*. She observed that "in the absence of knowing [the alleged abuser's] position, the defender could do no more than put the pursuer to his proof. They could not lead a positive case if they had no basis to do so." The conclusion was that "In all the circumstances no fair trial was possible".

[64] Counsel recognised that the primary ground of Lady Wolffe's decision was prescription rather than limitation, and so her observations on whether a fair trial was possible, which were made in the context of her consideration of limitation, might on one view be characterised as *obiter*. However, Mr Brown argued, the pursuer then reclaimed, and the decision was refused by the Second Division of the Inner House: *K* v *Marist Brothers* 2017 SC

258. The Second Division declined to deal with the prescription issue on the basis that

unless Lady Wolffe's conclusion on limitation was also to be reversed, the prescription point was academic. The Second Division concluded that Lady Wolffe had "reached the only conclusion that was reasonably open to her" on the limitation issue (Opinion of the court, delivered by Lady Dorrian at paragraph [8]). The Second Division's conclusions were the sole basis for the decision so, it was submitted, even if Lady Wolffe's observations were strictly to be classed as *obiter*, the Inner House's endorsement of them cannot be. The *ratio* of the Second Division's decision is that Lady Wolffe was correct to hold that no fair trial was possible and indeed that it was "the only conclusion open to her".

[65] The authorities to which he had referred demonstrated that in appropriate cases the factors relied upon by the defenders in those decisions could found the conclusion that a fair trial was not possible.

[66] Counsel for the defender went on to submit that, whilst he recognised that whether or not a fair trial was possible in any given case was fact sensitive, a consistent theme had developed as to the circumstances in which the court would find that a fair trial was not possible. This was illustrated by three decisions on section 17, as amended.

[67] The first of these was an English case which considered whether a fair hearing was possible within the meaning of s 17D(2), *JXY* v *The de la Salle Brothers* [2020] EWHC 1914 QB. In that case, the claimant had been a pupil at a list D school in Stirlingshire run by the defendants between 1972 and 1974. He alleged sexual assault by an employee of the defendants. The sexual assaults were not disputed, although vicarious liability was denied, and causation and quantum were disputed. There was a criminal conviction from 2003. The claimant also alleged negligence on the part of the headmaster by exposing him to the abuse or failing to protect him from it. That claim was contested. He also alleged non-sexual abuse by various de la Salle brothers who had taught at the school. There was no

conviction in respect of those assaults, which were not admitted.

[68] Chamberlain J. held that insofar as founded upon the sexual assault for which there was a conviction, the defendants had failed to establish that it was not possible to have a fair hearing and nor had they established substantial prejudice. Since the fact of the assault was admitted, the issues of vicarious liability, causation and quantification were much narrower (see paragraph 106). A different view was taken of the other two claims. In respect of both of them it was held that the passage of time and the death of key witnesses meant that a fair hearing was not possible. *SF* v *Quarriers* and *K* v . *Marist Brothers* were followed. Chamberlain J. went on to hold that if he had not found for the defendants on s17D(2), he would have done so on s17D(3) (see paragraphs 107-114).

[69] Counsel for the defender in the present case submitted that the view reached by Chamberlain J. that it was permissible to allow the claim to proceed in part whilst refusing to allow other aspects of it to proceed was founded on an agreement between counsel that this was a course open to him. Mr Brown submitted that the correctness of that view was at least open to question, a line of argument he would go on to develop. Based as it was on a concession, he submitted that it did not form part of the *ratio* of the decision. The reasoning on whether or not a fair hearing was possible, and whether or not there was significant prejudice, is unaffected by the decision to treat the three identified aspects of the claim as severable.

[70] In any event, counsel submitted that the reason why Chamberlain J. allowed the primary claim to proceed was because it was founded on a criminal conviction, and thus it was held a fair trial was possible, but he emphasised that a different view had been taken in respect of the other alleged failures.

[71] Counsel for the defender referred to Chamberlain J's reasoning in paragraph 101 and to the fact that some basic structural analysis could be found in paragraph 195 of the judgement.

[72] The cases relied upon were discussed and Chamberlain J. cautions himself against reasoning by analogy. He expresses a view that the Scottish parliament could not have intended simply to codify *B* v *Murray* and goes on to express a view on the statutory test being more stringent than *B* v *Murray*, which counsel submitted it must be. Counsel referred to paragraph 106 where Chamberlain J. disposes of the claim founded on based on the assaults for which there was a conviction and concludes that the defenders had not shown that it was not possible for a fair trial to take place and that claim was allowed to go forward. Counsel submitted that the second element of the case, involving Brother Alphonsus, was of a very different character and was dealt with accordingly by Chamberlain J.

[73] The next was *B* v *Sailors' Society* 2021 SLT 1070, in which the two pursuers had been resident in a children's home between 1968 and 1970 and 1972 and 1982 respectively. The home closed in 1982. There were limited records. The alleged abusers were dead. Lady Carmichael held that it would not be possible for a fair hearing to take place on the basis that the alleged abusers were dead, and that no investigation had taken place prior to their deaths. She emphasised the difficulty the defenders would have in advancing any positive case. Counsel submitted that Lady Carmichael's reasoning clearly echoed that in *SF* v *Quarriers* and *K* v *Maris Brothers* and *JXJ* v *The de la Salle Brothers*, and he referred in particular to paragraphs

[273] and [290]. He drew my attention to the finding by Lady Carmichael that there were no circumstances, such as a conviction, which might be capable of counterbalancing that

prejudice, as had been the case in respect of the sexual assault allegations in *JXJ*.

[74] The next case on s17D to which counsel for the defender referred was a decision of Lord Weir: *B* v *Congregation of The Sisters of Nazareth* [2022] CSOH 8, in which Lord Weir reached the same conclusion as Lady Carmichael. That case concerned Nazareth House, Lasswade and the present defender. It also concerned pursuers who had been in the care of the defender for a very brief period in 1974, which was the year after the present pursuer had been resident there. The pursuers in the *B* case alleged various non-sexual assaults. These were not particularised to individual Sisters but were asserted against all of the Sisters having care of the pursuers who were not named or otherwise identified. It was accepted that responsible investigation indicated that, of the twelve Sisters known to have been at the home at that time, eight were dead. Counsel for the defender relied upon the following observations made by Lord Weir at paragraphs [109] and [113].

> "There is no means of identifying the alleged abusers from the pleadings. That precludes the defender from obtaining from such unidentified individuals' responses to the allegations on record. It cannot explore with such individuals the essential credibility and reliability of the allegations. It cannot explore with the alleged abusers whether they were in a position within the Home to commit the kind of abuse alleged by these particular pursuers. It cannot even investigate with those individuals the veracity of the allegations made against the two individuals who have been named. In short, the defender cannot assert that the alleged abuse of these particular pursuers by un-named individuals did not occur nor can it develop a full defence to the claims which are made….."

> "The absence of evidence from persons said to have committed abuse but who have not been identified on record is fundamental to both cases and, in my view, precludes the possibility of a fair hearing in either of them."

[75] Counsel submitted that the similarities with the present case are very substantial. *B* v *The Congregation of The Sisters of Nazareth* concerns the same defender and the same home. The pursuers were in the care of the defender for a similarly brief period, and that was only a year later than the present pursuer. The same difficulties arose in respect of

allegations which were not particularised against identified Sisters.

[76] Under reference to these cases, it was submitted that there was a consistent line of authority both before and after the statutory amendment which makes the point about significant prejudice caused by death of those accused and loss of other evidence, and of the ability to put forward positive lines of defence in any given case.

[77] Counsel submitted that what could be said with certainty was that at one time the defender would have known the precise layout of the premises and would have been able to say with a high degree of accuracy how the home had been laid out, how the rooms were configured and which children in any particular part of the home were under the care of which Sister. It was also submitted that there would have been evidence about what the arrangements for bathing were in each different part of the home. There were two separate houses and there would have been a body of evidence about who was in which house, and the defender would potentially have been in a position, which they are no longer in, to mount a challenge to what is alleged on the basis that it could have said that it was impossible for anyone identified as being the perpetrator of abuse to have carried out the acts which the pursuer alleged, because they did not work in the house where the pursuer was accommodated. Whilst some limited evidence about bathing arrangements is still available, there would have been much more available at an earlier stage. For example, an account is given of large communal showers, but there is some limited evidence, of which there would have been more at an earlier stage, that there were no such showers.

Defender's Submissions on the Facts

[78] It was submitted on behalf of the defender that the present case was a more extreme example than *B* v *Sisters of Nazareth*. In that case the alleged assailants were all

Sisters said to have been at the home and responsible for the care of the children. They were mostly dead or unidentified; and even those who were alive were necessarily very elderly. But for all of that they represented a finite and at least identifiable class of persons.

[79] In the present case the pursuer's principal pleaded allegation was that she was abused in the showers by a priest or other male adult and that the defenders ought to have had systems to prevent such abuse from occurring. There is a separate case based upon vicarious liability although it was submitted by counsel that the precise ambit of this case was not clear.

[80] It was further submitted that the pursuer's pleadings have changed very substantially since the action was raised. As originally formulated, the pursuer alleged sexual abuse by a male, thought to be a priest, in the showers. Separately, she alleged that she had been made to masturbate a priest while sitting on his knee. Although it was not clear, the natural reading was that the two abusers originally mentioned were different persons. In particular one was said unequivocally to have been a priest, while the other was said equivocally to have been either a priest or another adult male. The original formulation on liability was clearly erroneous, that the defender was vicariously liable for the acts of priests. Those averments had been deleted. The masturbation allegation has been deleted entirely. The allegation of digital penetration in the showers remains. What has been added is an extensive chapter of averments entirely missing from the initial formulation to the effect that the various Sisters were present during the abuse in the showers and on at least one occasion "instructed" the abuser to wash the pursuer.

[81] Counsel then referred to the content of the pursuer's pleadings and her affidavit in respect of the description of her alleged abuser. He submitted that there was a paucity of information in this regard, which was material. The only description of the abuser in the

pleadings is of an adult male who may have been a priest. In her affidavit the pursuer states, at paragraph 24, that she was sexually abused "by a man who I believe to be a priest. For some reason the name James sticks in my head. I cannot remember if that is who it was. I remember he had whiteish greyish hair." There was no mention at all of sexual abuse in the original intimation of the pursuer's claim. The allegation was first made by letter dated 21 May 2019 in which the abuser was described as "elderly" and with "white hair" and possibly called James. In the subsequent letter dated 21 June 2019 it was asserted that the pursuer had been abused by a priest who might have been called Peter.

[82] It was further submitted that there was no way that a realistic search exercise could be devised from the paucity of information available as to the identity of the alleged abuser, and in this regard reference was made to the affidavit of the defender's principal solicitor, Mr Batchelor.

[83] The next chapter of his submission dealt with the impact of the loss of evidence and the passage of time. It was submitted that it was obvious that there could now be no prospect of identifying the alleged abuser from the material supplied, and the affidavit of Mr Batchelor was referred to in this regard. There was no suggestion of any other practical or feasible investigation that might be undertaken in this regard. In any event, it was said that it could also be readily concluded that there is little prospect of the alleged abuser being alive. The statement in the pursuer's affidavit that he had "whitish greyish hair" implies that he was at least middle-aged in 1973: her description of him as "elderly" and with "white hair" in the original letter of intimation might imply that he was of more than middle age. It is very unlikely that any man of even middle age in 1973 would still be alive today.

[84] As Mr Batchelor's affidavit records, investigations indicated that one priest, Father

CD, used to visit the home on behalf of a Catholic childcare organisation. There is no suggestion that he was ever accused of abuse, but investigations were nonetheless carried out on the basis that he was a priest who was known to have visited and who would have been around 43 years of age in 1973 and therefore potentially matching the pursuer's description. He died in 2016.

[85] It was accepted by the defender that the death of an alleged abuser will not necessarily or in all circumstances constitute a bar to a claim proceeding on the grounds of fairness. That will be particularly so where there is a relevant conviction or where the allegation was made whilst there was still scope to investigate it meaningfully. The pursuer was in the defender's care for a very brief but identified period of only about three weeks. Had she identified a specific person then it might well have been possible to check the allegations against that specific time-frame. It is entirely possible that such an exercise directed against an identified person might have revealed evidence sufficient to rule out any possibility of that person having been at the home, either at all or in the relevant period. But since the accusation is so vague, there is no means of doing this.

[86] Similarly, Sisters who are alleged to have witnessed or participated in the abuse of the pursuer are not accurately identified. The pursuer stops short of a definite averment, instead using the vague formulation "The Sisters the pursuer remembers being present on various occasions." Three Sisters are named, but the formulation leaves open the possibility either that there were others or that the pursuer has mis-remembered the names of those that were there. Her affidavit (at paragraph 27) indicates that there may have been others, but she cannot remember which ones. It was suggested that the vagueness is deliberate.

[87] As is made clear in Mr Batchelor's affidavit there is no record of any Sister X and therefore no realistic lines of further investigation. Sister W is thought possibly to be a

reference to Sister AB, although this is unclear. She was at the home at the material time and worked with children, but died in 2009, a decade before the claim was first intimated and without any statement or precognition having been taken. Sister Y has been identified as having been at the home, and being alive, albeit elderly and in poor health. I was advised that Y is the Sister X referred to by Lord Weir. Counsel observed that it was clear from the affidavits of the pursuer and her sister that they appear to have been aware of press coverage in respect of the prosecution and conviction of Sister Y, and also that they appear to have discussed matters extensively.

[88] Counsel submitted that the pursuer's primary case is of failures in supervision and safeguarding, more particularly of allowing or facilitating or at least turning a blind eye to the presence of an adult male amongst young girls in a state of undress in circumstances indicative of a sexual motive. The pursuer is quite specific that this took place in the presence of multiple adults – the abuser and three or more nuns – and of other children. The present case is accordingly not the paradigm childhood abuse case involving a single abuser and abuse carried on covertly with only the abuser and the child present, where in his submission the absence of other evidence might perhaps be less prejudicial. However, in the present case, of all those adults alleged to have been present, only one is able to be identified and confirmed to be alive.

[89] There would at one time have been a "wealth of evidence" available as to the detail of the routine followed in the home in relation to day-to-day supervision and arrangements for washing or bathing. In particular it is clear that the home operated two separate houses – the main house and another one in the grounds known as Hollycot (see Mr Batchelor's affidavit and the affidavits of Anne Dawson and Margaret McLafferty, and the extensive discussion of that aspect of the home in *B* v *Sisters of Nazareth*). In *B's* case Lord Weir held it

to be of significance that the passage of time had deprived the defender of the ability to source "a potentially more compendious administrative archive". That was so particularly in light of the evidence that children were generally in one house or the other, under the care of a particular Sister and that children from the main house did not go into Hollycot (and vice versa). There are no surviving local authority records in respect of admissions to the home. Given that the pursuer appears to have been placed temporarily by the local authority in the care of the defender then returned to the care of her parents (presumably with the agreement of the local authority) it was submitted that it seemed overwhelmingly likely that there would at one point have been relevant records.

[90] In these circumstances, it was submitted that the present case gives rise to the same issues that led to the conclusion that no fair hearing was possible in each of *M* v *O'Neill*, *SF* v *Quarriers*, *K* v *Marist Brothers*, *JXJ* v *The de la Salle Brothers*, *B* v *Sailors Society* and *B* v *Congregation of The Sisters of Nazareth.* In short, the defender will only be able to put the pursuer to her proof when, but for the passage of time, they would have been in a position to make detailed investigation and in light of the fruits of such investigation, would have been able to adduce detailed positive lines of cross-examination. Such lines might well have demonstrated that the pursuer's account was impossible rather than just implausible. The resulting prejudice is irremediable, give that any proof on the merits of the claim will be fully fifty years later.

[91] Whilst counsel for the defender submitted that the foregoing analysis focuses on the primary allegation of sexual abuse, the averments of non-sexual abuse suffered from the same difficulties. In particular they are of a similar nature to the averments in *B* v *Congregation of The Sisters of Nazareth*, being generalised allegations of assaults by "the Sisters". It is true that one Sister is identified, but that was also the situation in *B's* case and

that did not allow Lord Weir to avoid the conclusion that a generalised allegation by "the Sisters" either unidentified and untraced or identified but long dead, could not be the subject of a fair hearing.

[92] Therefore, it was submitted, the court should hold that a fair hearing is not possible in this case. Counsel for the defender went on to observe that in this connection it is relevant to consider whether the allegations of sexual and non-sexual abuse are severable. In the case of *JXY*, the decision to that effect proceeded on an agreement between (English) counsel. There is no indication that a view on severability formed any part of the jointly instructed expert report as to the law of Scotland. There is no analysis of the question in the decision, the judge having been prepared to proceed on the basis of counsel's agreement that it was open to him to treat the different allegations as severable. In *AB* v *Christian Brothers* Sheriff Dickson would have been prepared to hold that the allegations in respect of one abuser were severable from the allegations in respect of the two others (see paragraph [222]) but in light of his ultimate conclusion he did not require to consider that matter and his observations were *obiter* and acknowledged by him to be on a matter he was not fully addressed on.

[93] It was submitted that there was no obvious warrant in the statutory language for the view that it was permissible to treat the non-sexual element of the claim as severable from the sexual element. On the contrary, the reference to "the action" suggests that it stands or falls in its entirety. If the Scottish Parliament had intended to give the court power to permit some elements of the claim to proceed whilst not allowing others to do so it could easily have said so in terms. It seems much more likely that the legislation was drafted from the familiar starting point that a claim for damages is a *unum quid*. For the reasons given, a fair hearing is not possible in respect of either the sexual or non-sexual

abuse claims, and so severability would make no difference to the outcome.

Substantial Prejudice

[94] On the assumption that the court was not with him on the question of a fair hearing, counsel for the defender addressed the question of substantial prejudice. He submitted that on one view the answer to the question of whether there was such prejudice was straightforward and obvious. To be required to meet an allegation of abuse as vague as that made in the present case almost fifty years after it had occurred cannot but amount to substantial prejudice, particularly when most of the witnesses who might have given evidence are dead and where it is obvious that records will have been lost. The factors which the defender founded upon to render a fair trial impossible also amounted to significant prejudice.

[95] Counsel referred to the decision in *A* v *XY Limited* as being instructive in respect of a consideration of the matter of substantial prejudice. In that case, the allegation was of rape by a schoolteacher during a school trip in 1987. The school had notice of the allegation only four years later. The alleged abuser was alive, as were the other pupils who had been on the trip. There was no doubt that the pursuer had been on the trip as had the teacher. There were contemporaneous notes of a disclosure made by the pursuer to a psychiatrist in 1991 and the psychiatrist was available to give evidence. A criminal prosecution had been commenced but discontinued because it depended on mutual corroboration and the other complainer did not feel able to give evidence. Lord Woolman found substantial prejudice existed on other grounds but was not persuaded any difficulty of investigation amounted to substantial prejudice. The contrast with the far greater difficulties the defender will face in the present case was said by counsel to be obvious.

[96] Counsel further submitted that the difficulties caused by lost evidence and inevitable deterioration in recollection caused by the passage of time are notorious under reference to the discussion of that concept by Lord Drummond Young in *B* v *Murray* and Leggat J in *Gestmin SGPS SA* v *Credit Suisse (UK) Ltd & Another* [2020] 1 CLC 428, in a passage that has been widely cited and approved. The analysis applies to witnesses generally including the normal situation of witnesses about whom there is no other cause for scepticism, the essential point being that insufficient weight is placed on the inherent fallibility of human memory. In the present case there is very substantial cause to be sceptical of the pursuer's reliability.

[97] In addition to the general difficulties caused by the passage of time and loss of recollection, the defender also relied upon the following factors to establish substantial prejudice:

> (i) The law has changed. Prior to the decision of the House of Lords in *Lister* v *Hesley Hall* [2002] 1 AC 215 there could have been no question of the defender being vicariously liable for acts of abuse. That there had been such a change was accepted as amounting to significant prejudice in *A* v *XY Limited* (at paragraphs [26] – [31] and [42] – [43]). The same conclusion was reached in *B* v *Sailors Society* (at paragraph [266]).
>
> (ii) Documentary evidence has been lost. As Lord Weir held in *B* v *Sisters of Nazareth,* it is likely that there would have been further records of routine administrative matters which would have assisted. Public records which would have been of assistance, such as social work records, have also been lost.
>
> (iii) The impact of judicial interest over a lengthy period of time has increased the value of the claim significantly.
>
> (iv) The pursuer's case is of doubtful cogency, the point made being that the prejudice caused to the defender is greater in such a case, because when faced with a case of such doubtful cogency, the availability of other sources of evidence becomes relatively more significant as a means of cross-checking the accuracy of the pursuer's account.

[98] Next, counsel for the defender turned to consider the matter of the pursuer's

interest in the case proceeding. He submitted that it was trite that every pursuer in every case of this type has an interest in the action proceeding. It might be thought invidious to attempt an exercise which measured the relative size or extent of that interest, leading as such exercises necessarily must, to a conclusion that some pursuers have greater interests than others. The legislation offers no criteria by which such an exercise could be conducted. Lord Woolman's observation in *A* v *XY* (at paragraph [50]) that the abuse in that case was particularly grave appears to indicate that the graver the abuse the greater the pursuer's interest in the action proceeding. The same point was made in *JXJ* at paragraph 239 (h) and quoted with approval by Lord Weir in *B* v *Congregation of The Sisters of Nazareth* (at paragraph [78]).

[99] The pursuer's interest in the action proceeding encompasses the nature and extent of the claimed consequences of the abuse (see *JXJ* at paragraph 101(h)). The present pursuer initially claimed substantial losses arising from the events she alleges but following the receipt by her of an opinion from an expert psychiatrist this position was departed from. Mr Brown submitted that, although it was distasteful, it is inescapable that this is a lesser interest than those cases which involve lifelong consequences and where pursuers claim their lives have been ruined. In this context, counsel for the defender further observed that the pursuer does not assert any pecuniary loss. There is no sense in which her livelihood could be said to depend on the outcome.

[100] In relation to Lord Woolman's observation in *A* v *XY Ltd* it might be relevant that the context in that case was of the allegation of rape having been made the subject of a criminal prosecution which was subsequently discontinued because the other complainer, upon whom the prosecution depended for mutual corroboration, felt unable to give evidence, and thus there was an interest on the part of the pursuer in seeing her abuser

held to account. The present case does not appear to have that feature. There has apparently been no report to the police. The alleged abuser remains unidentified and untraced.

[101] The extent of the pursuer's interest ought to be considered having regard to these

factors and also the existence of an alternative remedy, as discussed below.

[102] It was submitted that the apparent cogency of the pursuer's case is relevant to a consideration of substantial prejudice: see *B* v *Sailors' Society* at paras [242], [243] and [292]; *B* v *Congregation of The Sisters of Nazareth* at paragraphs [91] to [95]. Although it will be rare that a case is so cogent that the absence of relevant evidence could never make a difference, there will be cases, typically where there is a criminal conviction, where it is obvious that there will be very limited scope for a successful defence on the merits. Thus, a pursuer with an obviously cogent and persuasive case will have a greater interest in that case proceeding. By the same reasoning, a pursuer with a case of doubtful cogency is likely to have a lesser interest in it proceeding. Counsel for the defender submitted that this point was made by Lady Carmichael at para [243] of *B* v *Sailors' Society.*

[103] Counsel founded on the fact that the pursuer's primary case is predicated on the very specific allegation of abuse at which multiple adults were present and which occurred in large communal showers. The existence of at least some evidence that there simply were no such showers raises obvious doubt, as did the existence of some limited evidence that children were organised into groups under the care of a single Sister, in either the main house or Hollycot, with no real mixing between the two.

[104] In his submissions on cogency, counsel for the defender also founded on the fact that, as initially intimated, the claim contained no allegations of sexual abuse, with the

pursuer making that allegation subsequently, at the same time as her sister, represented by the same agent, made essentially an identical allegation. The allegation of sexual abuse has evolved materially and, in particular, the allegation of the Sisters being present were added later. There is an obvious concern that the allegation has been tailored to meet the circumstances given the recognition that the initial case of vicarious liability for the actions of the alleged abuser was obviously unsound.

[105] Counsel also founded upon the differing accounts that the pursuer has given to the psychiatric experts in the case and concerns expressed by the defender's psychiatric expert, Professor Fahy, about the reliability of her account, his ultimate conclusion being to the effect that he did not consider the pursuer to be a reliable historian and that he did not have clinical confidence in the accuracy of her account. Counsel recognised that assessment of credibility and reliability would be for the court at any subsequent proof in the event the action survives the preliminary proof, but for present purposes the significance of Professor Fahy's conclusion was that there is an obvious objectively based cause for doubt that the pursuer would be accepted.

[106] Thus, it was submitted, there is a very significant cause to doubt the cogency of the pursuer's account. Her interest in the action proceeding has to be assessed on that basis and against the cautionary advice derived from *Gestmin*. Similarly, the exercise of balancing that interest against the prejudice to the defender has to be assessed on a basis that this is an action in which the defender would be expected to mount a robust challenge to the pursuer's reliability and credibility but would be deprived of significant chapters of evidence and cross examination.

[107] Finally, counsel for the defender addressed the question of the availability of an alternative remedy to the pursuer. In *B* v *Congregation of The Sisters of Nazareth* Lord Weir

attached little weight to the possibility of an alternative remedy under the statutory redress scheme. Counsel sought to distinguish the present case on its facts from the facts of B, on the basis that the sum sued for is £50,000 in a claim specifically limited to solatium. There was no basis for thinking that the pursuer would obtain any less from the redress scheme than she would from the court in a successful pursuit of the present action. Since the sexual assailant remains unidentified and untraceable there is no sense in which he would be brought to account. At most the defender would be brought to account on some sort of accessory basis. By contrast, in *B's* case, lifelong effects were alleged, and sums were sought substantially in excess of anything that might be obtained under the redress scheme.

[108] It is also relevant to consider the likely impact on the pursuer herself on being subjected to searching cross-examination. In the overall analysis, the scope for her to avoid that and make use of the redress scheme and by doing so achieve an outcome that in financial terms at least would be at least as good as the best she could achieve via the present action, was a relevant consideration. Her interest in the present proceedings is less obvious. It is for example noted that her affidavit makes no attempt to identify the nature of that interest. It was submitted that on no possible view was any interest the pursuer might have sufficient to outweigh the substantial prejudice to the defender.

[109] For all of these reasons the court should accede to the defender's motion and should hold that a fair hearing is not possible, which failing that there is substantial prejudice to the defender and having regard to the pursuer's interest in the action proceeding, that prejudice is such that it should not proceed.

Submissions for the Pursuer

[110] Counsel for the pursuer began his submission by drawing the court's attention to the fact that the case proceeded under Chapter 36A of the Rules of the Sheriff Court, and that it was accordingly not subject to the rules governing simplified pleadings. He submitted that having regard to that, the defender had to set out specifically and relevantly why it cannot have a fair trial and also why it would be substantially prejudiced.

[111] Counsel for the pursuer drew the court's attention to the fact that, in the defender's pleadings they rely on a series of fifteen 'circumstances' in furtherance of the section 17D defence. However, it was said, next to no specification was provided in the pleadings as to why the fifteen averred 'circumstances' prevent a fair trial and / or caused the defender substantial prejudice. Thus, as these averments were wholly lacking in specification and irrelevant, they ought to be deleted from probation.

[112] The factors (or circumstances to use the language of the pleadings) relied upon by the defender to demonstrate that it would not be possible for them to have a fair hearing and that they would be substantially prejudiced are narrated in Answer 6, and are as follows:

> "(i) They only have limited internal records available to them.
>
> (ii) The records that are available do not detail matters such as those now forming the allegations made.
>
> (iii) Edinburgh City Council have been unable to find any social work records in relation to the pursuer.
>
> (iv) Records recovered from Midlothian Council during the currency of the present action do not contain any childhood records for the pursuer. The defenders are accordingly unable to identify the pursuer's social worker at the material time or what involvement that individual had with the pursuer.
>
> (v) The pursuer has averred conduct on the part of unidentified individuals. There is little prospect of the defender being able to identify or locate them. Without knowing the identity of these individuals, it is impossible for the defenders

to know what their relationship was with the defenders at the time of the pursuer's residence at Nazareth House, Lasswade or to investigate the vicarious liability properly.

(vi) The pursuer fails to specify which individuals carried out particular abusive acts. So far as she does her averments and (sic) vague and lacking in specification. It is in the nature of a fair hearing that where allegations are made notice of the alleged perpetrator and the ability to investigate the allegations be possible. That is not possible with the lack of specification in the pursuer's averments, the evidence available and the passage of time.

(vii) The pursuer does not identify which group she was in. That causes prejudice to the defender in identifying potential witnesses.

(viii) The defenders do not have personnel records for staff who worked in the home in 1973. A number of former staff who worked at Nazareth House, Lasswade around the time the pursuer was resident there are dead.

(ix) The pursuer's allegations of abuse have been inconsistent and subject to development over time. She is not a reliable clinical historian, which makes assessing causation difficult.

(x) Approaching other residents in the home could of itself cause those persons harm and distress. Accordingly, even if such potential witnesses could be traced the defender is justifiably reluctant to approach them.

(xi) The delay itself is significant. The pursuer's period in the care of the defender was for a period of only three weeks and one day and ended over 47 years ago. The pursuer first intimated a claim to the defenders on 6 December 2018. She made no allegations of sexual abuse at that time. She subsequently made allegations of sexual abuse against one individual in May 2019. She has since then made allegations against two unidentified males, but by adjustment on 4 February 2022 has deleted the averments in relation to one of them. The claim is stale. The quality of evidence, even where it exists, will likely have diminished. The pursuer has suffered several cerebral haemorrhages which might impact on her recall from memory. Avenues of inquiry may not be apparent due to the passage of time.

(xii) Of the 18 Sisters who worked at Nazareth House, Lasswade in 1973, 13 are deceased. The remainder are elderly. Given the unspecific nature of the pursuer's allegations about the conduct of unnamed sisters, the loss of these witnesses causes prejudice to the defender. The only sisters who were known as Sister W at the time, Mother W, Sister WA and Sister W are all deceased.

(xiii) The defender has no record of a Sister X at Nazareth House, Lasswade in 1973.

> (xiv) The delay itself has seen significant changes in the law. The law relating to vicarious liability has changed. Had the present action been raised timeously, the pursuer would likely not have succeeded in establishing vicarious liability for alleged assaults by employees. The law relating to limitation has changed, retroactively and retrospectively.
>
> (xv) The intervening period has also seen significant changes in social attitudes and mores. Changes in social attitude between the time of the alleged abuse and now mean that it would be difficult to reconstruct the social attitudes prevailing at the material time, which would lead to a serious decline in the quality of justice."

[113] I deal with the detail of each of the criticisms made by counsel for the pursuer in respect of factors (i) to (xv) below at paragraphs [164] to [194].

The Pursuer's Position on the Section 17D defences

[114] Notwithstanding the pursuer's primary position in relation to s 17D relative to lack of relevancy and specification, it was submitted on her behalf that a fair trial was possible, and that the defender was not substantially prejudiced.

[115] In the first place, the pursuer submitted that one of the key protagonists in her abuse, Sister Y, remains alive. The defender's agents had spoken to her about the pursuer's allegations but had not produced any evidence from her. From the affidavits of the defender's agent Mr Batchelor and that of Chris Dunn, the defender's position on her evidence can be discerned. That is to say that she has no recollection of the pursuer, denied the allegations of abuse, and did not witness any sexual abuse of children. The pursuer submits that with this in mind it is impossible to see why the defender cannot have a fair trial. It is in a position to mount a defence in line with the information provided by Sister Y. It was not said by Mr Batchelor that Sister Y is incapable of giving evidence, either in person or by way of affidavit. That affidavit states that "there will be evidence available in relation to what her position would have been in relation to the allegations of abuse as a

generality". It is surprising, if not alarming particularly given that concession, that none of Sister Y's evidence is before the court.

[116] Instead, it was submitted, the court is being asked to determine that a fair trial is not possible, and that the defender is substantially prejudiced on the basis of secondary / hearsay evidence when primary evidence could have been produced but was not. In any event the secondary evidence actually provides the basis upon which the defender can properly mount a defence to the pursuer's allegations, that is to say that the abuse of the pursuer was neither committed nor witnessed by Sister Y.

[117] The pursuer did accept that of the two other Sisters she names as having witnessed the sexual abuse, one is deceased and the other cannot be identified. In any event, whether the death or absence of a wrongdoer means a fair hearing is not possible or that it causes the defender substantial prejudice depends on the circumstances of the case. The important consideration is whether a defender is placed into a difficulty by having no proper basis in the evidence to positively advance a defence that the abuse never happened or to cross- examine the pursuer on that basis.

[118] Counsel for the pursuer submitted that the distinguishing feature in the present case compared to those cases which have determined the absence of a wrongdoer precludes a fair trial is that in other cases the absence of a wrongdoer meant the defender could not properly assert that the alleged abuse did not occur. In the present case, one of the wrongdoers is available. Not only is she available, but she specifically denies all of the pursuer's allegations. Whilst the pursuer accepted that Sister Y may not specifically remember the pursuer and that her lack of recall may cause the defender some prejudice, it does not amount to substantial prejudice. There is no dispute that the pursuer and Sister Y were at the home at the same time. It is virtually if not completely improbable that Sister Y

would forget witnessing sexual abuse of children in the manner averred by the pursuer. She does not just specifically deny remembering the pursuer, but she specifically denies ever seeing or knowing about any child being sexually abused. Therefore, although the defender may face some difficulty given the absence of the other two named Sisters, their absence does not prevent the defender from mounting a positive defence that the abuse did not happen. The pursuer accepts the situation might be different if nobody was available to give evidence in response to the defender's averments. However, that is not the position in this case and that is why this case is fundamentally different to previously decided cases where a fair trial was held not to be possible.

[119] Counsel for the pursuer reminded the court that the available evidence from Sister Y is also supplemented by the available visitors' book for the home, lodged at 6/14 of process, which allows the defender to challenge the pursuer at proof that there were no male priests who visited the home during the pursuer's residence.

[120] It was further submitted that the court ought to bear in mind that, in relation to available evidence, Mr Batchelor confirms that the defender's agents did not consider it proportionate to investigate the case by exclusion (paragraph 9 of his affidavit). He explains this to mean that unless a witness had direct relevance to the pursuer's allegations, those people were not contacted in relation to the allegations. An example of this is given at paragraph 9 of his affidavit where he sets out that, in respect of a particular witness, because she was not named as an alleged abuser or as an eyewitness, she was not contacted because it would seem highly unlikely that she would have any evidence of direct relevance to the pursuer's allegations. With that in mind, and having regard to the other people listed in the affidavits and the Joint Minute whom the defender contends cannot be located, spoken to or traced, then standing what Mr Batchelor says, it seems highly unlikely

that the defender would have tried to contact those people at any time. As Mr Batchelor alludes to, as they are not named as alleged abusers or eyewitnesses to the pursuer's abuse, they have no relevance to the present case. The court should not be swayed by the suggestion that vast numbers of witnesses and avenues of enquiry are somehow now closed to the defender. Not only does the defender fail to aver in what way the absence of all these people precludes a fair trial or causes substantial prejudice, but on its own evidence, the defender accepts that these people would be highly unlikely to have been able to assist with the case anyway.

[121] In relation to missing records which may have at some time been held by the defender, there would never have been any record of the assaults, particularly the sexual assaults, even if records were available. In relation to social work records, Mr Batchelor's affidavit goes no further than suggesting that the pursuer's records do not contain any information about why she was admitted to the home or what contact she had with social workers at the time. The significance of that evidence, even if it was available, to the pursuer's averments on record is highly doubtful.

[122] In relation to the physical assaults, the defender avers that it would be difficult to reconstruct the social attitudes prevailing at the material time and that would lead to a serious decline in the quality of justice. The onus of establishing that anything went beyond reasonable chastisement at the material time is on the pursuer and does not preclude a fair hearing or amount to substantial prejudice, see: *B* v *Sailors Society* 2021 SLT 1070 at 263.

[123] In summary, the pursuer's counsel invited the court to have particular regard to the fact that she was eleven years old when she was in the defender's care and that she alleges to have suffered very significant sexual assaults for which she seeks to establish that

the defender is directly and vicariously liable. Counsel submitted that the allegations are only one step removed from rape. Even though it is accepted that the effects upon the pursuer cannot be said to have made any material difference to her present psychological position, the abuse, nevertheless, constituted serious sexual assaults, committed in circumstances where the pursuer was vulnerable, both as a child in care generally and specifically whilst naked within a shower. Furthermore, the abuse was committed whilst the defender's Sisters were in a position of trust and when their very job was to care for and protect the pursuer. All things considered the action is one which should be allowed to proceed. In this regard reference was made to *AB the English Province of the Congregation of Christian Brothers* [2022] SC EDIN 7 at 227 and *A* v *XY Ltd* 2021 SLT 399 at 50 -51.

Pursuer's Motion

[124] The motion for the pursuer was in 6 parts. counsel invited the court to:

> (i) Reject the defender's submission that a fair trial is not possible and to repel the defender's first plea-in-law
>
> (ii) Reject the defender's submission that it would be substantially prejudiced were the action to proceed and to repel the defender's second plea-in-law. Find that, having regard to the pursuer's interests in the action proceeding, the action should proceed in the event that the court were to find that a fair trial was possible but that the defender would be substantially prejudiced if the action were to proceed
>
> (iii) Uphold the pursuer's fourth to seventh plea-in-law and to exclude from probation all averments in Answer 6 in so far as they relate to the defender not being able to obtain a fair trial and being substantially prejudiced.
>
> (iv) To repel the defender's fourth plea in law
>
> (v) To fix a proof

[125] In respect of expenses, it was submitted on behalf of the pursuer that expenses should follow success. The practical result of this was that if the case is dismissed at this

stage the pursuer accepts the inevitable consequence that she should be found liable to the defender in the expenses of process to date except insofar as already determined. However, if the action is allowed to proceed the pursuer craves the court to find the defender liable to the pursuer in the expenses of the Preliminary Proof.

Supplementary Submissions

[126] Whilst the present case was at avizandum, the Inner House issued a decision in the reclaiming motion in the case of *B* v *The Congregation of the Sisters of Nazareth* [2022] CSIH 52; 2023 SCLR 116. Because both parties had referred to the Outer House decision in their submissions before me, I invited supplementary submissions in writing on the decision of the Inner House. Both parties provided written submissions.

Pursuer's Supplementary Submissions

[127] The pursuer's counsel made the following points in relation to the decision of the Inner House in *B:*

1. Reliance on other cases in such fact sensitive matters is of doubtful value - paragraph [7] of *B.*

2. A fair hearing is not dependent upon each party being able to investigate all that it would wish to pursue, nor on reassurance that all pertinent evidence remains extant and available to the court – paragraph [8].

3. Section 17D(2) presents a high test. If met, it will usually be quite clear that the problems are insurmountable – paragraph [8].

4. It is hard to envisage a case of alleged childhood abuse where the pursuer's interest in the action proceeding is not worthy of considerable weight – paragraph [14].

5. The focus at the preliminary stage should not be on the merits of the action – paragraph [14].

[128] I was invited to exercise caution when considering the reliance placed by the defender upon the Outer House decision in *B* and counsel stressed that the primary focus at this stage of the case should on the merits, with the result that the defender's submission in the present case on cogency were irrelevant. Counsel further sought to correct an observation made in his original written submission to the effect that the pursuer had been given advice to restrict her case to allegations where she could name her abusers. It was submitted that a case need not be framed under reference to specific abusers and the pursuer reiterated the submission he made at the proof that the defender was not disadvantaged, either from the point of view of a fair trial or substantial prejudice, because the abuser in this case had not been identified.

[129] The pursuer further submitted that what had been said by the Inner House about the concerns expressed by the defender regarding the absence of records being speculative applied in the present case, that it would be wrong for the court to consider the passage of time has had an effect on the availability of witnesses in light of what was said on that topic at paragraph [12] of *B*, and that any change in the law brought about by the decision in *Lister* v *Hesley Hall* [2002] 1 AC 215. did not amount to prejudice.

Defender's Supplementary Submissions

[130] The defender made the preliminary observation that there was some difficulty in ascertaining the *ratio* of the Second Division's decision in *B*. In particular there was said to be material uncertainty as to whether the Division had made a positive finding that a fair trial was possible, or whether the finding was more limited - that the defenders had not established at the preliminary stage whether a fair trial was not possible but leaving open to them the prospect of doing so at a subsequent proof on the merits. Aside from this observation, it was submitted that the reasoning in *B* upon which the decision to allow the reclaiming motion was based, could be summarised in two propositions; first, that there was a difference between cases where there had been what could be termed individualised abuse, where abuse had been carried out by a small number of persons, and those concerned with "generalised abuse, which would be reflected in the culture and ethos of the administration of the Home as a whole"; and secondly, that when dealing with the latter type of case, it is a question of degree whether a defender has a sufficient number of pieces of the relevant jigsaw to be able to have a fair trial of the issues. It was noted that in *B* there was no criticism of the line of authority that it will rarely be possible to have a fair trial when the alleged abuser is dead or unidentifiable.

[131] The present action was said to be materially different to *B* as in that case the alleged assailants were all Sisters said to have been at the home and responsible for the care of the children and were a finite and at least theoretically identifiable class of persons. A further difference was that the present case is concerned with allegations of abuse specific to the pursuer, committed within a narrow window of time rather than, as in *B*, a broad general account of the regime at Nazareth House. There were specific reasons why there could not be a fair trial in the present case. The abuser has not been identified, nor is there any

prospect of the abuser being identified. He is probably dead. Given that the period of abuse is alleged to have been three weeks, it would in principle have been possible to prove by exclusionary evidence that the pursuer's account cannot be true, but that exercise cannot be undertaken because, as previously submitted, a mass of evidence has been lost. The link to the unnamed or untraced Sisters who witnessed the abuse or directed it is vague and the attempts to identify two of the three named Sisters had shown that one had never existed, and that one had died in 2009.

[132] Returning to the preliminary observation in the supplementary submission, the defender urged the court to determine whether or not the present action should proceed as a preliminary exercise and not to leave open the question of whether it should be allowed to proceed, in effect deferring a decision on that question after the full proof had been heard.

[133] The defender adhered to the primary submission on severability, noting that the question had not arisen in *B*, and also renewed the submission on substantial prejudice, the availability of an alternative remedy under the redress scheme and the lack of apparent cogency of the present pursuer's case.

[134] The defender also renewed the submission that a fair hearing was not possible and that substantial prejudice existed.

Joint Minute

[135] A significant quantity of evidence was agreed in terms of joint minute between the parties. It was agreed that defender was responsible for running Nazareth House, Lasswade and that the pursuer had been resident there under the defender's care, together with her two sisters and two brothers, between 13 July 1973 and 4 August 1973. Various

sets of records which were lodged in process were agreed to be true copies of the originals. The document including the such social work records that were available, the pursuer's GP and Edinburgh Royal Infirmary records, the entries from the visitors' book kept at Nazareth House for the period during which the pursuer was in the defender's care, the records held by the defender relative to the pursuer's time at Nazareth House, the record of the pursuer's previous convictions as held by Police Scotland and the various letters of claim and supplementary letters of claim sent on behalf of the pursuer and her sister.

[136] The agreed documents included a list of all the Sisters who were noted to have worked in Nazareth House, Lasswade in 1973. It was further agreed that twelve Sisters were present at the home during the period of the pursuer's residency and that nine of those Sisters have since died. The dates of death of other individuals were also agreed.

[137] An expert report by Professor Gary McPherson, dated 1 May 2022 on behalf of the pursuer and a corresponding expert report and a further supplementary report by Professor Tom Fahy, dated 13 March 2021 and 4 January 2022 respectively on behalf of the defender, were all agreed to be true copies of their principals.

Witness evidence

Duncan Batchelor

[138] Mr Duncan Batchelor was the principal solicitor dealing with the pursuer's claim on behalf of the defender. He provided an affidavit detailing the efforts his firm had made to investigate the case. He had taken over the case from his colleague, Graeme Watson, in around May 2001. He had previously made extensive investigations into the case of *B* v *Sisters of Nazareth* 2022 Rep LR31, involving two claimants who were in the defender's care for a period of five weeks in 1974, and his affidavit narrated where his investigations were

relevant to the present claim.

[139] Mr Batchelor confirmed that in 1973/1974 the children at Nazareth House were divided into five separate groups. Each group had a housemother assisted by lay members of staff. Three groups were based in the main house and two in a separate building, Hollycot. No records of which group the pursuer was in could be found.

[140] He recognised that taking statements from witnesses involving allegations of non-recent abuse was a sensitive task and could be stressful for witnesses even if no allegations are made against them personally. Mr Batchelor was unaware of any other allegation of abuse by a male priest or other worker being presided over by the defender's Sisters in the manner alleged.

[141] In respect of the pursuer's claim, he narrated how the description of abuse had developed, initially being a solely a claim of physical abuse, particularly by Sister Y. The initial allegations were made in the letter which formed 6/32 of Process dated 6th December 2018. Thereafter, in a further letter dated 21 May 2019, the pursuer indicated that she had been sexually abused by an elderly man whom she thought may have been a Priest called 'James' (lodged as 6/34 of process). The pursuer's sister had made similar allegations in letters of the same date. On 21 June 2019, an additional letter indicated that the pursuer had been further sexually abused by a different priest, whose name she thought was Peter, on three or four occasions. This was a different male to the alleged abuser named in the May 2019 letter. It was stated that the pursuer's brother had witnessed one of these latter events. This letter was lodged at 6/37.

[142] When the initial writ was lodged it contained allegations that the pursuer was made to masturbate a priest whilst sitting on his knee, an event which was witnessed by her

brother, and that a male staff member fondled her in the showers. Other allegations of physical and emotional abuse were also made. Adjustments on 17 November 2011 expanded the pleadings to allege that she and other girls were taken into the communal shower by two or three sisters including Sister W, Sister X, and Sister Y. The adjustments outlined that the Sisters were said to have remained in the showers whilst the abuse took place, that access was permitted to the priest and that on one occasion Sister Y directed an act of abuse. This occurred on four or five occasions. Finally, by way of adjustment on 2 February 2022, the pursuer deleted several averments including being separated from her siblings, being made to masturbate a priest and that unnamed sisters were present in the showers.

[143] Mr Batchelor described how he had made attempts to obtain records from the pursuer's solicitors and the defender. The defender's then archivist, Christine Hughes, provided such records as were held on 19 December 2018. These included register entries and a discharge receipt dated 4 August 1973. These documents formed 6/8 of process. A list of the eighteen Sisters noted to have worked at Nazareth House in 1973 was also provided and is lodged as 6/33. Since the list was provided two of those Sisters had died. Enquires made of the defender to ascertain what shower facilities existed disclosed plans for proposed alterations to the main house from 1970. There were plans at that time to install showers, but they were not of the communal type. No records could be found of visiting priests.

[144] The affidavit also detailed how Clyde & Co's own internal intelligence team had been used to try and trace witnesses, and that, standing the views expressed in *F* v *Quarriers* 2016 SCLR 111 by Lord Bannatyne at paragraph [155] on the matter of contacting other former residents in childhood abuse cases as potential witnesses, how a view was

taken not to approach former residents in an unsolicited manner, particularly when to do so would be on a speculative basis.

[145] Whilst enquiries had also been made to trace the males who had allegedly abused the pursuer these enquiries, without any biographical details, proved extremely difficult. The visitors book, which was lodged as 6/14 of process, contained no entries in respect of visiting priests during the time in question and although a former resident who volunteered to work in the home and who had the same forename name as one of the pursuer's alleged abusers, had been convicted of the sexual abuse of two children at the home between 1969 and 1971, he was in his mid-twenties in 1973 and did not match the pursuer's description.

[146] As far as the Sisters who could have been potential witnesses are concerned, eighteen Sisters were present at Lasswade House during 1973. Of those eighteen, 12 were present during the time of the pursuer's residency. Of those 12, nine are now dead and three survive.

[147] In respect of the Sisters named as complicit in the pursuer's abuse, Sister Y is 80 years old. The pursuer's allegations had been put to her through her own independent solicitors in Belfast. In reply, she stated she had no recollection of the pursuer, denied the allegations of abuse and stated she had not witnessed the abuse of children. Her health had deteriorated, and she had a heart condition. Although her cardiologist advised her to avoid stressful situations, Mr Batchelor confirmed that he was not in a position to say that she would be incapable of giving evidence, and even if she did not there would be evidence available about her position generally. Of the other Sisters named by the pursuer, the records indicated there was no Sister X at the home at the material time. Insofar as a Sister W was concerned, there was a Sister W who worked with children, and she was referred to

as Sister W, although the defenders could not be sure whether this was the Sister W to whom the pursuer referred. She died on 23 December 2009.

[148] Of the remaining sixteen Sisters present in 1973, statements from three of these witnesses were available. These are referred to below and were taken historically in connection with other claims. These witnesses were not re-precognosed, as it was thought that realistically they could offer no further useful information. Of the remaining 13 Sisters it was the case that either no statements had ever been taken from them historically, or if such statements had been taken, these were of no direct relevance to the pursuer's specific allegations.

[149] Regarding lay staff, the position was largely the same. Of the twenty former members of the lay staff identified as potential witnesses, all but three were either not present at Nazareth House at the same time as the pursuer, dead or untraceable. Of the witnesses who had been traced and who had worked at Nazareth House at the material time, one of these witnesses (Elizabeth McFadzean) was in poor health and contacted the defender's agents through her daughter. She had no recollection of the pursuer. Affidavits from Margaret McClafferty or Gerslerberger and Anne Dawson, taken for the purposes of the case B and W had been lodged.

[150] In respect of non-staff witnesses, a Father CD who used to visit Nazareth House had been verified as dead. He had given a statement in a previous case, but this did not relate to Nazareth House, Lasswade. Although he identified potential further witnesses, attempts were not made to trace them. Other witnesses were either dead or thought unlikely to be of assistance. Other than those identified above, no statements had been obtained from any priests or male workers who were present at Nazareth House, Lasswade. In respect of documentation only the visitors' book for Lasswade House, lodged

at 6/14 had been recovered. This recorded no visitors for the three weeks the pursuer was at the home from 13 July 1973 to 4 August 1973. The documents which the defender's agents would normally expect to recover including care records, punishment books, visitors' books, accident books, incident logs, daily logs and admission registers were not available. There was no individual file for the pursuer. No records indicating which group the pursuer was in were available. The register entries which were available showed basic details of the pursuer's admission and discharge to Nazareth House. The social work records recovered from Midlothian Counsel were lodged at 6/5 of process. They did not contain any entries relative to the pursuer's childhood. The Doncaster Social Work records were lodged at 6/9. Medical records from the pursuer's GP and Edinburgh Royal Infirmary with process numbers 6/3 and 6/5 respectively were lodged.

Christopher Dunn

[151] An affidavit was also provided from Christopher Dunn, an Associate Solicitor with Clyde and Company. He had been involved in the investigation of previous historic abuse claims intimated to the defender. He had spoken to Sister Y (who was by then known as Sister M). She confirmed she had gone to Lasswade in 1973, that she was responsible for around 15 children in a house called 'Hollycot 1' which was a separate building to the main house and was located near to the gate to Nazareth House. Hollycot 1 had its own toilets. She did not remember the pursuer and, when the allegations in the original letter of claim were put to her, she denied them. In particular she denied punishing her in the manner originally averred (hitting her with a crucifix and slapping her). She never punished a child in such a manner, and she had never witnessed this being done by anyone else. At that time there were no allegations of sexual abuse, but in any event Mr Dunn confirmed

that Sister Y had never witnessed such abuse nor participated in it.

Graeme Watson

[152] Graeme Watson's evidence was provided in the form of an affidavit. He was another partner from Clyde and Company who had been involved in the initial claims made against the defender, most of which were abandoned following the decision in *AS* v *Poor Sisters of Nazareth*. Most of the material from that time has been retained as had some of the defence material from the criminal trial involving Sister Y. In addition, he had represented the defenders at the Scottish Child Abuse Inquiry (SCAI). He confirmed that his inquires at this time demonstrated that during the 1970s there were five different groups of children at Nazareth House, Lasswade, three in the main house and two in Hollycot. Sister Y was in charge of one of the groups in Hollycot. The Sisters did not become involved in each other's groups. Mr Watson confirmed that having investigated the allegations originally made in the present action, his firm had not been able to identify the male abusers (plural, as they were then), even to the extent of clarifying whether they were priests. Claims from other residents and indeed the pursuer's own sister's claim did not assist.

Karen Firmin-Cooper

[153] Ms Firmin-Cooper provided an affidavit detailing her role as the defender's Archive and Heritage Manager. She had been asked to locate any documents relating to the pursuer and relative to Nazareth House Lasswade, for the period from July to August 1973. She was able to confirm that the pursuer had been a resident between 13 July and 4 August 1973 and that she was admitted with her siblings. The Nazareth House Edinburgh Admission and

Discharge Register (6/8 of Process) and the Nazareth House Edinburgh Discharge Receipt Books are the only records specifically relating to the pursuer. She confirmed that there were no records relating to whether Priests were involved at Nazareth House in 1973 and that in response to a query as to whether there had been showers, she was only able to produce the ground and first floor plans dating from 1970 and showing proposed alterations. Those plans are lodged as 6/28 of Process. She spoke to the possibility of other records previously having been in existence, including an Observation Book, Punishment Book, Address book of Relatives and an Inventory Book. There was no list of children indicating which group they were allocated to, but she was unable to say whether such a list had ever existed. Whilst she cannot say whether a specific case file existed for the pursuer she could confirm that when a child had specific needs a separate file was sometimes kept, although these were not usually comprehensive and the content varied widely, depending on what the Sister who had decided to keep such a record decided ought to be included. In addition to specifics of records that may have contained entries relating to the pursuer, Ms Firmin-Cooper provided information about the defender's archiving system in general, in particular the Generalate Archive, the Generalate being the defender's governing body. The Generalate Archive comprises documents for the congregation as a whole and within that there are sections on regions and individual houses. Historic records go back as far as the founding of the congregation in 1850. Insofar as individual houses such as Nazareth House are concerned, there were no records of formal historic policies or procedures for those houses, although Guidance notes were provided within the Directories of the Congregation. These Directories and Books of Custom would be issued by the Generalate every few years providing direction on how children should be cared for within the various houses. The same information was passed to all the houses. Ms Firmin-Cooper identified that there were a number of different records kept for

each house. These included (i) the Children's Register, the relevant extracts from which were lodged in the present case as 6/8 (ii) Discharge Receipt Books, the extract for the pursuer which was again lodged at 6/8 (iii) Children's Observation Books (iv) Address Books (v) Logbooks (vi) Punishment Books, and (vii) Visitors Books (the relevant extract from which had been produced at 6/14). There were no historic staff or personnel records going back to 1973. Minutes from the Northern Regional Council in March 1973 contained a record of estimates for the installation of a complete bathroom suite and baths at the top veranda of Hollycot.

[154] Visitation reports lodged at (6/64) demonstrated that between 1972 and 1976 there were five groups of children accommodated at that time and that building works in 1972 were being undertaken so that each group would be completely separate. There were no personnel files for individual Sisters although Sisters Employment Registers did exist. The lists of Sisters who had worked at Nazareth House Lasswade in 1973 (6/13) and the list showing when each of those Sisters started and left Nazareth House in 1973 (6/66) was prepared from information in the Sisters Employment Registers. In respect of the allegation that the pursuer was abused by a priest or other adult male, Ms Firmin-Cooper confirmed that the visitors book for the main house did not show any visiting Priests between 1973 and August 1973 (6/14) and the archives did not show any male members of staff working with the children in 1973.

Sister May Bridget Broderick – formerly Sister May Cormac

[155] Sister Mary Bridget Broderick's evidence was contained within a signed witness statement. She had joined the Order on 20th February 1962. She arrived at Nazareth House, Lasswade in 1973 and stayed until 1975. Thereafter she had worked in various roles

in North America and Ireland, latterly as a Mother Superior in Dublin. During her time in Nazareth House, Lasswade there were up to 26 children in the group being cared for and a mixture of girls and boys aged between about 7 and 15. She had undertaken a childcare training course in Aberdeen for a year in about 1967.

[156] She confirmed there were two groups of children in Hollycot and three in the main house. Each group was looked after by a different Sister. She was in the main house with her group. The bedrooms were situated upstairs and there were separate bedrooms, not dormitories. There were showers in the shared bathroom. She described Hollycot as a small bungalow in the grounds situated about one hundred yards from the main house. Children in the main house did not go into Hollycot and vice versa. The groups were kept separate, and the Sisters looked after their individual groups. She was not involved in the care of other groups. Although the groups were housed separately, the children mixed at school and for leisure purposes. She remembered Sister W who was in charge of a group of children, and there being no concerns over her. She recalled that Sister Y and Sister Lillian were in Hollycot with a group of children each. As far as lay staff were concerned they would help get the children up, washed and dressed and assisted at mealtimes and with homework. She remembered that children would be kept in family groups. She thought that individual children had their own files in which medical information would be kept. She described showers at Lasswade and said that children were free to shower whenever they wanted. The younger children would be helped to shower by staff members. She had never seen or heard of anything that would constitute physical, emotional or sexual abuse by sisters or staff and she herself had never undertaken any such abuse.

Anne Dawson

[157] Anne Dawson's evidence was provided to the court in a signed witness statement. She had worked at Nazareth House, Lasswade as a "housemother" from the mid-1970s for around 10 years. She stopped work to look after her mother and thereafter went back to Nazareth House where she then worked as a care worker for the elderly. She retired from there at around the age of 63. She cannot recall the precise dates when she worked at the home. She worked for Sister Y in one of the groups at 'Hollycot 1", initially between 4pm and 8pm, but quickly becoming full-time between 1pm and 9pm. The children ranged in age from babies up to about 16 or 17. She thought there were around twelve children in the group. There were two groups in Hollycot and the other group was looked after by Sister W. Her duties were to look after the children and help them with their schoolwork. She did not recall any complaints against either Sister Y or her successor. She did not remember anything serious about discipline and sometimes dealt with disciplinary matters herself. She had never witnessed any incidences of abuse.

Mrs Eileen McElhinny – formerly Sister Eileen Pirret

[158] Mrs McElhinny's evidence was provided to the court by means of a signed witness statement. She left the order in 1975 and thereafter attended university, where she studied social work. She graduated in 1976/77 and thereafter worked in Scotland and London as a social worker until her retirement in 2012. Her work was predominantly with families and young children. She had worked at Nazareth House between 1972 or 1973 and 1975. She worked in the main building which she remembered being divided into three children's groups. She was in charge of a group of 27 children, both boys and girls ranging in age from 3 to 14 years. Sisters Cormac and Julia were in charge of the other groups in the main

building. Sister Y was in Hollycot, which was a separate building. She described the groups as "pretty much autonomous". She remembered three lay helpers, her own assistant called Janet and two other female helpers, Mrs Marr and Mrs Gavin. She also remembered a Mrs Jamieson who was younger and brought her own children into the home in the evenings. She remembered Sister Y, whom she knew but did not have much to do with as her work was in Hollycot, Sister Cormac and Sister Julia, who had a helper called Mrs Harkins. She remembered a Father CD who is now deceased but who was in charge of Catholic Child Care. He would visit possibly once a month. She had kept records for each of the children in her care, which recorded day to day incidents and significant things that happened to them, such as a visit from social workers or parents. She left these files behind when she left Lasswade. Sometimes children would have to take cold showers if the boiler had failed to come on, but children were not forced to take cold showers out of cruelty or deliberately. She had never hit any child and did not witness anything that she considered to constitute abuse whilst at Lasswade. She had never had any contact with anyone from Nazareth House since leaving in 1975.

Margaret McIlroy – formerly Sister Margaret Mary McIlroy

[159] Margaret McIlroy provided evidence by way of a signed witness statement dated 21 September 2021. She had joined the Order when she was around 17 years of age around 1966 or 1967. She lived in various Nazareth Houses and recalls that she was sent to Lasswade in about 1974 so that she could undertake exams prior to starting teacher training, which she subsequently did. She qualified as a teacher and started teaching in 1977. She left the Order. She was sent to Lasswade to assist a Sister with a group of children. Thereafter the Sister became ill and she was responsible for the group on her

own. After that she returned to the convent to study for her exams. Whilst at Nazareth House, Lasswade she was responsible for one of the three groups of children in the main building. The group included boys and girls. She could not remember the name Hollycot as meaning anything but recalled two nurseries and a unit of children being separate to the main building but still within the grounds. She had no concerns over how children were treated, and never saw anything that concerned her. She could not remember the names of any Sisters and did not witness abuse of any kind. If she had seen anything of that nature she would have reported it to the Mother Superior. She would have thought the children would have complained had they been ill-treated and she never treated a child in that way and never saw anyone else doing so.

Margaret McLafferty

[160] Mrs McLafferty's evidence was provided by way of signed affidavit dated 3 September 2021. She worked as a lay member of staff at Nazareth House, starting there in either 1974 or 1975. Whilst she did not have a particular job title, she was in charge of Nazareth House when the nuns were absent. Eventually, after two years or so, she became the deputy manager. She recalled at most there would be three or four lay staff at any time. She lived-in at Nazareth House and recalled that there were five different groups of children, each with their own member of staff. One nun was in charge of each group of children with two live-in staff and various staff who came during the day. In accordance with the recollection of other witnesses, the groups were quite separate.

[161] She recalled that three of the groups of children were housed in the main building and two at separate individual houses called Hollycot 1 and Hollycot 2. She only ever visited Hollycot 1 and worked solely with the children there between 1975 and 1980.

Sister Y was in charge of the Hollycot 1 group and that was the only place she was based. She thought Sister Dominic was in charge of Hollycot 2. She recalled the sleeping accommodation in Hollycot 1 was upstairs and there was a large bathroom. Boys and girls were not accommodated together but families were kept together in the same house.

[162] In respect of allegations of abuse, Mrs McLafferty did remember that children would occasionally be given a smack on the back of the hand or bottom, and she saw Sister Y do this once. Lay staff did not administer corporal punishment, only the nuns. She never saw anything she would describe as child abuse. She made the point that the children "got worse at school" and that people forget that corporal punishment was the norm at the time. The nuns would only ever smack children with their hands. She described Sister Y as having a good relationship with all of the children and remembers her doing her best for them. She thought that the children respected her and that she could get annoyed and would shout if children were pulled up by other Sisters or staff. She said that it never entered her mind that staff would hit children. She recalled a male member of staff who was a driver and another man who came later who was a handyman (a function also fulfilled by the driver). She could not recall the driver's name but could remember the other handyman lived in a house by the gate with his wife and daughter and his name was Mr Thomson. Social workers regularly visited to review the children and could come at any time.

GD

[163] GD, the pursuer, gave evidence to the court in the form of an affidavit dated 7 June 2022. She described how, together with her 3 sisters and 2 brothers she was taken into care when she was around 9 years of age. She remembers going into Nazareth House with two

or three nuns and remembers Sister Y being there. She described how corporal punishment was something that would happen every single day and that violence and beatings were rarely administered as punishment and described them as "just daily occurrences". She described Sister Y as very violent and states that she would hit and slap her frequently. On two or three occasions Sister Y rubbed her face with dirty underwear at the end of the day. Her statement goes onto describe the other instances of physical abuse which no longer form part of the action. GD then went onto describe how she was showered with her sisters during her time at Nazareth House. She remembered the nuns were in the shower room, which she described as like "a big wet room" which contained an industrial Belfast sink where the girls' hair was washed. She described being sexually abused in the showers by a man whom she believed to be a priest and that the name 'James' stuck in her head. She recalled that her abuser had white greyish hair and wore a white collar together with black clothes. The abuse occurred on four or five occasions and happened in the evenings. The shower room where the abuse happened was of a communal type with several showerheads. There were no individual showers. Her sisters were usually with her when the abuse occurred, and sometimes another girl. The nuns were always present when the abuse occurred and usually two or three of them were there. She named Sister W, Sister X and Sister Y as being present. She further states that there may have been other nuns present on one or two occasions, but that she cannot recall their names. She is not certain if all three of the named nuns were present on every occasion but is certain that Sister Y was.

[164] The nuns remained in the corner of the shower room whilst the abuse took place. On another occasion GD remembers the abuser being directed to wash the girls by Sisters Y. She states that the priest then washed and assaulted the girls in the manner averred on Record one by one. On another occasion the boys were also present and once a girl who

was not part of her family but also present in the communal shower was led away and assaulted out of sight of the rest of the group. Thereafter she states that when the man was fondling her in the shower there were one or two nuns there and that they would have seen this episode of abuse.

SM

[165] SM also gave her evidence by way of affidavit dated 7 June 2022. She is the younger sister of GD. She described the circumstances in which she came to be taken to Nazareth House, Lasswade. In so far as relevant to the present action, SM's affidavit contains allegations of abuse by a priest who used to shower her in the home. He is described as being quite a heavy man with white hair and a black gown with a collar round it. SM thought that he may have been called 'Peter'. She described in some detail how she was abused in the showers and how another of her sisters (not the pursuer) was also similarly abused. She remembers that after the abuse the nuns, including Sister Y, dragged her from the shower. She did not know whether the nuns had just come in at that stage, or whether they had been present during the abuse.

Records

[166] Extracts from the Nazareth House Children's Register (No 6/8 of process) record that the pursuer and her siblings were "Recommended" by Midlothian Council because their parents were "in desertion", that they arrived there on 13 July 1973 and left on 4 August 1973. Their father signed the Discharge Receipt Book on 4 August 1973 to say that they were in "a Perfect State of Health and Cleanliness".

[167] A letter from Karen Firmin-Cooper which forms 6/38 of Process records that lists of

visiting Priests or clergy were never kept so there is no way of knowing which priests may have visited at any particular time. Some Priests may have been residents in the care home at that time, however elderly residents' records for a House will have been kept by that House if it is still open today – which it is. She had found nothing in the Generalate Archive that could assist on this matter.

[168] Number 6/38 of Process also recorded that proposed plans for the ground and first floor alteration and extension of the Children's Wing of Lasswade House (also 6/38), dating from 1970, showed no indications of showers being planned for the proposed ground floor sports changing rooms. The plans for the first-floor boys and girls bathrooms may indicate that shower cubicles were planned. A 'Report of Visitation of Lasswade' dated 23 October 1972 recorded that "workmen are at present engaged in building bathroom facilities so that each group will be completely separate..". Ms Firmin-Cooper was not aware whether the work which was being carried out at that time was in accordance with the 1970 plans.

[169] Number 6/7 of Process contains extracts from the Records of Midlothian Council, including a Social Enquiry Report from Midlothian Council, dated 23.09.2004. Within that report, the pursuer gives details of her personal history, including details of a family move to Doncaster when she was ten. However, when the family arrived there they had no accommodation, and the children were placed in a children's home until their parents found accommodation. The pursuer reported that the family returned to Midlothian when she was 17 years old. The history was repeated in further Social Enquiry Reports dated 5 November 2007 and 15 February 2010 and again in a Criminal Justice Social Work Report dated 14.10.2013.

[170] In the Social Enquiry report dated 23.09.2004 the pursuer blamed her longstanding mental health difficulties on the abuse she had suffered in a previous relationship. This

assertion was repeated in subsequent Social Enquiry reports dated 5.11.2007 and 15.02.2010. There is no mention in these reports of the pursuer having been abused, either in the care of the defender, or elsewhere.

[171] Number 6/36 of Process, The Midlothian Council Records, contain an extract of the pursuer's previous criminal convictions. I note that these contain a number of offences for dishonesty.

[172] Number 6/5 of Process comprises an extract from the pursuer's general practitioner records. Of relevance to the present case are the contents of an entry in records for 18.02.2020:

> "Consultation struggling with mood dealing with historical abuse enquiry (Nazareth house) also reports sexually abused aged 6-7, mood low, tearful pain in legs, increase venlafaxine r/v in 3-4/52 refer psychol? Dr Gary O'Neill." and the contents of a referral letter of the same day from the pursuer's general practitioner to Midlothian Adult Psychiatry:
>
> "I would be grateful if you would see this 58-year-old woman for survive and thrive. She reports being abused in the care of the Nuns at Nazareth House as well as previous sexual abuse. She is currently having to speak to the enquiry board about the historical abuse which is unsurprisingly bringing these issues to the fore".

Expert Reports

[173] Number 5/1 of Process is a report dated 22 July 2020 by Professor Gary McPherson, Consultant Clinical Psychologist, instructed on behalf of the pursuer for the purpose of the litigation.

[174] Within that report, Professor McPherson noted that the pursuer had thought she had been in the care of the Defenders for a period of six weeks, and that she had denied having been abused prior to the time she had spent in the care of the defenders, but that there were discrepancies in terms of this account. In that respect he referred to a report within the pursuer's records from Margo McClintock, Psychiatrist dated 8 March 1999, in

which Dr McClintock recorded:

> "I note that she disclosed sexual abuse by a neighbour from five years of age whom she stated was prosecuted and sexual abuse from seven years of age for around one year by a neighbour which she had never disclosed. She made no reference at the time to any abuse while in the care of the Sisters of Nazareth."

[175] The abuse alleged to have taken place whilst the pursuer was in the care of the Sisters of Nazareth was described by Professor McPherson at page 12 of his report, but he did not review the pursuer's account of events in detail, as these were outlined within her statements. He reported that:

> "I understand that she was subjected to emotional and physical and sexual abuse while in the care of the Sisters of Nazareth. She explained that she was placed in cold showers for extended periods, she was made to eat sandwiches containing sand, she was assaulted regularly with a wooden cross, she was sexually assaulted by several males, and she was made to masturbate a male on a number of occasions. I understand that she was in the care of the Sisters of Nazareth for a total of three weeks."

[176] Number 6/10 of Process is an expert report from Professor Tom Fahy, Professor of Forensic Mental Health, dated 13 March 2021. This report was instructed on behalf of the defender.

[177] In the narration of the pursuer's background and personal history Professor Fahy described how the pursuer recounted an incident of abuse which she suffered at the age of five or six, when she was assaulted by a man in some woods whilst on her way to school. This incident clearly had nothing to do with the pursuer's time in Lasswade House and preceded it by some years.

[178] When asked specifically about Nazareth House and on being provided with the actual dates of her admission as Professor Fahy understood them to be, the pursuer related that she thought that she had been in Nazareth House for a longer period, possibly a couple of months. In terms of the abuse she had suffered, the pursuer recounted being force fed

and of children's underwear being rubbed in their faces if it was dirty. She further described being abused by a Priest in what she thought was an office and being told to play with his penis whilst he sat in a chair and abused her and being threatened with being eaten by rats if she did not do as he asked. She said she was slapped and hit on the head with a wooden cross for taking communion and being made to stay in a cold shower for longer than usual for committing this act. She alleged that there were other instances of hitting and slapping.

[179] Describing the incident that occurred in the shower, Professor Fahy recorded how the pursuer had recounted that a priest would bathe or shower the children at times. He would put his finger inside her vagina. This occurred on more than one occasion. She said that she felt disgusted and used to cry when this happened.

[180] Professor Fahy reviewed the pursuer's extensive GP records but noted that they contain no detailed contemporaneous information regarding her childhood.

[181] During the interview, the pursuer initially denied having been sexually assaulted prior to entering Nazareth House. When Professor Fahy pointed to the entries in the clinical records that contradicted this account the pursuer acknowledged the incident of abuse when she was five or six, but she did not acknowledge the second incidence of sexual abuse by a neighbour when she was seven years old.

[182] Professor Fahy expressed some concerns about the pursuer's reliability as a clinical historian, citing various reasons for this including her failure to give a spontaneous account of the sexual abuse she may have suffered prior to entering Nazareth House, the generally vague nature of her account of events and the fact that her recollection of some aspects of her stay at Nazareth House may be inaccurate. For example, that she appeared surprised that the duration of her admission to Nazareth House was three weeks, her recollection

being that it was longer than this.

[183] In addition, Professor Fahy noted that although her admission to Nazareth House was brief, the pursuer claimed to have experienced multiple incidents of physical emotional and sexual abuse during these three weeks. Given the lack of any contemporaneous corroborative information or reporting of specific examples of the sexual abuse until recent years, he felt that the plausibility of her account is a matter for consideration. Whilst he acknowledged, or course quite rightly, that the plausibility of her account was a matter for the court, he made some specific clinical observations. Firstly, in respect of the specific allegations in the pleadings (which have narrowed since Professor Fahy prepared his report) he observed that the incident of abuse by a male worker/or priest is alleged in the Initial Writ to have taken place in the shower but, he records, the pursuer informed him that this incident took place when she was in a bath. The plausibility of this second incident (as it then was) of a male staff member or priest being tasked with bathing an 11-year-old girl was also an issue for consideration, in his view.

[184] There was also the fact that the pursuer did not report these incidences of abuse after she re-joined her family. However, previous incidents of abuse (i.e., preceding Nazareth House) had been disclosed to family or to the authorities. The pursuer's description of her personality and behaviour after Nazareth House suggested she was "assertive and oppositional" which made it difficult to understand why she did not disclose the alleged incidents of abuse that had occurred at Nazareth House.

[185] Professor Fahy stated that he had not found the pursuer to be an impressive or persuasive clinical historian and he went as far as to say that he did not have clinical confidence in the reliability of her account of her experiences at Nazareth House or her description of sudden and persistent behavioural change following only three weeks in

institutional care.

[186] Professor Fahy went onto observe that the pursuer's clinical records did not refer to post-traumatic symptoms focused on her experiences in Nazareth House. When she has reported childhood abuse (e.g., to a psychiatrist who wrote a detailed letter dated 8 March 1999) she referred to the abuse that occurred before she was taken into Nazareth House, rather than to any abuse in the children's home.

[187] In his supplementary report dated 4 January 2022 Professor Fahy noted that the updated GP records he had by then perused contained only a single reference to stress associated with the historical inquiry into childhood abuse, but no other references to symptoms related to her experiences at Nazareth House. The content of these records did not lead him to change his opinion.

[188] Having perused the social work and police records he commented that there was no reference to childhood abuse in care or childhood sexual abuse. In these records the pursuer attributed her mental health problems in adulthood to the effects of abuse by her partner.

[189] 6/30 is a site plan showing Nazareth House and Hollycot. The latter does not appear to be a bungalow as some witnesses thought, but a much larger building.

Decision

Severable Allegations

[190] A preliminary issue in the present case is whether it is permissible to allow part of the claim to go to proof whilst refusing allow other aspects of it to do so. Whilst in light of my decision on the questions of whether a fair trial is possible and whether there is substantial prejudice, I do not need to decide this question, I provide my reasoning for

completeness.

> "In *JXY* v *The de la Salle Brothers* [2020] EWHC 1914 QB, Chamberlain J followed this course of action, finding that in respect of the sexual assaults for which there was a conviction, a fair trial was possible, and that these admitted assaults were severable from the allegations of negligence on the part of the headmaster and the other non-sexual assaults. Counsel for the defender in the present case, Mr Brown, submitted that whilst the court had done so there, this course of action had been followed on the basis of an agreement between counsel that this was a course of open to him, and thus did not form part of the *ratio* of the decision."

[191] Whilst this is correct, I agree with the observations as to the interpretation of s.17D made by Chamberlain J in *JXJ* where, after noting that it was common ground between the parties in that case that the application of the tests in s. 17D(2) and (3) might yield different results in respect of the claims relating to: (i) sexual assaults; (ii) the claim for vicarious liability based on a failure to prevent exposure to the risk of abuse and protection from that abuse, and (iii) the physical assaults, he said:

> "In my judgement, this is correct in principle. Although s. 17D(1) of the 1973 Act precludes the court from allowing "an action…to proceed" if either of the tests in s17D(2) or (3) is met, I do not read that provision as barring the whole action simply because there can be no fair hearing (or because the test in s. 17D(3) is met) in respect of *one* of the cause of action pleaded."

[192] In *AB* v *The English Province of the Congregation of Christian Brothers* [2022] SC EDIN 7, Sheriff Dickson would have been prepared to hold that allegations in respect of one abuser were severable from allegations in respect of the other two (see paragraph 222) but in light of his ultimate conclusion he did not require to consider the matter and his observations were *obiter* and on a matter which he acknowledged he was not fully addressed on. In my opinion no good reason has been advanced as to why part of a pursuer's case can be allowed to proceed, even if another part could not because a fair trial could not be obtained in relation to those allegations. Where the allegations are severable, as they are in this case, and where they relate to separate and distinct delicts, it would

seem bizarre if, as the defender asserts, the part or parts of any given case in respect of which the defender was not prejudiced by any delay in bringing proceedings had to perish alongside the allegations in respect of which a fair trial could not be obtained. Such a result would not seem to sit with what both parties in this case agreed to be the purpose of the legislation, which was to remove the onus on pursuers of defeating limitation whilst at the same time protecting the interests of defender in cases where they could demonstrate that they would be substantially prejudiced. Against this background, if the defender's submissions in the present case were to be accepted, even the parts of a claim in respect of which there could be a fair trial and in respect of which no prejudice existed would also have to be dismissed, resulting in a substantial windfall benefit for the defender. I cannot accept that this could have been the intention of the legislature.

[193] I was not addressed on any authority on this point and counsel for the defender submitted that reference in the section to "the action" suggested that it had to stand or fall in its entirety and if the Scottish Parliament had intended to permit some element of a claim to proceed whilst allowing others to go forward, it could have said so in express terms. It was much more likely that the Scottish Parliament intended a claim for damages to be viewed as a *unum quid.* I disagree with this submission for the reasons expressed above.

Specification and Relevancy

[194] I require firstly to consider the attack made by the pursuer's counsel upon the defender's averments on the basis that they were fundamentally lacking in specification to the extent that none of them ought to be remitted to probation.

[195] Counsel for the pursuer invited me *inter alia* to uphold the pursuer's fourth to

seventh pleas in law and to exclude from probation all of the averments in Answer 6 in so far as these relate to the defender's inability to obtain a fair trial and being substantially prejudiced. I am not prepared to accede to this submission, as I consider that the defender's averments in Answer 6 provide adequate fair notice of why the matters upon which they found can be said to render a fair trial an impossibility, failing which to cause them substantial prejudice.

[196] The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them, see *Esso Petroleum Co* v *Southport Corp* [1956] AC 218 per Lord Normand at 238.

[197] As is noted in the 4th Edition of McPhail Sheriff Court Practice at paragraph 9-30:

> "The degree of specification which will be deemed sufficient for fair notice depends on the particular circumstances of each case." In the footnote to that paragraph the authors observe "What is required will depend upon the nature of the case" and in support of that proposition make reference to the opinion of Lord Brodie in *Richards* v *Pharmacia Ltd* [2018] CSIH 31, where his Lordship said: "but regard must also be had to the identity of whom the pleadings are primarily addressed: the other party, and what the other party is already aware of and what the other party may be taken readily to understand."

[198] Here it appears to me that, in the context of a historical abuse case, it is obvious why the matters founded upon by the defender might be said to render a fair trial impossible or, in the alternative, to cause substantial prejudice. To use the language of Lord Brodie, I consider that the difficulties caused by the factors relied upon ought to be readily understood by the pursuer, without the need for further specification.

[199] In respect of circumstances (i) to (iv) relative to the absence of records it was submitted that the highest averment in support of these factors was that the defender has been unable to identify the pursuer's social worker nor what involvement that individual has had with the pursuer. It further was submitted that there were no averments

specifying why the absence of records or a named social worker would prevent a fair trial nor why this would cause prejudice to the defender, let alone substantial prejudice and, accordingly, the pursuer does not have fair notice of what the import of these averments is in relation to the section 17D defences in this case.

[200] I did not accept the submission that the averments regarding an absence of records were lacking in specification to the extent that the pursuer had no fair notice of how these averments could be said to inform the defender's claim. To my mind, it is obvious that an absence of contemporaneous records is potentially prejudicial to a party attempting to investigate historical allegations, particularly allegations as old as those made in the present case.

[201] From the point of view of relevancy and specification, all of the records which are now said to be missing, and which are detailed in the pleadings as circumstances (i) to (iv) could, potentially, have shed light on the matters relevant to the pursuer's claims of abuse. To give a few examples of documentation that may have been relevant to the matters referred to in the defender's pleadings, the records may have demonstrated which group the pursuer was in, which housemother was responsible for her care and which members of the lay staff worked with her group.

[202] I do not consider that the defender needed to make any further averments about such matters, as the potential prejudice arising from the lack of documents averred was obvious.

[203] In respect of circumstances (v) and (vi), which relate to conduct on the part of unidentified individuals, counsel for the pursuer submitted that the defender avers that without knowing the identity of the individuals who carried out the abusive acts, the defender cannot know their relationship to the defender, nor properly investigate

vicarious liability. However, Mr Langlands submitted, the pursuer does not seek to found upon the defender's vicarious liability for any unidentified individuals (although she had sought to do so at an earlier stage of the case). The only unidentified individual in the pleadings is the male who sexually abused the pursuer. It does not matter that the pursuer cannot name the male who sexually abused her. The defender's liability is not contingent upon the pursuer establishing who he was, and the pursuer did not contend that the defender was vicariously liable for the actions of the male abuser. Not being able to identify him did not preclude a fair trial as the pursuer need only establish that the abuse occurred, and that the defender is either directly or vicariously liable. It is said that given that the abuse was either carried out by Sister Y (the physical assaults) or was witnessed by the defender's Sisters (the sexual assaults) the absence of the unidentified adult male in and of itself does not prevent the defender from investigating the pursuer's averments. Accordingly, the argument ran, the averments relating to circumstances (v) and (vi) should be struck out.

[204] The problem with this submission is that, whilst the defender's liability might not depend on the pursuer being able to identify the abuser in the circumstances averred, regardless of who the abuser was, the pursuer still needs to establish that the abuse occurred, and the defender ought to be afforded an opportunity to make meaningful investigations in order to show that it did not, given that the abuse is denied. If the pursuer was able to name the abuser or give at least some cogent information which could have led to him being identified with at least some degree of certainty, then the defender could have carried out investigations which could have shed some light on who that person was, for example if he had been fully named, if his job title could have been provided, or if other information from which his identity could have been discerned

pleaded (for example that the pursuer or others had seen him working elsewhere in the institution).

[205] Accordingly, in respect of circumstances (v) and (vi) I do not consider that the defender requires to provide any further specification as to how these matters may prevent a fair trial or otherwise cause substantial prejudice. Again, the disadvantage caused by the identity of the abuser not being specified, even if the pursuer is not seeking to hold the defender directly liable for that individual's actions, is obvious. The weight to be attached to such factors in the particular circumstances of this case is, of course, a different matter.

[206] In respect of circumstance (vii), relating to the pursuer not averring which group she was in, this was said to cause prejudice to the defender in identifying potential witnesses. It was submitted that this was not a relevant consideration either, firstly because the defender fails to specify why its inability to identify potential witnesses precludes a fair trial or causes it substantial prejudice. Secondly, it does not specify what relevance identifying the pursuer's group would have on its ability to identify witnesses. Paragraphs 20 to 28 of the Joint Minute contain detail of every Sister known to have worked in the home, both during the pursuer's residence and in 1973 generally, as well as their current known status. The defender avers at Answer 6 (x) that it does not wish to contact other former residents. These things considered, the defender offers no specification as to what other witnesses it would expect to uncover that would either have knowledge of the pursuer's abuse, or which it would be prepared to contact. In any event, standing the naming of the Sisters who were either present when the abuse occurred or physically abused her, it was argued that the absence of the hypothetical witnesses, the significance of which is also not averred, does not prevent the defender from investigating

the pursuer's averments. Again, in the pursuer's submission, the court should disregard any evidence relating to the lack of ability to trace witnesses based on the pursuer's group and the court should disregard any submissions relating to why the lack of knowledge of the pursuer's group prevents a fair trial or causes substantial prejudice. Again, in my view, standing the factual averments made by the defender in Answer 4, the difficulties caused by the pursuer's failure to specify which group she was in could be said, potentially at least, to raise difficulties which ought to be readily apparent to the pursuer without the need for further specification. In respect of the separation of the children at Nazareth House in 1973 the defender avers the following in Answer 4:

> "Explained and averred that in around 1973 /1974 children cared for at Nazareth House Lasswade were organized into separate houses or groups. In around 1973 / 1974 there were five different groups of children. Three groups were housed in the main house. Two groups were house in a separate building named Hollycot. The groups were not separated by gender. The different groups of children had their own areas including dining areas, bedrooms and bathrooms. Each group has a housemother and lay staff."

[207] It seems readily apparent to me that in these circumstances, had the pursuer specified which group she was in, more focused enquiries may have been possible, which could have been conducted with the various witnesses identified as to the systems operated in the part of Nazareth house where she was, the arrangement for washing facilities, and whether some or all of the staff members she alleges abused her had ever actually worked in the area where the group of which she was a member had been accommodated. Accordingly, I reject the submission that there is a lack of adequate specification in respect of the defender's circumstance (vii).

[208] Circumstance (viii) relates to the absence of personnel records for staff at the home in 1973 and the fact that a number of staff who worked at the home at the relevant time are dead. Again, it was submitted, there are no averments specifying why either of these

things would prevent a fair trial or cause the defender substantial prejudice and that the court ought to disregard any submission relating to why these factors.

[209] In respect of circumstance (viii), relating to the absence of personnel records, I do not consider that the defender needed to make any further averments either on why these matters could prevent a fair trial or whether, in the alternative, they caused substantial prejudice. Personnel records could potentially have allowed further surviving staff members to be traced and precognosed as to the detail of the operation of the home, its layout, the systems employed to look after children in the defender's care, particularly around the arrangements for washing and how likely it was that the circumstances in which the sexual abuse in particular could have arisen during normal day to day operations of the home in 1973. It is obvious that the lack of such records and the death of staff cause material difficulties in investigating such matters, and the defender did not need to make further averments on such matters.

[210] Circumstance (ix) relates to difficulty in assessing causation. On behalf of the pursuer, it was submitted that she does not submit any claim which requires a difficult assessment of causation. She claims solatium for the immediate consequences of the abuse and for flashbacks linked thereto. It was submitted that if the court accepted the fact of the abuse and that the pursuer had suffered flashbacks and nightmares as a consequence of that abuse, then there would be no difficulty in determining that they were causally linked to the abuse. As such the averments about this factor were irrelevant and should be struck out.

[211] The defender's pleadings on the difficulties in assessing causation refer to the fact that the pursuer's allegations have changed over time and that she has not been a reliable clinical historian. In Answer 4, the defender avers the following:

> "The pursuer has given numerous differing accounts of abuse. The pursuer's allegations have evolved during the course of this action."

Again, the point being taken here by the defender seems clear to me without the need for further specification. Because the pursuer's accounts have varied, the defender foresees difficulty in establishing which of the versions of events can be taken to be the correct version when assessing whether and to what extent they may be liable and in assessing to what extent these events may have caused any loss. Whilst the weight which I would afford this factor when assessing the possibility of a fair trial or the question of substantial prejudice is another matter, I do not consider that any further specification requires to be offered in terms of fair notice, and I am not prepared to treat these averments as irrelevant or lacking in specification at this stage.

[212] Circumstance (x) relates to the reluctance to approach other residents of the home on the basis that this could cause harm and distress to them, even if they could be traced. In respect of this factor, it was submitted on behalf of the pursuer that there was no specification of why that reluctance would prevent a fair trial and or cause the defender prejudice; secondly the pursuer submits that the reluctance tends to support her allegations about the abuse she suffered; and thirdly, that reluctance, even if justifiably held, is held by the defender and is only a reluctance. The averment is tantamount to the defender not wanting to defend itself for fear of potentially upsetting other people. Even if the court considered that position justifiable, it could mean that the pursuer's case could not proceed because the defender was worried about upsetting other people. A decision to that effect would in effect be a "get out of jail free" card for the defender in many cases, where all it would need to do would be to suggest that its investigations may upset others. It was said that from Mr Batchelor's affidavit it could be seen that the defender has

contacted the Sisters relative to a significant number of cases. The police routinely carry out investigations into all sorts of cases, including allegations of historical abuse, where doing so may cause upset to other people.

[213] Strictly from the point of view of relevancy and specification, I do not consider that these averments should be dismissed. Whilst it was submitted by the pursuer that there was no specification offered as to why this factor could prevent a fair trial or caused prejudice, I do not think any further specification is needed. If the defender is justifiably reluctant to approach other potential witnesses on an unsolicited or speculative basis because they do not want to upset them or cause distress, then they are clearly unable to investigate the allegations as fully as they might otherwise have done. At the very least, if the case had been presented to the court at an earlier stage, then it might have been possible, either through documentary evidence or other witness testimony, to identify named individuals who were known to have been residents at the home and in the same part of the home at the same time as the pursuer, and to this extent at least, such enquiries would not have been speculative. It has to be observed that there is judicial sympathy for a reluctance to make unsolicited approaches to witnesses who had formerly been in care – see *B* v *Murray (No 2)* 2005 SLT 982 at para. [123] where Lord Drummond Young expressed such sympathy when he said:

> "Dr Abernethy stated that the defenders were reluctant to make unsolicited approaches to children who had been in care at the material time to discover whether they had any relevant evidence, even in the current whereabouts of such children could be traced. I find this entirely understandable."

[214] It is obvious that contacting witnesses on a completely unsolicited basis to ask them about a period they had spent in care during their childhood has the potential to raise unpleasant memories and could well be distressing. Thus, no further specification

is, in my, view required in respect of this factor. I do not accept the submission that such reluctance on the defender's part could be taken to support the pursuer's allegations of abuse. The reluctance arises simply from the defender's desire not to upset those who may have been in care during a difficult period of their lives and cannot be taken by itself to support or weaken the position of either party on the merits.

[215] Circumstance (xi) relates to the period of delay, the pursuer's period in the care of the defender being over forty-seven years prior to the hearing and the claim having been intimated in 2018. The defender founds on the likely deterioration in the quality of evidence over that period, the possible effect of the cerebral haemorrhages from which the pursuer has suffered on her memory and the fact that possible loss of avenues of enquiry may now not be obvious. I consider the potential difficulties caused by these matters are self-evident and that no further specification of the problems caused by such factors is required. I reject the suggestion that there is any lack of fair notice in respect of factor (xi).

[216] Circumstances (xii) and (xiii) relate to the death of former Sisters and the fact that those who are still alive are now elderly. On behalf of the defender, prejudice is said to arise from the death of these witnesses in the face of allegations pertaining to unnamed or at least unidentified Sisters. Reference is made to the fact that the only Sisters who may have gone by the name of "Sister W" are all deceased and that there is no record of there having been a Sister X at Nazareth House in 1973. In support of the submission that these averments were irrelevant and lacking in specification, counsel for the pursuer argued that the pursuer's averments were "very specific". They name the Sisters present during the abuse. Sister Y remains alive, and the pursuer does not advance a claim founding upon the vicarious liability of any Sister who is not named within the pursuer's averments. As such, the averments relating to these circumstances are irrelevant and should be struck out. In

this respect I note that a generalised factual averment of abuse by "the Sisters" is made but that a case of vicarious liability for assault is only made out against Sister Y alone.

[217] Whilst it is correct to say that the pursuer does not, on a fair reading of her averments, seek to blame any of the unnamed Sisters for either sexual or physical abuse, the fact remains that the now deceased Sisters could well have spoken to matters pertinent to a defence of this claim, such as the layout of the home, which of the Sisters had responsibility for which parts of the home and the bathing arrangements, to name but a few of the topics which could have been canvassed with these witnesses had they still been alive. Again, the prejudice arising from the death of these potential witnesses is obvious and no further specification of the prejudice is required. In addition, the passage of forty seven years could potentially affect both the extent of the recollection and on the quality of the evidence, of the surviving Sisters.

[218] Circumstance (xiv) relates to the fact that had the action been raised timeously the pursuer would not likely have succeed with her claim for vicarious liability for alleged assaults by employees. On behalf of the pursuer, it was submitted that she avers only very limited assaults. The most significant element of the claim relates to her sexual assaults. It was submitted that the defender does not aver why, in the circumstances averred by the pursuer, vicarious liability would not have 'attached' had the present action been raised 'timeously'. The averments also fail to specify why the absence of vicarious liability with a 'timeous' action would amount to the absence of a fair trial or substantial prejudice. However, it was submitted, on the assumption the defender alludes to the decision in *Lister* v *Hesley Hall Limited* [2001] UKHL 22, the theory of the common law holds that the defender would always have been vicariously liable for the abuse and that the pursuer was always entitled to compensation from it from the time that the abuse occurred. Reference was

made to *A* v *XY* Limited 2021 SLT 399 at 28; *JM* v *Fife Council* 2009 S.C 163 at 38.

[219] Again, I do not consider that there is any lack of specification or relevancy in respect of this factor. The defender sets out clearly that prejudice arises because the pursuer would likely not have succeeded in establishing vicarious liability for assaults by employees if the action had been raised timeously and founds on the fact that the law relating to limitation has changed, both retroactively and retrospectively. It is clear that "timeously" in this context means with such time period as would have ensured that the case was not barred by limitation, and whilst it is correct to say that applying the declaratory theory of the common law it can be said that the pursuer always had an entitlement to compensation in respect of the alleged conduct of those for whom the defender is responsible, it was not until the decision in *Lister* v *Hesley Hall Limited* in 2001 that this position was clarified, with the House of Lords holding that vicarious liability can arise if there is a sufficient connection between an employee's criminal conduct and the work that he had been employed to do. In this respect I refer to the comments of Lord Woolman in X *v* Y at paragraphs [25] to [28] and to the opinion of Lord Bannatyne in *SF* v *Quarriers* 2016 SCLR 111 at paragraph [164] to [169].

[220] Circumstance (xv) relates to difficulty in reconstructing social attitudes at the time. On behalf of the pursuer, it was submitted that the most significant element of the pursuer's claim relates to sexual abuse. There can be no doubt that the averred sexual abuse would always have constituted both criminal and civil wrongs. As such, as far as this circumstance is directed towards sexual abuse it is irrelevant. In relation to physical assaults the defender does not specify the significance of its averment to its section 17D defence in this case. Accordingly, in the pursuer's submission, the lack of specification means the court must disregard any submissions relating to why these perceived but

unspecified difficulties prevent a fair trial or cause substantial prejudice.

[221] In respect of the allegations of sexual abuse, I find the pursuer's criticism of the averments relating to changes in social attitudes and mores to be well founded. There could be no conceivable situation in which the sexual abuse and the circumstances in which it came to arise as described in Condescendence 4 could be viewed as acceptable, even in the light of any different social standards which might have applied of the 1970s. In respect of the allegations of physical abuse, the analysis is more subtle. The concept of differing social standards in the context of physical assault was discussed by Lord Drummond Young in B *v* Murray (No.2) at paragraph [22], where his lordship said the following:

> "The loss of evidence and the decline in its quality are especially important when the delay following the events complained of is measured in decades rather than years. Cases involving such a delay present one particularly difficult feature. This is the proper understanding and assessment of events that occurred at a time when social attitudes were markedly different from those that now prevail. It would be quite unfair to judge events by any standards other than those that prevailed at the time; the social attitudes of today cannot be the test of matters that occurred 20 or 30 years ago. Consequently, a judge who is called upon to decide a question relating to events of the 1950s, 1960s and 1970s must assess the propriety of what happened against the standards that then prevailed in society. That is not easy. It involves historical reconstruction not of events themselves but of the underlying perceptions and attitudes that underlay those events, which is a much more subtle exercise. This point is especially well illustrated by the present cases. The pursuer's complaints relate in large measure to the administration of corporal punishment. In the 1960s and probably in the 1970s, corporal punishment was the norm in Scottish schools and homes. Now it has been abolished in schools and is to be substantially restricted even in the home. It can scarcely be doubted that these changes in practice reflect changes in the general attitudes that prevail in society. Nevertheless, the allegations of excessive corporal punishment must be assessed not against the norms that were considered reasonable between 25 and 50 years ago……What is required for a proper assessment of events, however, is an appreciation of the cultural climate that prevailed in schools and homes at that time. This is relevant not merely to determining whether there was an excess of corporal punishment in any particular case. It is also relevant, if there was such an excess, to determining how serious the resulting injury is likely to have been, and what is reasonable compensation must be measured against the standards of the time when the individual pursuers were in the care of the defenders, not the standards of today."

[222] It seems to me that the difficulties of the type that Lord Drummond Young

identifies in respect of abuse cases involving physical chastisement and changing social values are obvious, and I do not think that the defender needs to do any more than they have done to put the pursuer on notice as to how these difficulties could in theory render a fair trial impossible or create substantial prejudice. The weight to be given to such matters is, of course, an entirely different matter.

[223] Accordingly, I hold that the averments regarding changing social attitude in Answer 6 to be irrelevant in respect of the claimed sexual abuse, but sufficiently relevant and specific in respect of the claimed physical abuse.

Decision on Fair Hearing & Substantial Prejudice

[224] In a case where there have been significant delays, it is clear that whether or not a fair hearing is possible or whether there may be substantial prejudice is a fact sensitive issue. It is, however, possible to identify the elements to which weight will be given in a consideration of the issue and which may result in a court deciding that a fair trial is not possible or that substantial prejudice arises.

[225] In my opinion, the submission for the defender based on *M* v *O' Neil* 2006 SLT *SF* v *Quarriers* 2016 SCLR, *K* v *Marist Brothers* [2016] CSOH 54 and *K* v *Marist Brothers* 2017 SC 258, to the effect that factors such as the death of material witnesses, the loss of documentation and the death of alleged abuser or abusers, particularly before any claim had been intimated could, in appropriate circumstances and depending upon all other relevant factors, lead the court to a conclusion that a fair trial was not possible, was well founded.

[226] I have also considered *JXJ* v *The de la Salle Brothers* [2020] EWHC 1914 (QB). *B* v *Sailors Society* & *B* v *Poor Sisters of Nazareth* and note that in those cases the death of alleged wrongdoers led the court to the conclusion that it was not possible for there to be a fair

trial.

[227] However, when considering such matters, I have to be mindful of the comments made in the recent decision of the Second Division of the Inner House in *B & W* v *The Congregation of the Sisters of Nazareth* [2022] CSIH, 52. In *B & W*, the Second Division reversed the decision of the Lord Ordinary, at the same time cautioning against placing too much reliance on decisions in other cases, which were, of course, based on their own facts. In delivering the opinion of the court, Lord Malcolm said the following at paragraph [7]:

> "[7] The Lord Ordinary equiparated the circumstances with the difficulties facing the defenders in *[X]* v *Province of Great Britain of the Institute of Christian Schools* [2020] EWHC 1914 and *B* v *Sailors Society* 2021 SLT 1070 (para.109). We doubt the value of reliance on decisions in other cases in such fact sensitive matters. The present claims are materially different from those where the allegation concerns only a deceased abuser or abusers, and all the more so if they were operating in circumstances where others were likely to be ignorant as to what was happening. It is understandable that in such circumstances a defender might be unable to prepare and could do no more than put the pursuer to proof of the claim. However, here the pursuers seek to prove abusive practices carried out by those charged with their care in 1974. In effect they allege generalised abuse which would be reflected in the culture and ethos of the administration of the Home as a whole. In her affidavit B states that all of the nuns treated her the same way. W speaks of "a cruel regime" which includes beatings from Sister X (who is still alive) and other nuns. As noted by the Lord Ordinary (para 18-43) there are several witnesses available who can speak to how the children were treated if, for example, they wet the bed or did not eat their food. We consider that the Lord Ordinary erred by not taking into account the nature of the attack on the overall standard of care, or lack of it, in the Home as a whole, as opposed to allegations of specific incidents.
>
> [8] The defender asserts that the lack of specification of particular episodes of abuse by named people and the consequences of the passage of time presents it with a fundamental difficulty in investigating in a meaningful way the totality of the wrongdoing. However, a fair hearing is not dependant on each party being able to investigate all that it would wish to pursue, nor on reassurance that all pertinent evidence remains extant and available to the court. In our view if appropriate regard is given to the systemic nature of the allegations and to the numerous sources of relevant evidence still available to the defender, it cannot be said that any hearing would be bound to be unfair. That is the high test presented by Section 17D(2). If met it will usually be quite clear that the problems are insurmountable."

[228] At paragraph [9] of *B & W* Lord Malcolm went on to discuss the findings of the

Inner House in relation to the Lord Ordinary's concerns about the lack of contemporaneous documentation in B & W where he said:

> "And in our view the concerns expressed as to missing documentation are speculative. They would have carried more weight if there was a basis for assuming that there were likely to have been records which would have been of material assistance on the key issues and that their absence would hamper the fairness of the hearing."

[229] The present case is highly unusual on its facts and parallels cannot be drawn with the circumstances in which abuse is alleged to have occurred in other cases, nor with the decisions in those cases. Whilst the party who actually carried out the physical act of abusing the pursuer has not been traced (the "male priest or other adult male"), and it appears likely it can be said that this person never will be traced now, one of the three Sisters who are said to have facilitated the abuse and permitted it to happen, Sister Y, remains alive. The pursuer has averred that she was present on "most occasions" when the abuse took place.

[230] In these circumstances, there is considerable force in the pursuer's submission that the distinguishing feature of the present case as compared with other cases where the wrongdoer cannot be traced, is that in those other cases, the absence of the wrongdoer meant that the defender could not properly prepare their defence and, if the action proceeded to proof, would be forced simply to put the pursuer to their proof. This was the case in *SF* v *Quarriers* where the allegations of abuse were directed against a single person who was dead.

[231] The present case is far removed from a situation where the only wrongdoer is deceased and the abuse happened in a situation in which, to adopt the language of Lord Malcolm in *B & W*, the abuser was operating in circumstances where others were likely to be ignorant of what was happening. Not only was Sister Y not ignorant of what was

occurring, but she is said, albeit along with others, to have facilitated or encouraged the abuse and to have been present on most of the occasions when it occurred. Furthermore, the pursuer avers that on at least one occasion, Sister Y positively directed the priest or adult male abuser to wash the pursuer, and that this led to the serious sexual assault narrated in the pleadings.

[232] It has to be recognised that the defender is, of course, disadvantaged to a considerable degree by the passage of time, and that they cannot now, for example, take a statement from the Sister who died in December 2009 and who could have been the Sister W referred to by the pursuer. Similarly, they have been unable to trace or otherwise identify the third Sister alleged to have been involved in the abuse whom the pursuer refers to as Sister X. They have been unable to take statements from 9 of the 12 Sisters who were present during the period of the pursuer's residency at Lasswade House, because they have died.

[233] However, I must also weigh in the balance that there are, potentially at least, various other sources of evidence available to the defender. As I have referred to above, at paragraphs [123] to [129], Sisters Mary Bridget Broderick, Mrs Eileen McElhinny and Margaret McIlroy have provided statements in connection with the case of *B & W*. As yet, however, they have not been asked about the very specific allegations which are made by the pursuer in the present case, for example, whether, if had they wished to do so, it would have been possible for two or three Sisters to allow a male into the showers to abuse the children and to carry out such an act undetected on several occasions and, if such an act were not possible, why not. There is nothing in these statements about the existence or otherwise of communal showers, and it may well be that further investigations with these witnesses would be fruitful. Certainly, at this stage, I do not think on the evidence before

me it can be said that there are no further useful enquiries that can be made of these individuals.

[234] In addition to the evidence of the surviving three Sisters from the time of the pursuer's residence at Nazareth House, the defender has available the evidence of the lay witnesses who worked at the home at the relevant time. Anne Dawson worked directly for Sister Y at Hollycot 1 during the period of the pursuer's residence, and she has not, as yet, been asked about the specific allegations made by the Pursuer in this case. The statement from Mrs Dawson in the present case was given for the purposes of the case of *B & W*, as was that of Margaret McLafferty. These witnesses may well be able to shed further light on the running of the home and the arrangements for bathing. I acknowledge that Mrs McLafferty was not working at the home at precisely the same time as the pursuer was there, but nonetheless, she may be able to provide some assistance on the general arrangements at the home. There are witnesses who were adults working at the home at or about the time when the pursuer was a resident there and who could give evidence both about Sister Y, the standards of care and discipline in the home and general practices observed therein, such as the arrangements made for bathing the children. Their evidence may cast doubt on the credibility and reliability of the pursuer's account of her abuse, or at least part of it.

[235] Most importantly, of course, Sister Y herself is still available to provide evidence. Although she is now 80 and suffers from a heart condition, the defender's agent has indicated that he is unable to say that she would be unfit to give evidence and that even if she were, there would still be evidence about her position available. Mr Batchelor's affidavit records that the pursuer's allegations have been put to Sister Y, and that she had no recollection of the pursuer, denied the allegations against her, and had not witnessed the

abuse of children at Nazareth House. However, no detail about Sister Y's position is available to the court at this stage. I would expect that at any subsequent hearing, whether Sister Y gave evidence in person or by way of affidavit, her position could be expanded upon considerably and more detail provided about the running of the home, the arrangements for bathing and the possibility of something of the nature averred by the pursuer occurring. It is not unreasonable to observe that the defender is likely to have a considerable amount of information available from Sister Y, both about the general running of the home and regarding the specific allegations against her at any proof at large, that this information which was not before me at the Preliminary Proof, and that this is a factor which I have to weigh in the balance when considering whether any trial is bound to be unfair. Certainly, in the absence of a detailed statement or affidavit from Sister Y about the very particular allegations made against her, it is difficult to reach the view that it would not be possible for the defender to receive a fair trial. The court does not know the full extent of the available evidential material or its relevance or weight in advance of the trial itself. Given that Sister Y denies the allegations she may well be able to provide the defender with useful testimony which will enable positive lines of defence to be advanced and which will allow cross-examination of the pursuer and her sister on those lines of defence. Their evidence can be tested on this basis. Shortly put, I do not consider that this is a case where, on the basis of the evidence and submissions before me, I can find that all the defender would be able to do at an evidential hearing would be to put the pursuer to her proof in respect of the allegations of sexual abuse.

[236] As no affidavits or statements are available from any of the defender's witnesses on the specifics of the abuse alleged in this case, it is difficult to know what opportunities the defender will have to test the accounts given by the pursuer and her sister. Whilst it is

true to say that the pursuer has been unable to identify the individual who allegedly perpetrated the acts against her in the showers, in the very particular circumstances of this case, I do not consider that this necessarily renders any trial unfair. This situation can be contrasted with that which arose in cases such as *SF* v *Quarriers*, and *B* v *Sailors' Society*, where the only abuser was dead.

[237] In relation to the allegations of physical abuse, the situation is different as the only Sister against whom the pursuer makes a case in respect of these assaults is Sister Y. Her position is that, as with the sexual assaults, she denies the allegations, and although there has been the passage of a great deal of time since the alleged abuse, she can again he asked about the allegations and will be able to give evidence about whether such events took place and, on the hypothesis that they did, whether such acts could have gone undetected at the home.

Delay

[238] Whilst I am mindful of the comments made by Leggatt J in *Gestmin SGPS SA* v *Credit Suisse UK Ltd* [2013] EWHC 3560 regarding the fallibility of memory and the tendency of the human mind to construct a narrative after the event, and I am also aware that there are inconsistencies in the various accounts of events which the pursuer has given, I do not think that this factor, either alone or taken with the other factors, can justify a finding that any trial is bound to be unfair or that there is substantial prejudice. The defender will have ample opportunity to cross-examine the pursuer on her version of events and the inconsistencies as to the identity of the abusers and the history of the abuse can be put to her. It may be that the pursuer's version of events is ultimately held to be part of a narrative that developed in the way described by Leggat J in *Gestmin*, but that is a

matter that can be tested in the usual way at proof, both under reference to the pursuer's differing accounts and against any positive evidence which the defender choses to lead, the extent of which is at present unclear.

[239] Nor did I consider that the pursuer's formulation of the description of which of the Sisters were involved in taking her to the showers and which of the Sisters physically abused her to be materially unfair or substantially prejudicial. The pursuer avers that she remembered being taken to the showers by "two or three of the defender's Sisters" and that the Sisters she "remembers being present on various occasions" were Sisters W, X and Y. In respect of the physical abuse she allegedly suffered, she avers that she was physical abused by "the Sisters" but most frequently by Sister Y. I do not consider these formulations as being any more than general narrative. In her averments of fault, the pursuer is not seeking to hold the defender liable for the acts of anyone other than the Sisters whom she names in her pleadings. At proof the defender would be entitled to object to any attempt by the pursuer to lead evidence about abuse by any Sisters other than those named.

Records

[240] In respect of the absence of records, I do not think on the basis of the evidence before me that this factor would justify a finding that a fair trial was not possible. In his affidavit Mr Batchelor identified that normally the defender would expect to recover a range of records including care records, punishment books, visitors' books, accident books, incident logs, daily logs and admission registers. In submission counsel for the defender referred to the fact that at one stage there would have likely been "a wealth of evidence" available as to the detail of the routine followed at the home in relation to day-to-day supervision and arrangements for bathing. In particular he referred to the fact that the

home operated as two separate houses, the main house and another house in the grounds, Hollycot and that there may have been lists available at one stage demonstrating which child was in which unit. Whilst I considered that the defender's pleadings on this point were sufficiently relevant and specific for enquiry, and that it may well be true that there would have been a greater range of documentation available at an earlier stage, it is not clear what the significance of additional documentation would have been to the presentation of the defence. For example, it is difficult to see how the recovery of accident books would have advanced the defender's position. Whilst records listing which house each child was in would have been useful, I note that the defender's Archive and Heritage Manager was unable to say whether any such list had ever existed, and neither could it be said that a separate case file had ever existed for the pursuer as an individual.

[241] However, the defender has been able to recover the actual visitors' book from the Main House for the period of the pursuer's residency and that confirms there were no visiting priests during the brief time of the Pursuer's stay at Nazareth House, and this may assist them to some extent.

[242] It was also submitted that if the claim had been raised earlier, then the pursuer's local authority records would have been available. Again, it is difficult to know what would have been contained within these records that would have helped the defender, particularly when there is no suggestion that the pursuer had ever disclosed the alleged abuse at Nazareth House whilst under the supervision of the Social Work Department.

[243] Similarly, it is doubtful whether punishment books or incident logs would have added anything to the case as the sexual abuse for which the pursuer seeks to hold the defender liable would not have been recorded in these documents. In so far as the physical assaults are concerned it is unlikely that any punishment that went beyond what could be

considered reasonable chastisement at the time would have been recorded.

[244] As regards the absence of records, it cannot be said that the lack of this material would prevent a fair hearing or cause substantial prejudice in this case.

Other Matters

[245] In respect of the other factors relied upon by the defender in respect of the argument that they cannot secure a fair trial, whilst I have given these my full consideration, I do not consider that these factors, even when taken together, indicate that any subsequent hearing would be bound to be unfair.

[246] Whilst it is fair to say that the pursuer's pleadings have changed during the course of the litigation both in respect of the acts allegedly perpetrated against her and the identity of those who perpetrated those acts, I do not consider that the defender is prejudiced in this regard as they are able to cross-examine the pursuer as to why this change has occurred, and part of the reason for that change may have been, as is recorded in the defender's written submission at paragraph 28, that the original formulation of the case, that the defender was liable for the acts of Priests, was erroneous.

[247] In so far as the defender's reluctance to approach former residents of the home for statements is concerned, clearly such reluctance is justifiable, and this is a factor which could potentially carry some weight in the assessment of whether or not a fair trial is possible or whether there is substantial prejudice, and I am mindful of the comments of Lord Bannatyne in *SF* v *Quarriers*. However, in the present case, there is no suggestion from the defender that any former resident who could have information which would be useful to the presentation of the defence has either been identified or traced. Had a witness who was known to have potentially vital information been identified, but not approached

for the reasons discussed by Lord Bannatyne, then this factor could carry more weight. But in the absence of specific information about evidence which could not be obtained pertaining to this case, then the concern about not approaching former residents is a general concern, which does not appear to me to justify a finding that a fair trial is impossible or that there is substantial prejudice caused to the defender in the present action. It was acknowledged by Mr Batchelor, the defender's solicitor, at paragraph [9] of his affidavit that unless a witness was known to have evidence of direct relevance to the pursuer's allegations, then they were not approached for a statement for the purposes of the preliminary proof. This suggests that those witnesses who were thought potentially to have useful evidence were traced and precognosed where possible, and calls into question what the value of the evidence of others who might otherwise have been precognosed on a speculative basis could have been.

[248] Similarly, I do not consider that the fact that there has been a change in the law, or at least in the interpretation of the law, following *Lister* v *Hesley Hall*, to amount to substantial prejudice in this case. This is a factor which will arise in almost every case to which the new S17A -17D of the Prescription and Limitation (Scotland) Act 1973 applies and is the inevitable consequence of the retrospective effect of the legislation.

[249] Whilst I acknowledge that the defender has sustained what Lord Woolman called in *A* v *XY* a "sea change" to their position as a consequence of both the decision in *Lister* v *Hesley Hall Limited* and the introduction of the new section 17A - 17D into the Prescription and Limitation (Scotland) Act 1973, the prejudicial effect of these factors in the present case is not as acute as it might have been in a different claim of higher value.

[250] In the present action the pursuer only advances a claim for *solatium* which will necessarily have a limited monetary value, and which can be contrasted with the potential

value of other such historical abuse claims, such as that advanced in *X* v *Y Limited*, where the pursuer claimed the abuse had had a "corrosive and pervasive consequences" which had affected her whole life. Thus, whilst clearly prejudicial to some degree, I do not consider that the changes in the law in the present case either prevent a fair trial or amount to such substantial prejudice that either taken alone or with other factors would justify dismissing the present action. Similarly, because the claim has a limited value, the effect of the accumulation of judicial interest over a long period of time is not as detrimental to the interests of the defender in this case as it might otherwise have been. Ultimately, the defender can argue that the pursuer's delay in bring the claim ought be taken into account by the court in assessing the interest to which she would otherwise be entitled, so I do not consider the defender to be substantially prejudiced by this factor either.

[251] The same observation applies to the defender's argument that due to the passage of such a lengthy period of time, there will be difficulty in reconstructing the social attitudes of the period when the abuse took place. Firstly, in terms of the alleged sexual abuse, as I have already observed, at no stage in the 1970s would it have been acceptable for anyone charged with the care of a young girl such as the pursuer to have facilitated, encouraged, and allowed that child to be abused in the manner averred, so no real difficulty arises from reconstructing social attitudes in that respect. Secondly, in respect of the physical abuse, whilst some difficulty might be experienced in reconstruction the social norms of the time, I do not think that this would be great, and certainly I do not think that such difficulty could lead to "a serious decline in the quality of justice" as the defenders plead. I do not think that it would be unduly difficult to find evidence to ascertain whether what Sister Y is alleged to have done fell foul of the standards of the time or not, and indeed one of the defender's witnesses had already touched on this very issue, with

Margaret McLafferty, in describing a particular incident of corporal punishment, saying:

> "She would give the kids a tap on the bum. They got worse at school. People forget that corporal punishment was allowed then. I didn't think anything about her doing this."

[252] Accordingly, looking at the totality of evidence that is available and potentially available to the defender, and considering all of the circumstances of the case, I cannot reach the conclusion that any subsequent hearing would be bound to be unfair, the "high test" identified by Inner House in *B & W.* I am not satisfied that the defender has established that a fair trial is not possible.

Substantial Prejudice

[253] For the same reasons as I have explained in relation to the unsuccessful argument that the defender cannot receive a fair trial in this case, I do not consider that the factors relied upon by the defender can be said to result in substantial prejudice such that this action should be brought to an end. Whilst undoubtedly the passage of such an amount of time since the alleged acts will cause prejudice I am not satisfied that it can be described as "substantial" to the degree that the case ought not to proceed any further.

[254] Had I been required to do so, I would, in any event, have reached the view that even if there was substantial prejudice caused to the defender, the pursuer's interest outweighed that prejudice, and I would have found that the action ought to proceed.

[255] Counsel for the defender addressed me in some detail on both the pursuer's interest in the action proceeding and the cogency of her case.

[256] It was argued for the defender that in the present action, the pursuer had initially claimed for substantial losses arising from the events that she alleged, but that following receipt of a report from Professor McPherson to the effect that the substantial hurdles she

has faced in her life could not be causally linked to the events that she describes in her pleadings whilst in the care of the defenders, she had been forced to reduce the ambit of her claim to one in which she sought solatium only. To that extent, whilst recognising that this was a somewhat distasteful exercise, the defender submitted that the pursuer's interest in pursuing this case could be compared with a case where someone had suffered lifelong consequences and had their life ruined by abuse. Thus, the argument ran, the pursuer's interest in the present case was a lesser interest than in such cases. An important factor in this argument appeared to be that the pursuer had not suffered any pecuniary loss because of the events alleged in the present case, and thus, because her livelihood has not been affected, the case was of less importance to her.

[257] In assessing the question of the pursuer's interest the seriousness of the abuse and the claimed effects of that abuse are both relevant, see Chamberlain J. in *JXJ* v *The de la Salle Brothers* at paragraph 101. Whilst it is true that the pursuer has encountered a variety of problems in her life, and that these cannot be linked to the alleged abuse, none of that detracts from the fact that if these events occurred in the manner the pursuer describes in her pleadings, they constituted grave abuse committed, as counsel for the pursuer submitted, at a time when the pursuer was vulnerable, both as a child in care, and also specifically when she was a young girl naked in a shower. I agreed with counsel for the pursuer that if this abuse was allowed to occur and was indeed facilitated by the defender's Sisters, who were supposed to be protecting and caring for the pursuer, then this is an important consideration.

[258] If these events did occur in the manner described by the pursuer, then clearly her interest in obtaining redress for them, and indeed in holding those alleged to have facilitated the abuse to account, is considerable. As the Inner House observed at para. [14]

in *B & W* v *The Congregation of the Sisters of Nazareth*, it is hard to imagine a case of alleged childhood abuse where the pursuer's interest in the action proceeding is not worthy of considerable weight. Although the effects of the abuse are not as serious as in those claimed in some of the reported cases, I consider that the pursuer's interest outweighs any substantial prejudice that the defender may have suffered.

[259] Regarding the cogency of the pursuer's case, it was submitted under reference to *B* v *Sailors Society* at paragraphs [242] [243] and [292] and the Outer House decision in *B* v *The Congregation of the Sisters of Nazareth* at paragraphs [91] to [95], that the apparent cogency of the pursuer's case was a factor to which the court ought to have regard when assessing the issue of substantial prejudice.

[260] It was submitted that the doubts over whether the communal showers had ever existed and the changes in the pursuer's account, which had evolved from no allegation of sexual abuse at the initial stages to become the abuse narrated in the pleadings, taken with the fact that the pursuer's sister had made essentially identical allegations and was only said to have been present during the abuse at a later stage in the case and not initially, were all factors which ought to present cause for concern as to how convincing and compelling the pursuer's case was.

[261] The differing accounts of the abuse given by the pursuer to Professor Fahy and the fact she had denied being abused prior to entering Nazareth House, only correcting that when challenged, and Professor Fahy's view of the pursuer as an unreliable historian were said to present an objectively based cause for doubt that the pursuer would be accepted. Taken with references in the medical records to her psychiatric history, substance abuse, and criminal convictions presented, it was said that there was significant cause to doubt the cogency of the pursuer's account.

[262] Whilst I agree that the apparent cogency of a pursuer's account is a factor to which the court ought to have regard when assessing the possibility of a fair hearing or substantial prejudice, I am not satisfied that I can decide at this stage that the criticisms of the pursuer's account are such that they cause the defender substantial prejudice by having to answer a case which is highly unlikely to succeed.

[263] Counsel for the defender submitted that the abuse described was both extreme and unusual. Whilst the alleged conduct described was certainly of the utmost severity, having been facilitated, encouraged and on one occasion allegedly directed by the defenders' Sisters, I do not consider that I can reach the view that the accounts of abuse, either sexual or physical, were so extreme or unusual so as to be unlikely or implausible.

[264] In coming to this view, I have had regard to, and agree with, what was said by Lady Carmichael in *B* v *Sailors' Society* at paragraph [249] when her ladyship observed:

> "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 (James)* v *HM Advocate* 2020 J.C. p152; 2020 S.C.C.R. p135, para. 34."

Alternative Remedy

[265] The defender urged me to view the fact that the pursuer had an alternative remedy under the scheme introduced by the provisions of the Redress for Survivors (Historical Abuse in Care) (Scotland) Act 2021 as important. Counsel submitted that in this case there was no basis for thinking that the pursuer would obtain any less under the scheme than she would if she prosecuted her action for damages to a conclusion. Mr Brown contrasted this with the situation in *B* v *The Congregation of the Sisters of Nazareth* in which Lord Weir had placed little weight on the availability of an alternative remedy under the statutory scheme

because in that case B claimed to have suffered life-long effects from the abuse and sought substantial sums. Counsel for the defender also founded upon the fact that because the abuser was and would remain untraced there would be no sense in which he could be personally held to account, even if the action were successful. Finally, it was said that it was a relevant consideration that if the present action were to be dismissed the pursuer would be avoided the ordeal of cross- examination and could make use of the statutory scheme to obtain redress. Thus, her interest in the proceedings, which had not been identified or specified in the pleadings, could not outweigh the substantial prejudice to the defender if the case went forward to a trial.

[266] Whilst I agree that the availability of an alternative remedy under the 2021 Act is a factor to be weighed in the balance in considering the question of substantial prejudice in a case such as the present, I do not consider that a great deal of weight can be afforded to that factor in this instance. That is principally because of the severity of the allegations made against the defender. If the abuse occurred in the manner averred it was, as I have already observed, of the utmost severity, committed, encouragement and indeed facilitated by the very Sisters who were charged with protecting the pursuer. Whilst it might be true to say that the now untraced abuser will not be held to account, it is clear that the pursuer would have a considerable interest in holding the Sisters whom she alleges helped and encouraged the sexual abuse to account. Whilst the abuser may not now be held to account personally, the Sisters still could be, if the accounts given by the pursuer and her sister were accepted. Equally, the pursuer would have a considerable interest in holding Sister Y to account in respect of the physical assaults she alleges. Whilst she may well obtain a financial payment under the terms of the 2021 Act, she would not in any real sense obtain the satisfaction of holding those who perpetrated the abuse against her to account if she

were simply to proceed under the scheme.

[267] In respect of the argument that the pursuer would be spared the ordeal of being cross- examined were the action to dismissed, in which case she could simply proceed to seek financial compensation under the Scheme, this is not a factor to which I attach any weight.

[268] As was observed by the Lord Ordinary at para. [116] of *B & W* v *The Congregation of the Sisters of Nazareth*, in a comment subsequently endorsed by the Inner House, access to justice through the courts is a "precious commodity". If the pursuer wishes to exercise her right to seek redress for the conduct she alleges to have occurred through the courts, then I do not think that it is for me to decide that it would somehow be in her best interest for the action not to proceed because she will have to be cross-examined. It is for the pursuer, not the court, to decide in this case whether she ought to give evidence and undergo cross-examination.

Conclusion

[269] I do not consider that the defender has demonstrated that a fair hearing is impossible. On the matter of substantial prejudice, I have reached the view, largely for the same reasons, that whilst there is inevitably prejudice to the defender as a result of the long delay in bringing this case, that prejudice is not of such a degree that it would justify bringing the action to an end. Even if I had considered that there had been substantial prejudice to the defender, I would have found that, mainly due to the gravity of the allegations made in this case, the pursuer's interest in prosecuting this action outweighed any such prejudice.

[270] I repel the defender's first and second pleas-in-law and sustain the pursuer's sixth

and seventh pleas-in-law. I also sustain the pursuer's fourth and fifth pleas-in-law but only to the limited extent that they relate to the defender's averments regarding the difficulties in reconstructing the social attitudes of the time in respect of the allegations of sexual abuse made by the pursuer. All questions of expenses are reserved meantime. A Procedural hearing will now be fixed to take place on a date to suit the parties in order that the court can be addressed on the question of further procedure and the length of any diet required.