

**SHERIFFDOM OF LoTHIAN AND BORDERS
IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT**

[2022] SC EDIN 7

PIC-PN2593-18

JUDGMENT OF SHERIFF CHRISTOPHER DICKSON

in the cause

AB

Pursuer

against

THE ENGLISH PROVINCE OF THE CONGREGATION OF CHRISTIAN BROTHERS

Defender

Pursuer: Di Rollo QC, Ross; Digby Brown LLP

Defender: Mackenzie QC; Clyde & Co LLP

Edinburgh 11 January 2022

The sheriff, having resumed consideration of the proof, finds the following facts admitted or proved:

FINDS IN FACT

1. The pursuer is AB. The pursuer was born in April 1967. The pursuer has three brothers, J, T and EF and a sister, R. EF is 14 months older than the pursuer.
2. The defender is The English Province of the Congregation of Christian Brothers.
3. The pursuer was resident at St Ninian's School, Falkland, Fife between 16 February 1980 and 10 April 1981 (hereinafter referred to as "the school"). The defender operated the school during those dates.

4. The pursuer was moved to a care home called [REDACTED] on 2 September 1968 (when the pursuer was aged about 1 year and 4 months) for a period of time, as result of his mother being unable to cope.
5. The pursuer then went to stay at a care home called [REDACTED] when he was aged about 4 and stayed there until about 1974.
6. After leaving [REDACTED] the pursuer went to live with his mother in a flat in [REDACTED] Street.
7. Around 1975 the pursuer moved to a flat in [REDACTED] Street with his mother. That flat was, at times, cold and miserable.
8. Approximately on the day [REDACTED] six men came to the pursuer's family home with weapons, kicked in the door and tried to kill the pursuer's step-father, [REDACTED]. The pursuer's mother and the pursuer were in the family home at the time of this attack. During the attack the pursuer jumped out a first floor window of the flat wearing just a pair of shorts and one sock. After the attack the police moved the family, for their own safety, [REDACTED] [REDACTED] accommodation.
9. The pursuer suffered some nightmares about the attack on his step-father after that attack occurred. The pursuer does not currently have nightmares about that attack.
10. There came a point in time when the pursuer and his family left the [REDACTED] accommodation, which they had been placed in, and went to live in [REDACTED] Street.
11. Immediately prior to moving to the school the pursuer's step-father gave the pursuer and EF a note and told them to hand it in to the front desk at the social work department. The note said that the pursuer's step-father could not look after the

pursuer and EF and that he (the step-father) "was away". The pursuer and EF took the note to the social work department. Their step-father did not accompany them. The social work department then took the pursuer and EF to the school.

12. When the pursuer attended the school that were about 60 other children at the school. Some of the children had been sent to the school by a Children's Hearing as a result of committing criminal offences. However, the pursuer and EF were sent to the school solely for their care and protection. The sleeping arrangements at the school were that there were junior dormitories and senior dormitories. The pursuer was put in one of the junior dormitories with about six other children.

13. Within a few days of arriving at the school, the pursuer ran away. This was before the pursuer had suffered any abuse. The pursuer subsequently ran away from the school on numerous occasions.

14. During the pursuer's time at the school he was under the care and protection of, amongst others, Brother Ryan, Brother Farrell and Kelly (they are hereinafter collectively referred to as "the Brothers").

15. At first, Brother Ryan was nice to the pursuer and conducted himself like an old gentleman. However, Brother Ryan started abusing the pursuer. Brother Ryan's abuse of the pursuer started when Brother Ryan got his penis out in front of the pursuer. This occurred in Brother Ryan's room and it also may have occurred in the pursuer's dormitory. On one occasion, in Brother Ryan's room, Brother Ryan started forcing his penis into the pursuer's bottom. The pursuer cried because it was sore. Brother Ryan realised it was too sore for the pursuer and he (Brother Ryan) stopped. On occasions Brother Ryan made the pursuer take hold of Brother Ryan's penis and masturbate him. This occurred on more than four occasions but less than fifteen

occasions. On some of those occasions Brother Ryan ejaculated. Brother Ryan would normally ejaculate into a hankie but on one occasion he may have ejaculated on the pursuer's hand. Brother Ryan also touched the pursuer's penis. The pursuer had had no previous sexual experience when this sexual abuse was occurring.

16. Brother Farrell sexually abused the pursuer on numerous occasions.

Brother Farrell put his penis in the pursuer's mouth. This occurred more than once but not more than three times. Brother Farrell also made the pursuer masturbate him until he ejaculated. Brother Farrell also masturbated the pursuer. The foregoing sexual abuse of the pursuer by Brother Farrell occurred in Brother Farrell's room. Brother Farrell also physically assaulted the pursuer at the school. On one occasion the pursuer had run away from the school. When the pursuer returned, Brother Farrell battered him with a belt from the top to the bottom of his body.

17. Kelly physically assaulted the pursuer at the school. The school had a tuck shop and the children at the school would swap items for tuck. On one occasion the pursuer had been to the tuck shop. He had been swapping items for tuck and had possession of a lot of tuck, including a bottle of juice. Kelly saw this, grabbed the pursuer and asked him how he had all this tuck. The pursuer told Kelly he had swapped items for the tuck, however, Kelly flew into a violent rage. The bottle of juice was knocked from the pursuer's hand and smashed. Kelly then would not stop punching the pursuer to the face and body. Someone had to stop Kelly from continuing the attack on the pursuer.

18. At night the Brothers would drink alcohol and play music. They played the song "Ashes to Ashes" by David Bowie. The Brothers would come into the pursuer's dormitory at night and he would cower under the covers hoping that one of Brothers

would not take him. The pursuer has, to this day, a reoccurring dream where he is in his bed in the dormitory at the school and one of the Brothers (in his reoccurring dream he sees a white collar but not a face) comes into the dormitory. If the pursuer hears the "Ashes to Ashes" song it takes him right back to his dormitory at the school.

19. At the time the sexual abuse was occurring the pursuer did not know that other children at school were being sexually abused. In pursuer's mind, at the time, the abuse was just happening to him. The pursuer did not, at the time, say to anyone that he had been abused. The pursuer had been told not to say anything by the Brothers.

20. EF was at the school at the same time as the pursuer. Whilst at the school Brother Ryan groomed and abused EF by: (a) caning him, causing injury to his bottom; (b) offering to soothe said injury with cream; (c) watching him shower as a result of noticing a rash on EF's legs and bottom; (d) using the cream application tactic as a pretence for sexual abuse; and (e) making EF lie naked face down on Brother Ryan's bed and sexually abusing him resulting in EF suffering anal bleeding caused by finger penetration. Brothers Ryan, Brother Farrell and Kelly watched the children at the school shower. This made EF feel uncomfortable. Brother Farrell and Kelly each had a group of favourite boys who were identified as targets for sexual abuse. One of the dormitories was known as the "favourite boys' room". EF lived in the "favourite boys' room". Boys in that room would be heard screaming when they were being abused. Brother Farrell masturbated EF at the school. EF blamed himself for the abuse he suffered at the school.

21. The actions of Brothers detailed in findings in fact 15, 16 and 17 were all deliberate attacks on the pursuer. The physical attacks were criminal assaults. The sexual attacks involved either a part of the Brother's body of sexual significance or a part of the pursuer's body of sexual significance and were criminal indecent assaults. Brother Ryan's attempt to penetrate the pursuer's anus was done without the pursuer's consent and also amounted to the crime of attempted sodomy (unnatural carnal connection between male persons).

22. The actions of Brother Ryan and Brother Farrell detailed in finding in fact 20 were deliberate attacks on EF. The caning was a criminal assault. Point (d), (e) and Brother Farrell's actions involved a part of the pursuer's body of sexual significance and were criminal indecent assaults.

23. After leaving the school the pursuer was supposed to attend a secondary school in the west of Scotland but he did not go because he felt he had had no schooling from the school and was embarrassed.

24. In 1991 a former friend of the pursuer, [REDACTED], held a gun to the pursuer's head.

25. In 2010 the pursuer separated from his wife, however, they remain on good terms to this day.

26. By 2011 the pursuer was living in a scatter flat (which is a form of temporary housing) and taking heroin every day.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

28. Brother Ryan died on 6 July 2013.

29. On 14 November 2013 EF provided a statement to the police about the abuse he suffered at the school. [REDACTED]

EF opened up to the police and told them about the abuse he suffered at the school.

30. The pursuer did not tell anyone about the abuse he suffered at the school until the police came see him on 29 November 2013. The police came to his door and asked the pursuer if he had been at the school. Right away, the pursuer knew what the police were going to ask him about. The pursuer broke down because he had kept the abuse in his head for 30 years. Prior to providing his police statement the only information the pursuer was provided with by the police was that: (i) they were investigating abuse at the school; and (ii) they were aware that the pursuer was a former pupil of the school.

31. The pursuer only discovered that EF had been sexually abused when the police came to speak to him (the pursuer). The pursuer has never spoken to EF about the abuse he suffered at the school and *vice versa*.

32. On 22 July 2016 Brother Farrell was convicted after trial in the High Court of Justiciary of the following four charges:

“(001) on various occasions between 17 April 1980 and 21 March 1983, both dates inclusive, at St Ninian’s School, Falkland, Fife and you JOHN BERNARD FARRELL did indecently assault [redacted], aged between 11 and 14 years, a pupil in your care, touch him on the body, place your hands beneath his clothing and handle his private parts, touch his penis and masturbate him, compel him to touch your penis and to masturbate you, ; [sic]

(040) on various occasions between 5 May 1981 and 26 May 1983, both dates inclusive, at St Ninian’s School, Falkland, Fife you JOHN BERNARD FARRELL did indecently assault [redacted], aged between 13 and 15 years, a pupil in your care, touch his private parts, masturbate him, compel him to touch your private parts and masturbate you to ejaculation, and penetrate [sic] his mouth with your penis to ejaculation;

(060) on various occasions between 30 March 1982 and 31 July 1983, both dates inclusive, at St Ninian’s School, Falkland, Fife you JOHN BERNARD FARRELL did assault [redacted], aged between 11 and 13 years, a pupil in your care, repeatedly slap him on the body, seize him by the body, strike him on the head and body with a belt, and compel him to stand in the main hallway of the said school dressed only in his underwear for prolonged periods of time, to his injury;

(063) on two occasions between 30 January 1979 and 19 December 1980, both dates inclusive, at St Ninian’s School, Falkland, Fife you JOHN BERNARD FARRELL did indecently assault [redacted], aged 14 and 15 years, a pupil in your care, touch his penis, and compel him to touch your penis and masturbate you;”

Brother Farrell committed the offences set out in the above charges.

33. On 22 July 2016 Kelly was convicted after trial in the High Court of Justiciary of the following six charges:

“(033) on various occasions between 28 October 1981 and 1 June 1982, both dates inclusive, at St Ninian’s School, Falkland, Fife you PAUL VINCENT

KELLY did indecently assault [*redacted*], aged 15 years, a pupil in your care, enter a shower beside him compel [*sic*] him to touch your penis and to masturbate you to ejaculation, place your hands beneath his clothing, handle his private parts, seize him by the head and penetrate his mouth with your penis, touch his penis and masturbate him, put his penis in your mouth and perform oral sex on him and ejaculate onto his body;

(034) on various occasions between 28 October 1981 and 1 June 1982, both dates inclusive, at St Ninian's School, Falkland, Fife you PAUL VINCENT KELLY did assault [*redacted*], aged 15 years, a pupil in your care, and penetrate his anus with your penis and have unnatural carnal connection with him;

(042) on various occasions between 5 May 1981 and 26 May 1983, both dates inclusive, at St Ninian's School, Falkland, Fife you PAUL VINCENT KELLY did indecently assault [*redacted*], aged between 13 and 15 years, a pupil in your care, compel him to touch your penis and masturbate you, penetrate his mouth with your penis, compel him and other pupils to remove their clothing and perform sexual acts on themselves and on each other and on you, compel other pupils to touch him on the body and private parts and to penetrate his mouth with their penises, and masturbate in his presence;

(043) on various occasions between 5 May 1981 and 26 May 1983, both dates inclusive, at St Ninian's School, Falkland, Fife and you PAUL VINCENT KELLY did assault [*redacted*], aged between 13 and 15 years, a pupil in your care, and

- (a) penetrate his anus with your penis and have unnatural carnal connection with him; and
- (b) while acting with others, penetrate his anus with the penises of other pupils at said school and thus repeatedly have unnatural carnal connection with him;

(046) on one occasions between 5 May 1981 and 26 May 1983, both dates inclusive, at St Ninian's School, Falkland, Fife you PAUL VINCENT KELLY did, while acting with other pupils at said school, indecently assault [*name of a male*] now known as [*redacted*], aged between 13 and 15 years, a pupil in your care, seize hold of him, pin him down, remove his clothing, touch his body and private parts, rub the penises of said other pupils against his bare buttocks and simulate sexual intercourse with him;

(081) on various occasions between 9 March 1982 and 31 July 1983, both dates inclusive, at St Ninian's School, Falkland, Fife you PAUL VINCENT KELLY did indecently assault [*redacted*], aged 14 and 15 years, a pupil in your care, expose your penis to him, instruct him to perform oral sex on you, threaten him with violence and penetrate his mouth with your penis;''

Kelly committed the offences set out in the above charges.

34. On 12 August 2016: (i) Brother Farrell was sentenced to five years imprisonment in respect of the charges set out at finding in fact 32; and (ii) Kelly was sentenced to 10 years imprisonment in respect of the charges set out in finding in fact 33.

35. The pursuer and EF gave evidence at the above trial of Brother Farrell and Kelly (hereinafter referred to as “the criminal trial”). Brother Farrell and Kelly were tried together and were acquitted of the charges they faced in respect of the pursuer.

36. The Scottish Child Abuse Inquiry (hereinafter referred to as the “SCAI”) carried out a case study investigation of the provision of residential care by the defender between 1953 and 1983 at the school. The defender is a core participant in the SCAI. In July 2019 the defender made closing submissions to the SCAI in respect of the said case study investigation. In those submissions the defender accepted that: (i) boys at the school had been abused by the deliberate acts of individual men who lived and worked there; (ii) Brother Ryan was a predatory paedophile: (a) who appeared to have entirely unrestricted access to boys for his whole time at the school; (b) who preyed on boys with impunity; and (c) who abused boys by being clandestine, violent or by using grooming tactics; (iii) Brother Farrell and Kelly indulged in similar behaviour to that of Brother Ryan; (iv) there was a culture of abuse within the home; and (v) a number of staff engaged in punishment to the point of brutality and that a substantial number of children were likely to have lived in fear. These extra judicial admissions were not made specifically in respect of the pursuer or EF but they were admissions to conduct by Brother Ryan, Brother Farrell and Kelly at the school that were closely linked to the abuse suffered by the pursuer in time, place and circumstances.

37. The abuse suffered by EF and the other pupils mentioned in the charges at finding in fact 32 at the school were closely linked in time, place and circumstances to the abuse suffered by the pursuer, in the following way, such as to demonstrate that the individual incidents were component parts of one course of criminal conduct persistently pursued by the particular Brother in question:

(1) The attempted anal penetration of the pursuer by Brother Ryan was closely linked in time, place and circumstances to the anal digital penetration of EF by Brother Ryan;

(2) The other indecent assaults committed against the pursuer by Brother Ryan were closely linked in time, place and circumstances to the anal digital penetration of EF by Brother Ryan;

(3) The indecent assaults committed against the pursuer by Brother Farrell were closely linked in time, place and circumstances to: (i) the offences committed by Brother Farrell set out in charges (001), (040) and (063); and (ii) Brother Farrell masturbating EF.

(4) The physical assault committed against the pursuer by Brother Farrell was closely linked in time, place and circumstances to the offences committed by Brother Farrell set out in charge (060);

38. The abuse that the pursuer suffered at the school has severely affected the pursuer's life. He has suffered depression, anxiety, panic attacks and sleeping problems since he left the school. He was prescribed medication in respect of those symptoms. As soon as the pursuer left the school he started abusing glue. He started taking drugs from the age of 17 or 18. He took a lot of cannabis. He then progressed to temazepam and then heroin. The pursuer took the drugs to feel

normal inside and to clear his memory from the abuse. The pursuer did not want to show his wife and child any emotion and the drugs calmed him down. The taking of drugs was the pursuer's way of coping with the abuse he suffered. The pursuer tried to come off drugs and turned to excessive alcohol consumption. The pursuer's excessive alcohol consumption was again to put the abuse out of his mind. The pursuer's excessive alcohol consumption resulted in him suffering stage 4 liver cirrhosis. The pursuer now cannot drink alcohol at all.

39. The pursuer's general practitioner's records showed that the pursuer:

- (1) in 1984 (aged 17) was prescribed valium (which is prescribed for anxiety);
- (2) in 1989 (aged 22) was prescribed nitrazepam (which is prescribed for anxiety and insomnia);
- (3) in 1991 (aged 23) was buying temazepam and valium because of "his nerves" and smoking cannabis;
- (4) by 1992 (aged 25) was using heroin;
- (5) in 1996 (aged 29) was prescribed nitrazepam and methadone;
- (6) in June/July 2003 (aged 36) was reporting that: (i) he had been suffering stress, depression and panic attacks for as long as he can remember; (ii) he felt anxious in busy places; and (iii) he had a troubled childhood in various children's homes;
- (7) in February 2004 (age 36) was reporting that his nerves were worse and he could not sleep;
- (8) in August 2004 (age 37) was reporting to Dr Wild: (i) symptoms consistent with social anxiety and acute periods of panic; (ii) significant levels

of social withdrawal and avoidance; (iii) thinking work colleagues were staring at him and talking about him; and (iv) a variety of traumatic incidents and abusive incidents associated with his time in care;

(9) in July 2005 (age 38) was reporting: (i) a troubled childhood in various children's homes; (ii) using drugs to cope with his feelings of anxiety and depression; and (iii) that he was so anxious about attending the appointment with Dr Wild in August 2004 that he required to use substances in order to keep his appointment;

(10) in May 2006 (age 39) was reporting that his panic attacks, sense of paranoia and self-harm on his arms dated back to his long term care in a children's home;

(11) in October 2008 (age 41) was reporting his main complaint was that he felt agitated and anxious all the time and that he was also suffering from occasional chest pains;

(12) in August 2012 (age 45) had had an alcohol and opiate dependence on a 20 year background of dysthymia.

40. The pursuer has misused drugs and alcohol since leaving the school. His misuse of substances has severely affected his social and occupational functioning. He has a diagnosis of mental and behavioural disorder due to the use of both opiates and alcohol. The pursuer's disadvantaged background, prior to attending the school, was one source of his later substance misuse and other psychiatric difficulties. However, the pursuer was abusing substances in an attempt to manage the anxiety that he was experiencing as a result of the abuse he suffered at the school. The pursuer, given his disadvantaged background prior to attending the school, may

have misused substances even if he had not suffered abuse at the school, but it would not have been as chronic or enduring as it ultimately was. The abuse that the pursuer suffered at the school materially contributed to the pursuer's substance misuse difficulties and his diagnosis of mental and behavioural disorder due to the use of both opiates and alcohol.

41. The abuse the pursuer suffered at school caused him to develop post-traumatic stress disorder (hereinafter referred to as "PTSD"). The pursuer's symptoms of PTSD include reoccurring nightmares related to the abuse, being reminded of the abuse when child abuse was mentioned in the news or in films, having intrusive thoughts during marital relations, engaging in social avoidance, being unable to talk about the abuse he suffered, having problems concentrating, having problems with sleep, having difficulties in establishing trust, being hyper vigilant and engaging in self destructive behaviour (in the form of substance misuse). The pursuer developed PTSD shortly after the abuse at the school occurred. The severity of the pursuer's PTSD fluctuated over time. The pursuer's current symptoms are moderate to severe. The pursuer's social and occupational functioning was impacted by not only his substance misuse but also by both his PTSD symptoms and his depression / anxiety (on which see finding in fact 42 below). Neither the attack on the pursuer's step-father or ■■■ holding a gun to the pursuer's head, caused the pursuer to develop PTSD.

42. The pursuer: (i) has suffered from persistent depressive disorder for the last 30 years; (ii) suffers from generalised anxiety disorder with panic attacks. The pursuer symptoms in relation to his persistent depressive disorder include low mood, irritability, problems with appetite, tearfulness, feelings of hopelessness,

anhedonia (the inability to gain pleasure from enjoyable experiences), thoughts of worthlessness, problems with sleep, suicidal thoughts, self-harm, long-standing history of low esteem, agitation and loss of libido. The pursuer's symptoms in relation to his generalised anxiety disorder include excessive, uncontrollable, irrational worry; apprehensive expectation about events; and symptoms of anxiety including sweating, tightness of chest, facial flushing, avoidance, racing thoughts and sleep problems. The pursuer, given his disadvantaged background prior to attending the school, may have suffered from low mood and anxiety, had he not been abused, but it would not have been as severe, chronic or enduring as it ultimately was. The abuse suffered by the pursuer at the school materially contributed to the pursuer's persistent depressive disorder and generalised anxiety order.

43. The pursuer's substance misuse problems, coupled with his anxiety, depression and PTSD (hereinafter collectively referred to, in both the findings in fact and in the findings in fact and in law, as the pursuer's "psychiatric conditions") have had a devastating impact on his life. They resulted in the pursuer's employment and social functioning being extremely poor for the entirety of his adult life thus far. The pursuer, apart from engaging in a Youth Training Scheme (hereinafter referred to as "YTS") in around 1985 and working in a warehouse as a forklift truck driver in the late 1990s/early 2000s, has never been able to work due to these psychiatric conditions. These psychiatric conditions have also resulted in the pursuer living as a virtual recluse for most of his adult life, avoiding social contact.

44. The pursuer's disclosed gross earnings from employment for the period from 26 April 1983 to 2019 were £28,351.40. The pursuer, for the majority of his adult life, has lived on state benefits.

45. The thought of giving evidence at the criminal trial and the actual giving evidence at the criminal trial exacerbated the pursuer's psychiatric symptoms. The pursuer's thoughts of both the abuse he suffered at the school and the criminal trial process, resulted in the pursuer making a suicide attempt around April 2014, which was approximately four and half months after he disclosed the abuse to the police.

FINDS IN FACT AND LAW

1. That Brother Ryan deliberately attacked and indecently assaulted the pursuer;
2. That Brother Ryan attempted to have unnatural carnal connection with the pursuer;
3. That Brother Farrell deliberately attacked and indecently assaulted the pursuer;
4. That Brother Farrell deliberately attacked and physically assaulted the pursuer;
5. That Kelly deliberately attacked and physically assaulted the pursuer;
6. That the above intentional wrongs: (i) materially contributed to the pursuer's substance misuse difficulties and his diagnosis of mental and behavioural disorder due to the use of both opiates and alcohol; (ii) caused the pursuer to develop PTSD; and (iii) materially contributed to the pursuer's: (a) persistent depressive disorder; and (b) generalised anxiety disorder with panic attacks.

7. That the defender is vicariously liable for the above intentional wrongs.
8. That had the above intentional wrongs not be committed the pursuer:
 - (i) would have been able to sustain periods of full-time employment in a low skilled un-promoted post, such as a forklift truck driver; (ii) would also have had periods of unemployment, which can be reasonably estimated to be approximately 10 years' unemployment over the period of his working life (between the ages of 16 to 67); and (iii) would not have gained further qualifications after leaving the school.
9. That the above intentional wrongs caused the pursuer pain and suffering. *Solatium* is reasonably assessed at £95,000.
10. That the above intentional wrongs caused the pursuer past wage loss. A reasonable assessment of the pursuer's past wage loss is £395,354.
11. That had the above intentional wrongs not been committed the pursuer would have been enrolled in workplace pension in October 2012. The pursuer was not enrolled in such a workplace pension and, as a result, has suffered pension loss. A reasonable assessment of the pursuer' pension loss is £23,100.
12. That the pursuer, as a result of his psychiatric conditions, will not work in the future. Had the above intentional wrongs not been committed the pursuer would have earned future wages until retirement.
13. That the above intentional wrongs have caused the pursuer future treatment costs. The pursuer, in order to treat his psychiatric conditions, would benefit from 8 to 10 sessions of supportive cognitive behavioural therapy (hereinafter referred to as "CBT") and then, if appropriate, 10 to 12 sessions of trauma focused CBT. Each session of CBT will cost approximately £100. A reasonable assessment of the pursuer's future treatment costs is £2,200.

FINDS IN LAW

1. That the evidence of Ms Bell is inadmissible.
2. That it was too late for the defender, at the end of the proof, to raise an argument under section 17D(1) and (3) of the Prescription and Limitation (Scotland) Act 1973.
3. That defender is liable to make reparation to the pursuer in the sum to be determined at a future hearing.

NOTE:**Introduction**

[1] In this action the pursuer seeks damages for the loss injury and damage he suffered as a result of being sexually and physically abused at the school between 16 February 1980 and 10 April 1981.

[2] The proof was heard over nine days, namely, 26 to 29 October and 2, 3, 5, 9 and 11 November 2021. The parties had agreed some basic facts in a joint minute of admissions (see paragraph [171] below) but both liability and quantum remained in dispute. The pursuer called the following eight witnesses to give evidence:

1. The pursuer (see paragraphs [4] to [35]);
2. The pursuer's daughter, CD (see paragraphs [36] to [43]);
3. The pursuer's brother, EF (see paragraphs [44] to [54]);
4. Detective Constable Andrew Gilmour (see paragraphs [55] to [63]);
5. Professor Gary Macpherson, Consultant Forensic Clinical Psychologist (see paragraphs [64] to [85]);

6. Keith Carter, Vocational and Employment Consultant (see paragraphs [86] to [94]);
7. Dr John Pollock, Fellow of the Institute and Faculty of Actuaries (see paragraphs [95] to [98]); and
8. Dr Jacqueline Scott, Consultant Psychiatrist (see paragraphs [99] to [123]).

The defender called the following three witnesses to give evidence:

1. Olivia Gomes Bell, Forensic Psychologist (see paragraphs [124] to [132]);
2. Douglas Govan, Employment Consultant (see paragraphs [133] to [145]); and
3. Dr Trevor Friedman, Consultant Psychiatrist (see paragraphs [146] to [170]).

[3] The evidence covered a vast period of the pursuer's life, involved a number of skilled witnesses and there were a significant number of issues in dispute. In the circumstances I considered that it was important to set out the evidence at some length and, thereafter, deal with each of the disputed issues in turn. This has resulted in a lengthy judgement.

The Evidence

The Pursuer's evidence

[4] A summary of the pursuer's evidence is as follows. The pursuer was 54 years of age and was born in April 1967. He had three brothers J, T and EF and a sister R. EF was 14 months older than the pursuer. The pursuer was married but not currently living with his wife (the pursuer accepted that they separated in 2010). He was, however, on good terms with his wife. The pursuer also had an adult daughter, CD.

[5] The pursuer explained that his mother had divorced his biological father when he (the pursuer) was born. His mother subsequently established a relationship with the

pursuer's step-father, [REDACTED] and married him when the pursuer was about ten years old. The pursuer, under reference to social work records, accepted that it was probably correct:

- (1) That he was moved to a care home called [REDACTED] on 2 September 1968 (when the pursuer was aged about 1 year and 4 months) for a period of time as result of his mother being unable to cope;
- (2) That he went to stay at a care home called [REDACTED] when he was aged about 4 and stayed there until about 1974; and
- (3) That after leaving [REDACTED] he went to live with his mother in a flat in [REDACTED] Street (it was suggested to the pursuer that this flat was cold and he was hungry while living there, but the pursuer could not recall that).

[6] That pursuer accepted that he then moved to [REDACTED] Street in 1975 and accepted that that flat was at times cold and miserable. The pursuer accepted that his mother had a boyfriend called [REDACTED] but could not recall him living at [REDACTED] Street. The pursuer accepted that his mother had had a lot of nervous breakdowns and had been in hospital as a result, but could not recall whether his mother had had a nervous breakdown when they were living in [REDACTED] Street. The pursuer also accepted that he was, at times, looked after by his sister when his mother was in hospital.

[7] The pursuer could not recall what the social work involvement was with his family when he was growing up. The pursuer explained that the reason why he and EF ended up being moved to the school was due to an incident at the family home. On the day [REDACTED] [REDACTED] six men had come to his family home with weapons, kicked in the door and tried to kill his step-father. The pursuer's mother and the pursuer had been in the family home at the time of this attack. During the attack the pursuer jumped out a first floor window of the flat wearing just a pair of shorts and one sock. After the attack the police had

moved the family, that night, for their own safety, to [REDACTED] accommodation. Thereafter, the pursuer's mother ended up in hospital, which the pursuer imagined would have been due to mental health difficulties. The pursuer accepted that after he left the [REDACTED] accommodation the family went to live in [REDACTED] Street. The pursuer could not recall whether, at this time, his mother and step-father went through a rough patch and [REDACTED] returned to the family home. The pursuer could not recall his mother then disappearing and explained that his mother might have ended up in hospital. The pursuer explained that his step-father then gave EF and him a note to hand in to the front desk at the social work department. The note basically said that his step-father could not look after the pursuer and EF and that he (the step-father) 'was away'. The pursuer and EF took the note to the social work department. Their step-father did not accompany them. The social work department then took the pursuer and EF to the school.

[8] The pursuer explained that the attack on his step-father was a very frightening experience. He confirmed that he did have nightmares, after the attack, about that attack, but advised that he did not suffer from nightmares about that attack now.

[9] The pursuer explained that the school was a nice building to look at. Inside it had a table tennis room, a pool room and a TV room. There was also a large hall. The sleeping arrangements were that there were junior dormitories and senior dormitories. The pursuer was in one of the junior dormitories with about six other children. There was about a total of 60 children at the school at this time. The pursuer did not think there was much schooling, it was more sports. The pursuer considered that he did not have a secondary schooling and advised that he never sat any tests whilst at the school. Meals were taken with the other children at big tables.

[10] The pursuer explained that when he arrived at the school Brother Ryan was the headmaster. The pursuer thought that Kelly was also at school at that time. Kelly was known as “snoopy” due to him having snoopy teddy bears in his room. The pursuer thought that Brother Farrell might have come to school after he (the pursuer) had arrived and thought Brother Farrell may have replaced Brother Ryan as the headmaster.

[11] The pursuer explained that in the first few days of being brought to the school he ran away. This was before he had suffered any abuse.

[12] The pursuer explained that, at first, Brother Ryan seemed to be nice, like an old gentleman. Brother Ryan’s approach was different from the other Brothers who would seriously assaulted you without thinking twice. The pursuer noted that, at the time, he was a young boy who had not previously received much attention. The pursuer thought that Brother Ryan read that from the pursuer and that was when the abuse started. The abuse started off when Brother Ryan ended up with his penis out. This occurred in Brother Ryan’s room and it also could have happened in the pursuer’s dormitory. On one occasion, in Brother Ryan’s room, Brother Ryan started forcing his penis into the pursuer’s bottom. The pursuer cried because it was sore. The pursuer thought that Brother Ryan realised it was too sore for the pursuer and he (Brother Ryan) had to stop. On occasions Brother Ryan would make the pursuer take hold of Brother Ryan’s penis and masturbate him. This occurred on numerous occasions with the pursuer initially estimating it to have occurred more than 4 times and less than 15 times, but later saying it was between 4 and 7 occasions, but he could not give an exact number. On some of those occasions Brother Ryan ejaculated. Brother Ryan ejaculated into a hankie and on maybe one occasion Brother Ryan ejaculated onto the pursuer’s hand. Brother Ryan also touched the pursuer’s penis. At this time the pursuer had had no sexual experience whatsoever. The pursuer also thought that he had

been physically assaulted by Brother Ryan. The pursuer explained that he could not remember being caned by Brother Ryan, after one of the occasions he ran away from the school, but he had been told by EF that he (EF) had watched him being caned by Brother Ryan. The pursuer explained that all the Brothers were capable of assaulting you and it became the norm to be assaulted by them.

[13] The pursuer explained that Brother Farrell sexually abused him on numerous occasions. Brother Farrell put his penis in the pursuer's mouth. This had occurred more than once but not more than three times. Brother Farrell also made the pursuer masturbate him until he ejaculated. Brother Farrell also masturbated the pursuer. This sexual abuse occurred in Brother Farrell's room. Brother Farrell was also violent to the pursuer. On one occasion the pursuer had run away from the school. When he returned Brother Farrell battered him with a belt from the top to the bottom of his body. The pursuer described Brother Farrell as an animal and could not understand how he could have been given a position at the school when he had been thrown out another country for being a paedophile.

[14] The pursuer explained that Kelly was violent and would batter you over a silly argument. The pursuer recalled one occasion when he had been at the tuck shop. The children would swap items for tuck and on this occasion the pursuer had been swapping items and had possession of a lot of tuck, including a bottle of juice. Kelly saw this, grabbed the pursuer and asked him how he had all this tuck. The pursuer told Kelly that he had swapped items for the tuck, however, Kelly flew into a violent rage. The bottle of juice was knocked from the pursuer's hand and smashed. Kelly then would not stop punching the pursuer in the face and body. The pursuer thought that someone had to stop Kelly from continuing the attack on the pursuer.

[15] The pursuer explained that some of children got to go home at weekends, but he and EF did not. The pursuer explained that the Brothers had a cupboard that contained whisky, rum and boxes of cigarettes. At night the Brothers would have a drink and play music. The pursuer recalled "Ashes to Ashes" by David Bowie being played by the Brothers and noted that it was No 1 in the charts at the time. The pursuer also recalled the Brothers coming into his dormitory at night and him cowering under the covers hoping that they would not take him. The pursuer explained that he has, to this day, a reoccurring dream where he is in his bed in the dormitory and one of the Brothers (in his reoccurring dream he can see a white collar but not a face) comes into the dormitory. If the pursuer hears the "Ashes to Ashes" song it takes him right back to his dormitory at the school.

[16] The pursuer noted that you could be told by the Brothers to stand in the long hall at the school for hours at a time. This happen to the pursuer on a couple of occasions. The pursuer recalled one occasion when he was required to stand in the long hall and the time had reached about 1am. There was creaking noises and the pursuer started to think about ghosts. The pursuer was frightened and eventually ran back to his dormitory.

[17] At the time the sexual abuse of the pursuer was occurring, the pursuer did not know that any other children (including EF) were being sexually abused. In his mind, at the time, the abuse was just happening to him. The pursuer did not, at the time, say to anyone that he had been abused. The pursuer had been told not to say anything by the Brothers and sometimes they said that in a nice way. The pursuer explained that he was too embarrassed and frightened to say anything. The pursuer was also frightened that EF might be hurt if he said something.

[18] The pursuer accepted that he left the school in April 1981. EF left the school at the same time and shortly after obtain employment, which resulted in him moving away from

the area where the pursuer was living. After leaving the school the pursuer was supposed to attend a secondary school in the west of Scotland but he did not go because he felt he had had no schooling from the school and was embarrassed. He also only had nine months of schooling in the secondary school to go, so he decided not to go.

[19] The pursuer did not tell anyone about the abuse he suffered at the school until the police came see him in November 2013. The police came to his door and asked the pursuer if he had been at the school. Right away, the pursuer knew what the police were going to ask him about. The pursuer broke down because he had kept the abuse in his head for 30 years. It was hard to tell the police about the abuse he suffered because he had never spoke about it before, but he gave a statement to the police. He only discovered that EF had been sexually abused when the police came to speak to him. The pursuer accepted, at the time of giving his statement to the police, that EF had been spoken to by the police. He could not remember whether he had spoken to EF after EF had given his statement but before the pursuer had given his statement to the police. The pursuer was clear that he had never spoken to EF about the abuse he suffered at the school. The pursuer did not recall the police providing with him with a questionnaire to complete and could not recall precisely what the police said to him. The pursuer was referred to the statement that he gave to police and confirmed it contained the truth. When he was asked why the statement did not contain details of the attempted anal rape by Brother Ryan, the pursuer said that he had kept the abuse in his mind for 30 years and thought it was maybe too hard for him to say or he did not remember about it at the time. However, the pursuer confirmed that the attempted anal rape by Brother Ryan had happened.

[20] The pursuer explained that the abuse at the school had severely affected him. He has suffered depression and panic attacks since he left the school (in cross examination the

pursuer said he did not know when the panic attacks started). The panic attacks could occur at any time. When they are occurring the pursuer feels that he cannot breathe. The pursuer has been prescribed medication for depression and the panic attacks. As soon as the pursuer left the school he starting abusing glue. He started taking drugs from the age of 17 or 18. He took a lot of cannabis. He then progressed to temazepam and then heroin. He took the drugs to feel normal inside and to clear his memory from the abuse. He did not want to show his wife and child any emotion and the pursuer felt the drugs calmed him down. The taking of drugs was the pursuer's way of coping with the abuse he suffered. The pursuer tried to come off drugs and turned to alcohol. The alcohol was again to put the abuse out of his mind. The pursuer could not recall whether he was drinking significant amounts of alcohol in 2007 but was clear that his alcohol consumption had resulted in him suffering stage 4 liver cirrhosis. The pursuer now cannot drink alcohol at all. The pursuer explained that all his substance problems had occurred after he left the school. The abuse that the pursuer suffered resulted in him never being happy and having no life. It caused him to have mental health problems and put him in a mental hospital. It caused him not to be able to trust adults. It took his faith away from him. The pursuer could not understand how persons who were meant to protect him, had abused him.

[21] The pursuer never wanted to tell his wife and daughter that he was sexually abused, but he had to tell them about it after the police visit and was upset that he had put the abuse he suffered in his daughter's mind. The pursuer noted that prior to telling his daughter and wife about the abuse he suffered he could be watching a film with them which made mention of abuse and he would have to go to the toilet to avoid showing any emotion to them. The pursuer had done this for years. The abuse also had a negative effect on marital

relations with his wife. In the course of such relations the abuse would sometimes come into the pursuer's mind and he would feel like an animal and have to stop.

[22] The pursuer explained that he had contemplated suicide on a couple of occasions and had ended up in hospital as a result. The only thing that stopped him committing suicide was his daughter who deserved better. The pursuer thought that his daughter had saved him. The pursuer was very protective of his daughter and would not let her stay overnight at the houses of friends when she was younger. He did this because he did not trust other adults and felt he could not let what happened to him, happen to his daughter.

[23] The pursuer was referred to a number of entries in his general practitioner (hereinafter referred to as "GP") records (production 5/1, with updated GP records being production 5/11). These included the following entries in his GP records (the pursuer's comments regarding the particular entry are noted after the relevant entry):

(1) Entries between 2 September 1983 and 14 March 1985 regarding being prescribed actifed linctus (5/1/26 and 5/1/26) and entry 20 July 1984 regarding being prescribed valium (5/1/26) – the pursuer accepted that he had been prescribed actifed linctus at that time. He did not know why he had been prescribed valium on 20 July 1984 and did not know if it had anything to do with having to appear in court regarding his conviction for theft by housebreaking on 29 September 1984 (see paragraph [24] below).

(2) Entry 21 June 1989 regarding being prescribed nitrazepam (5/1/28) – the pursuer explained that he was prescribed nitrazepam for depression and to help him sleep. At that time the pursuer was getting a lot of nightmares with the main one being the nightmare set out at paragraph [15] above.

(3) Letter from Dr Holmes, Senior House Officer, gastroenterology department at Gartnavel General Hospital, dated 17 April 1991 (5/1/201), which stated, amongst other things:

“... He tells me, however, that he regularly buys Temazepam and Valium to take because of “his nerves”. He also smokes 10 cigarettes a day and also probably smokes Cannabis, although he denies taking intravenous drugs. ...”
 The pursuer accepted, at that time, he was buying and taking temazepam and valium for his nerves. The pursuer explained that when he left the school his nerves were completely shattered. He used to bite his knuckle, fingers and the inside of his mouth. He found life hard to cope with. By the age of 24 he had smoked heroin. He had also tried intravenous drugs, but they were not for him. There was also a point when the pursuer became positive for hepatitis C but he took medication, which resolved that issue. The pursuer accepted that he was addicted to heroin by 1994. He explained that he had been seeking help for depression long before 1994.

(4) Entries between July and September 1996 regarding being prescribed nitrazepam and methadone (5/1/33) – the pursuer noted that the methadone prescription was to help with his heroin habit at that time. The pursuer advised that he is currently prescribed 90 mls of methadone.

(5) Entry 25 June 2003 (5/1/46), which stated, amongst other things:

“Married for 15 yrs [redacted]. Works at [employer] – fork lift driver Stress / depression – panic attacks. Troubled childhood - in childrens home – [redacted] couldn’t cope [undecipherable then possibly “neglect rejection”] – uses heroin – x£40 / day – always smoked, Also diazepam when can buy it. Given methadone - 2 yrs ago – came off it himself but started using cipramil...” –

The pursuer explained that the reference to a troubled childhood was a reference to the abuse he suffered at the school.

(6) Referral by Dr Melrose to the psychology department at Stobhill Hospital, dated 24 July 2003 (5/1/189), which stated:

“I would be grateful if you would see this man who has recently started on our methadone programme and is doing very well, currently prescribed 60 mls of methadone daily. In addition to this he is also on cipramil 20 mgm daily. He has been married for 15 years happily and has a [redacted]. He works at [name of employer] as a forklift driver. For as long as he can remember, he has been troubled by stress and depression with panic attacks. He finds himself feeling anxious a lot of the time particularly in busy places. He had a troubled childhood spending much of it in various children’s homes. He has [redacted]. He described his [redacted] as suffering from depression and not able to cope with the kids. [the pursuer’s] [redacted] was a largely absent figure. When his [redacted] failed to cope due to her nerves plus alcohol, the kids were taken into care. I don’t think there was any actual physical abuse as far as he tells me, but certainly, neglect and rejection are significant issues for him. He began using heroin at age 25 and really this is the first occasion where he has actively sought help in a constructive way. He appears well motivated and I would be grateful for your input at an early date if possible.”

The pursuer accepted that he did not mention the physical or sexual abuse he suffered. He agreed that he did tell Dr Melrose that he was anxious and unsettled. He accepted that he must have told Dr Melrose about feeling neglected and rejected.

(7) Entry 19 August 2003 regarding being prescribed methadone, citalopram and zopiclone (5/1/47) – the pursuer explained the methadone was prescribed due to his drug addiction and the other drugs were for his depression, his panic attacks, to help with getting to sleep and the nightmares he was suffering.

(8) Entry February 2004 (5/1/47) – regarding nerves being worse and not being able to sleep – the pursuer confirmed he was a regular attender at his GP practice as he needed help, but he would not go to a psychiatrist because he did not want to speak about the abuse he suffered.

(9) Letter from Dr Wild, Clinical Psychologist, Department of Psychology at Stobhill Hospital, dated 19 August 2004 (5/1/186), which noted, at the time of the

appointment, the pursuer was unsteady on his feet and had slurred speech and stated:

“... [*the pursuer*] was able to describe symptoms consistent with social anxiety, and acute periods of panic. These difficulties have led to significant levels of social withdrawal and other types of avoidance. He reported a more recent history of social paranoia also, thinking that work colleagues were staring at him and talking about him. This has led to him being off work for at least a month at the time of our meeting.

This man described some of his early traumatic childhood experiences associated with his time in care. He recalled a variety of traumatic and abusive incidents. His chronology of past and recent events seemed muddled, and I was therefore unable to build an accurate picture of his presenting problem. In addition, his presentation at my clinic did not facilitate a useful assessment process.”

The pursuer said that he would not go out for long periods of time. For years he stayed in and kept his curtains shut. Even to this day he could be like that. The pursuer could not remember the consultation with Dr Wild, but noted that he would have found it very traumatic to discuss what happened to him with a psychologist and explained that that is probably why he had been drinking before the appointment. The pursuer could not recall whether he told Dr Wild that he had been in and out of children’s homes but noted that he might have done.

(10) Referral by Dr Melrose to the psychiatric out patients at Stobhill hospital, dated 22 September 2005 (5/1/181), which stated, amongst other things:

“... [*the pursuer*] had a troubled childhood spending much of it in various children’s homes...He does not describe any specific incidence of physical or sexual abuse although obviously this may be the case. However he does describe feelings of rejection and neglect. He began using heroin at age twenty-five having smoked cannabis heavily prior to this. He describes using drugs to help cope with the feelings of anxiety and depression. When he presented in July 03 it was the first time he had sought help for his problem. [*the pursuer*] was referred to Psychology in August ‘04 when he saw Dr Matthew Wild. He felt he was suffering from social anxiety with acute periods of panic. He described a variety of traumatic and abusive incidents. Unfortunately however, [*the pursuer*] attended under the influence of either alcohol or drugs therefore a proper assessment was not possible and he failed

to attend his next appointment. [*the pursuer*] explained that he was so anxious about attending that he had to use in or to [*sic*] keep his appointment. [*the pursuer*] also has described feeling of paranoia and was stared [*sic*] on risperidone..."

The pursuer agreed that he had told Dr Melrose about being anxious and depressed and that he had self-medicated with drugs.

(11) Letter from Dr Sewell, Medical Officer, East Dunbartonshire Community Addiction Team, dated 18 May 2006 (5/1/177), which stated, amongst other things:

"[*the pursuer*] tells me that his panic attacks, sense of paranoia and self harm on his arms date back to his long term care in a children's home after his [*redacted*], his [*redacted*] became homeless and [*redacted*] though particularly his [*redacted*] had major alcohol issues."

The pursuer explained that the panic attacks, sense of paranoia and self-harm were as a result of the abuse he suffered at the school. The pursuer noted that he did not self-harm for long. He just wasn't coping with his depression and panic attacks and was thinking of suicide. He used to slash his arms with a kitchen knife or something similar.

(12) Letter from Dr Sewell, Medical Officer, East Dunbartonshire Community Addiction Team, dated May 2008 (5/1/157), which stated, amongst other things:

"[*the pursuer's*] alcohol use is again rising to dangerous levels, drinking a minimum of 4 to 6 cans of lager and a quarter bottle of vodka per day."

The pursuer said that he was not taking drugs at that stage but he was using alcohol.

(13) Letter from Dr Priyadarshi, Senior Medical Officer, East Dunbartonshire Community Addiction Team, dated 20 October 2008 (5/1/153), which stated, amongst other things:

"[*the pursuer's*] main complaint was that he felt agitated and anxious all the time. He felt concerned about occasional chest pains he has experienced over the last two years. He is worried that he has underlying ischemic heart disease."

The pursuer thought that this letter was referring to the panic attacks he suffers. The pursuer said that chest pain is part of the panic attacks he suffers. He had been taken to hospital by ambulance after suffering a panic attack. He had a panic attack last year where he could not breathe.

(14)

- (a) Entry No 1, 3 August 2010 (5/1/9), regarding a consultation with a counsellor, which stated:

“weepy ++ - cant stand his life any more – cant cope ‘just want to die.’ [redacted] found him with arope [sic] round his neck 2 days ago – ‘feels awful puting [sic] her through that’. today [redacted] found hiom [sic] with knives – wanted to stab himself. Plans to buy paracetamol and take od. admits to 1 vodka today – given by [redacted] spoke to cpn on call for [local area] – she will speak to [named professional] at edcat. priority=2”

- (b) Entry No 2, 3 August 2010 (5/1/10), regarding a consultation with a doctor, which stated:

“[redacted] phoned – [the pursuer] suicidal – depressed since [redacted] died at xmas. [redacted] 2 weeks ago – worse since. [redacted] found hiom [sic] with a rope round his neck 2 days ago and [redacted] found him today with knife ready to slit wrists. bring down at 4pm priority=2”

The pursuer explained he was admitted to hospital following the situation described in the above entries. The pursuer accepted that, at that point, his wife had left him and he explained that the reason why he attempted suicide was because he could not handle losing his wife. The pursuer noted, however, that he and his wife have managed to sort things out and they are now currently doing quite well (with their relationship).

(15) Letter from Dr Hay, Emergency Department Doctor, Emergency Department at Stobhill, dated 7 December 2010 (5/1/134) noting that the A & E diagnosis was:

“Intentional Self Harm – Self Harm – Sharp Object”

The pursuer confirmed that he had deliberately self-harmed with a sharp object.

(16) Letter from Dr Reynolds, Speciality Doctor in Psychiatry, Glasgow Addiction Services, dated 31 August 2012 (5/1/127), which stated, amongst other things:

“...Overall my impression was one of alcohol and opiate dependence on a 20 year background of dysthymia. ...”

The pursuer agreed that, at that time, he had had an alcohol and opiate dependence for 20 years.

(17) Letter from Dr Wilson, GPST2 and Dr Masson, Consultant Psychiatrist, East Dunbartonshire Community Health Partnership, dated 11 April 2014 (5/1/109) giving a diagnosis of (i) Subsyndromal Post Traumatic Stress Disorder; (ii) Adjustment Disorder; and (iii) Opiate Dependence Syndrome; and which stated, amongst other things:

“[the pursuer] was admitted to [name of hospital ward] ... on 6 March 2014 with increasing suicidal thoughts after an emergence of childhood trauma. [the pursuer] and his [redacted] experienced traumatic, physical and sexual abuse as children in a children’s care home run by Priests in Fife. His [redacted] [redacted] he and his [redacted] had also had to make statements two months prior to this admission. Following this he had an insurgence of suicidal thoughts with an increase in alcohol use. On the day of admission, he had attempted to jump off the Kingston Bridge stating “I want to be detached from reality”.

During the admission, [the pursuer] underwent alcohol detoxification, had his Fluoxetine increased and was started on Propranolol for anxiety. [the pursuer] described flashbacks and ongoing suicidal thoughts during his admission but appeared euthymic integrating well with other patients, bringing in DVDs and enjoying social time with them. [the pursuer] was assessed with his [redacted] who was concerned about [the pursuer’s] risk to himself and to other people. [the pursuer] had viewed some thoughts on homicidal activity towards the Priests who had been involved in the care home but did accept

that this would prevent other people involved from claiming justice for these events. [*the pursuer*] also stated that he would not kill himself because he would not want to upset his [*redacted*].

On the ward, [*the pursuer*] took an overdose of 450 mg Diazepam that he claimed he had kept from admission. On physical examination by the duty doctor, there was no clinical evidence of adverse effects. [*the pursuer*] had also used Heroin and alcohol while he was on the ward swallowing a bag of Heroin when he refused being searched and was told the Police would have to be involved. At this point, [*the pursuer*] also absconded from the ward later returning with the Police.

During his admission, [*the pursuer*] was advised to partake in Lifeskills and also attend the gym. He did not do either of these. [*the pursuer*] accepted discharge on 27 March 2014 after the events of using illegal substances on the ward. At discharge he said he had intermittent suicidal and homicidal thoughts but had no active plans on these and the Police Officer in charge of the case in Glenrothes was informed of his discharge."

The pursuer noted that the diagnosis of PTSD was after the police came to see him.

The pursuer explained that after the police came to his door everything blew up. His wife and daughter had to find out about the abuse he suffered. He had been trying to hide the abuse for all these years. It was now all out and it was one the worst times of the pursuer's life, apart from being abused. The pursuer explained that the lead up to the criminal trial was one of the most traumatic things the pursuer had experienced in his life.

(18) Letter from Dr Meyer, Medical Officer, East Dunbartonshire Community Health Partnership, dated 21 April 2015 (5/1/105), which stated, amongst other things:

"... [*the pursuer*] reports his mental health today as being poor and, although he has suicidal thoughts, he had no active plans, although he has some concerns that his mood may deteriorate further as he is currently awaiting a court case in which he will be a witness relating incidents of sexual abuse as a child. ...

Today, he presented as being depressed and withdrawn. For much of the consultation he had his head in his hands and at times he was difficult to understand as he was speaking so quietly.”

The pursuer agreed that the above part of the letter reflected how he was at that time.

(19) Entry 13 November 2017 (5/1/4), which states:

“due to start HEP C treatment 21/11/17 has nurse apt asking for psychological input for past hx of sexual abuse was witness at court last yr dredged up all memories [sic] from past in the childrens home catholic priests – I wills e eif [sic] can get psychol help for him says stable on methadone”

The pursuer agreed that this consultation with his GP was regarding the abuse he had suffered at the school.

(20) Letter from Dr Brooks, FY2 in Psychiatry, East Dunbartonshire Health & Social Care Partnership, dated 22 November 2019 (5/11/20), which provided a diagnosis of: (i) Depression; and (ii) Active Suicidal Planning; and which stated, amongst other things:

“[*the pursuer*] is a victim of childhood physical and sexual abuse. This occurred whilst he was in the St Ninians Childrens Care Home with his [redacted] based in Fife. This care home was run by priests and [*the pursuer*] informed me that they have been convicted with child abuse charges. He tells me he is currently awaiting a payment from this court case. From his EMIS notes I can see that his [redacted] has [redacted]

Impression

[*the pursuer*] is a 52 year old male who has presented as an emergency appointment with worsening depression and suicidal planning and intent. He had stated that if he were to go home today he would take heroin that he has stockpiled in order to end his life. He is not delusional and is not having any auditory or visual hallucinations.”

The pursuer agreed that, at that time, he had been admitted to hospital for his own good. The pursuer accepted that he had seen doctors a lot over the years.

[24] The pursuer was referred to his schedule of previous convictions (production 5/7 (also production 6/17) – it was matter of agreement that production 5/7 set out the pursuer's previous convictions), which contained the following convictions:

- (1) 16 March 1982 - Glasgow Children's Hearing – Theft by opening lockfast place – supervision requirement;
- (2) 20 May 1983 - Glasgow Sheriff Court – Theft by opening lockfast place – absolute discharge;
- (3) 29 September 1983 - Glasgow Sheriff Court – Theft by housebreaking – fine £45;
- (4) 19 September 1984 - Glasgow Sheriff Court – Theft by housebreaking – detention centre 3 months;
- (5) 8 May 1986 – Ayr Sheriff Court - Theft by opening lockfast place – fine £40;
- (6) 16 October 1986 – Glasgow Magistrates – Intended theft - in or on a building – Civic Government (Scotland) Act 1982, section 57(1) – fine £150;
- (7) 1 April 1996 – Glasgow Sheriff Court – (1) Assault; and (2) Breach of the peace – 3 months imprisonment; and
- (8) 11 January 2013 – Glasgow City Justice of the Peace Court – Breach of the Peace – fine £150.

[25] The pursuer said that the housebreaking conviction, dated 19 September 1984, related to him breaking into a pub when he was 16 years old. The intended theft conviction arose as a result of the pursuer looking for scrap. The conviction in April 1996 was an incident where he was pulling his wife away from a man. The pursuer was told if he pled guilty to the charges he faced, his wife would get off with the charges that she faced at that time.

[29] It was suggested to the pursuer that he was involved in stealing by 1974. The pursuer said that he could not remember if he was or wasn't involved in stealing by that age and explained that he could not remember whether he stole a sweetie from a shop (with the inference being that if the pursuer did steal anything it would have been stealing sweets).

The pursuer [REDACTED] did not agree with a suggestion that EF had a bad temper. [REDACTED] The pursuer accepted that he had inhaled gas (whilst it was clear that the pursuer accepted that he had inhaled gas during his childhood it was not clear at what point this occurred). [REDACTED]

[REDACTED] He denied a suggestion that if the pursuer and EF were short of cash that they would go out and steal. The pursuer did not know if he was streetwise in 1978. The pursuer could not recall being hit on the head with a brick in 1978. [REDACTED]

[REDACTED] The pursuer denied embarking on a mini crime wave with EF [REDACTED] [REDACTED] after the attack on his step-father, but accepted he did steal sweets. The pursuer denied stealing between 1983 and 1991. The pursuer explained that he was sometimes blamed for things but the charges were dropped and that there was a case of an alleged [REDACTED] but he was found not guilty of that. It was suggested, [REDACTED], that the pursuer was involved in dealing in heroin and cocaine. The pursuer said that this was pure fiction and a ridiculous suggestion. The pursuer explained that he had lived on his nerves since he left the school [REDACTED]

████████████████████ The pursuer did, however, accept that a man by the name of █████ had held a gun to his head in 1991. The pursuer explained that █████ used to be a friend of his when he was younger, but by that point, █████ had turned into a different person. The pursuer could not recall why █████ put a gun to his head, but accepted that it was not a nice experience.

[30] The pursuer explained that both prior to attending the school and whilst attending the school he was close with EF and they would help each other out. If someone was hitting the pursuer, EF would help him out and *vice versa*. The pursuer was not aware that EF started experimenting with acid and alcohol when he left the school and did not think EF got in trouble with police after leaving the school, apart from one incident after the dancing one night when on annual leave from his chosen occupation. The pursuer accepted that he missed EF when he left to pursue his career and confirmed that he remained close to EF to this day.

[31] The pursuer confirmed that a boy named DM had attended the school. The pursuer explained that DM had spoken to him in subsequent years, but thought he had not spoken to him in 30 years. The pursuer explained that DM was a friend of Brother Farrell. The pursuer did not tell DM about the abuse the pursuer suffered at the school.

[32] The pursuer did not agree with a suggestion that his mother neglected and rejected the pursuer. The pursuer explained that his mother did not reject him, but advised that she did have her own mental health problems. The pursuer accepted that in 2007 his father was terminally ill in a nursing home and subsequently died in 2009. The pursuer accepted that by 2011 he was living in a scatter flat and was drinking alcohol and taking heroin every day.

[33] The pursuer accepted that in the criminal trial both Brother Farrell and Kelly were acquitted of the charges they faced in respect of the pursuer. The pursuer denied a

suggestion that at that trial the pursuer had been unable to remember if Brother Ryan had done anything to him.

[34] It was suggested to the pursuer that his evidence in this case about what Brother Ryan, Brother Farrell and Kelly did to him was untrue. The pursuer strongly rejected this suggestion and stated that it was he who was at the school, it was he who knew what happened, that he had told the truth and that the abuse he had suffered had destroyed his life.

[35] Finally, the pursuer was asked whether he would comply with psychological therapy. The pursuer said that he did not know what such therapy would entail but recognised that he needed help and advised that he would take it, if he thought that it was something that could help him.

CD's evidence

[36] A summary of CD's evidence is as follows. CD was 32 years of age and is the daughter of the pursuer. She provided details of her current employment, which she had been in for the last 13 years and the qualifications that she had for her current role. CD advised she was very close to the pursuer. The pursuer and her mother currently lived apart but they were often together and CD viewed them as being 'together'. CD was aware that the pursuer had been visited by the police in 2013 (CD confirmed she was not living with the pursuer when the police visited). Prior to that police visit the pursuer had not told her that anything had happened at the school. Following the police visit in 2013 the pursuer still did not really discuss what happened to him at the school. The pursuer did take CD out to a restaurant and explained that something might be in the newspapers (with the inference being that something linking the pursuer with the abuse that had occurred at the school

when he was a pupil there, might appear in the press) but the pursuer did not confirm to CD what had happened to him. CD had pressed the pursuer on occasions about what had happened to him but CD felt that the pursuer could just not tell CD what happened to him. CD had not seen the pursuer speaking to EF about giving a statement to the police.

[37] When CD was younger she was not aware that the pursuer had health problems. CD did, however, note that when she was young she did not get her dinner at a regular time. It could be 5pm one night and 10pm the next night but she would always get her dinner. CD was aware that the pursuer looked different to other parents and noted that some of the kids she knew said that that they could not play with CD. CD was about 16 years old when she first became aware that the pursuer was taking drugs. By the time she was 19 years old she knew for sure that the pursuer was taking drugs, although the pursuer always tried to hide that fact. CD explained that she never saw the pursuer taking drugs.

[38] CD described the pursuer as a great dad who was loving, protective and made CD feel like she was his whole world. He was available to her all the time. CD said that when she was a child the pursuer did not allow her to stay at any of her friend's houses. She was not given a reason for this at the time. When CD was playing hockey at school the pursuer would drive to where she was playing to make sure she was alright. As CD got older the pursuer required CD to head home as soon as the street lights came on. Even if her friends were staying out a bit later, she was not allowed to.

[39] CD advised the pursuer used to stay up at night and sleep during the day. The pursuer had done this for as long as CD could remember. CD noted that she did wonder why the pursuer did not work, but explained that the pursuer's sleeping habits and the fact that he did not work just became the norm for CD. However, CD advised that she did start to reflect on this when she reached about 18 years old. CD noted that the pursuer had

always bitten his knuckle and nails. CD advised that she became concerned about the pursuer's eating habits when she was about 18 years old. CD explained that the pursuer's diet was, and is, not great and sometimes the pursuer could go for days without eating.

[40] CD had some memories of the pursuer suffering chest pains on a couple of occasions. CD explained that a couple of years ago the pursuer thought he was having a heart attack and, as a result, CD went to pick him up and took him to hospital.

[41] CD explained that she was aware her father had been detained in a psychiatric hospital on a few occasions. It was never confirmed to CD why the pursuer was admitted to a psychiatric hospital. She was simply told that the pursuer was not feeling well.

[42] Just over a year ago CD was doing an online child protection course in connection with her employment. The pursuer was present when CD was doing this course and got up and walked off. CD felt really sad doing that to the pursuer knowing what she knows now. She felt she put the pursuer in an awkward position and never meant to do that.

[43] CD explained that the pursuer was not very trusting and did not really have any relationship with anyone apart from her mother. CD thought that the pursuer struggled with maintaining relationships. He was, however, on good terms with EF and trusted him (CD explained that the pursuer would speak to EF on the phone or EF would come and visit the pursuer). CD explained that the pursuer was quite needy with her and advised that he needs constant re-assurance that she loves him and that he has done enough for her. CD noted that she had seen such a deterioration in the pursuer since the police visit and the subsequent criminal trial. CD explained the pursuer had always suffered from depression, but since having to speak about the events he is just sad all the time. [REDACTED]

[REDACTED]

[REDACTED]

EF's evidence

[44] A summary of EF's evidence is as follows. EF was 55 years of age. He was the older brother of the pursuer and the uncle of CD. He gave details of his employment, which he had been in for over 30 years. [REDACTED]

[45] EF was referred to [REDACTED] evidence [REDACTED] which included: (i) EF receiving a severe beating from Brother "John" resulting in a bruised eye and a swollen lip (5/15/39); (ii) Brother "John" behaving in a similar way towards other children (5/15/39); (iii) Brother Ryan grooming and abusing EF by: (a) caning him, causing injury to his bottom; (b) offering to soothe said injury with cream; (c) watching him shower as a result of noticing a rash on EF's legs and bottom; (d) using the cream application tactic as a pretence for sexual abuse; (e) making EF lie naked face down on Brother Ryan's bed and sexually abusing him resulting in EF suffering anal bleeding caused by finger penetration (5/15/46); (iv) EF blaming himself for abuse he suffered at the school (5/15/46); (v) Brothers Ryan, Farrell and Kelly watching the children shower, which made EF feel uncomfortable (5/15/48 and 5/15/68) (EF explained that he was watched in showers for three or four months whilst he was bed wetting and noted that the abnormal became normal; [REDACTED]; [REDACTED]; (vi) that Brother Farrell and Kelly each had a group of favourite boys who were particularly identified as targets for sexual abuse (5/15/48); (vii) that one of dormitories was known as the "favourite boys' room" (5/15/48) (EF explained that he lived in the "favourite boys' room" and noted that some of the things he heard from that room, in terms of screams, will live with him and have tortured him); (viii) that EF thought some children misinterpreted

sexual abuse for affection and wanted to be the 'favourite boy' (5/15/48) (EF explained that: (a) he had never experienced love and affection before; (b) when it was shown to him by Brother Farrell he had never experienced feelings like that before; and (c) he felt guilt and that what was happening to him was his fault). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[46] EF explained that at the criminal trial he only gave evidence about physical assaults against him and not sexual assaults. EF was shocked that he was only required to give evidence at the criminal trial about criminal assaults only.

[47] EF explained that Brother Farrell did things to him. It was only in hindsight that he realised that Brother Farrell was getting sexual gratification from the things he did to him. Brother Farrell was still getting EF up from bed 4 months after he stopped wetting the bed. Brother Farrell would masturbate EF. At the time EF did not know any better and it became the norm. Kelly was only physically abusive.

[48] Under reference to the submissions made by the defender at the SCAI (production 5/16), EF: (i) agreed that the school was not a List D school (EF noted that both the pursuer and EF were at the school for care and protection and had not done anything wrong); (ii) agreed that even without the abuse at the school, life at the school was not a happy one (EF described the discipline as harsh); (iii) explained that when he read how other boys had been groomed, it was the same as the way he had been groomed and it made him feel that he wasn't alone; (iv) agreed that certain features of life at the home were arranged, whether by accident or by design, to help provide men like Brother Ryan with opportunities to abuse the boys; (v) agreed that there was not a legitimate reason for the

Brothers to supervise the boys showering and that they used the showers for their voyeuristic desires; (vi) advised that he was: (a) aware that allegations had been made against Brother Farrell in South Africa but that he had been sent to another school; and (b) aware that Brother Farrell had been in other schools in Edinburgh; (vii) agreed that physical “punishments” went well beyond reasonable chastisement.

[49] EF explained that he felt guilt, embarrassment and shame and thought that he had brought the abuse he suffered at the school on himself. EF still found it difficult to speak about the abuse he suffered at the school. EF explained that whilst at school he did hear that abuse was taking place, but he never told anyone that he was suffering abuse. EF never discussed the sexual abuse he suffered with the pursuer and *vice versa*. EF did know that the pursuer was physically abused and confirmed that he saw violence being used against the pursuer by both Brother Ryan and Kelly (EF did not provide any detail about this violence). EF noted that he watched ‘do ins’ on a near enough daily basis at the school. Children were violently punched and kicked, but it became the norm. Most of the children, including EF, just accepted the violence that was used on them. The pursuer took a lot (meaning a lot of assaults). EF got the cane quite often. EF felt he got punished if the pursuer did something wrong. The pursuer was always running away from the school and EF felt he got punished for the pursuer’s actions. EF did not himself run away. EF explained that children ran away from the school all the time. When they were brought back to the school they were punished by being given a beating and then were given a bar of chocolate.

[50] EF explained that in a children’s home there is always a pecking order and fighting. EF explained that he would stand up for himself at the school and would also stand up for the pursuer. When EF heard that the pursuer had been abused at the school he realised that he failed (meaning failed to protect the pursuer).

[REDACTED]

[REDACTED] (iii) [REDACTED]

[REDACTED]

[REDACTED] (iv) [REDACTED]

[REDACTED]

[REDACTED]

(v) [REDACTED] accepted that when he lived at [REDACTED] Street the craze at the time seemed to be getting highs from fire extinguishers; EF noted that one of his friends died from this activity; [REDACTED]

[REDACTED]

[REDACTED] (vi) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (vii) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[53] EF accepted that he gave the police a statement on 14 November 2013 [REDACTED]

[REDACTED] EF was aware

that the police were coming to speak to him but did not know what they wanted to speak about. EF thought that the pursuer would be in the same position. When the police visited him, EF opened up and downloaded. EF could not remember if he spoke to the pursuer

about giving a statement to the police. It was suggested to EF that it would be natural to speak to the pursuer once EF had given his statement to the police. EF strongly rejected that suggestion and explained: (i) that he felt he deserved the abuse that he suffered; (ii) that when he goes to sleep he sees a picture of penis and he wakes up to that image; (iii) that it was hard to speak to anyone about the abuse he suffered; (iv) that he had not spoken to the pursuer about what happened to him; and (v) that the pursuer does not know what happened to EF.

[54] EF explained that his employment had been his coping strategy. However, he has had issues with alcohol and temper. EF advised that he felt angry at the system and felt that the abuse he suffered had ruined his life.

Detective Constable Andrew Gilmore's evidence

[55] A summary of Dc Gilmore's evidence is as follows. Dc Gilmore had 16 years police service. He currently worked in the public protection unit. In July 2013 Dc Gilmore became the investigating and reporting officer for an investigation about the school. The investigation was called "Operation Winterton" and was staffed by a small team of detectives.

[56] Dc Gilmore explained that there had been an earlier investigation into the school. This took place between 1999 and 2000 and was known as Operation Lazarus. A report was submitted to the Procurator Fiscal (hereinafter referred to as the "PF") at that time but no charges were brought. Dc Gilmore obtained and read the file for Operation Lazarus as part of his investigations.

[57] Dc Gilmore explained that he obtained a statement from EF on 14 November 2013. During this process EF brought up that the pursuer may have been a possible victim of

abuse but provided no further details. EF then passed the pursuer's details on to Dc Gilmore. Dc Gilmore then contacted the pursuer and made an arrangement to see him. At that time the pursuer was simply told that Dc Gilmour wanted to speak to him because he was a former pupil of the school. Dc Gilmour did not, at that stage, mention what the investigation entailed.

[58] Dc Gilmour explained that, prior to speaking to the pursuer, he had been briefed by the Deputy Senior Investigating Officer to simply say to possible victims of abuse when they met them that: (i) they were investigating abuse at the school; and (ii) they were aware that the possible victim had been a pupil at the school. Dc Gilmore advised that the word used was simply "abuse" and he did not provide any further specification as to the forms of abuse they were investigating. Dc Gilmour also explained that he understood the importance of not contaminating a witness by providing them with information.

[59] On 29 November 2013 Dc Gilmour attended the pursuer's home address with Pc Hay. They told the pursuer that they were investigating abuse at the school and explained that they were aware that the pursuer was a former pupil. Dc Gilmour did not think that they told the pursuer that they had spoken to EF. The pursuer agreed to provide a statement and Pc Hay noted the statement from the pursuer. Pc Hay noted down the pursuer's recollection using the pursuer's own words. They did not provide the pursuer with any names of teachers or staff at the school. Rather, they simply noted down the pursuer's recollections. The pursuer was not intoxicated when providing the statement but did ask if it was alright if he had a beer when providing the statement (the pursuer then did have a can of beer). When the pursuer was providing the statement he was agitated, upset and clearly traumatised about speaking about his experiences at the school. When he was speaking about the sexual abuse he suffered he became upset, was crying at times and

clearly found it very difficult to speak about the abuse he was disclosing to the officers. The statement took a couple of hours to complete. When the statement was completed it was read over to the pursuer and he signed it.

[60] Dc Gilmore advised that, at the time the pursuer provided his statement, not many other former pupils of the school had been spoken to, but at least two victims had been identified. However, the police investigations continued and they ended up identifying 35 victims of abuse. The case was reported to the PF in 2014 and the criminal trial took place in 2016. That trial involved charges against Brother Farrell and Kelly. No charges were brought against Brother Ryan because enquiries had established that he had died in July 2013. After the criminal trial the police identified a further 20 to 30 victims of abuse at the school.

[61] Dc Gilmore explained that in his experience it was relatively common for a victim of non-recent abuse to not recall everything that happened to them on the first occasion they were spoken to by the police. Dc Gilmore confirmed that other former pupils of the school had made allegations against Brother Ryan, Brother Farrell and Kelly that were similar to those made by the pursuer. Dc Gilmore advised that there were multiple very similar accounts of abuse.

[62] In cross examination Dc Gilmore explained that the role of a detective is be inquisitive and establish the facts. He accepted that it was important not to: (i) make suggestive comments to people whom he interviewed; (ii) influence and taint the recollection of witnesses; and (iii) pre-judge whether someone in the pursuer's position was a victim. Dc Gilmore was asked why he described the pursuer, during his evidence, as a victim. Dc Gilmore explained that from the investigations he had carried out, he had no reason to question the pursuer's account and he had accepted that the pursuer was a victim.

Dc Gilmour was asked whether it was important to look for corroboration of the pursuer's account. Dc Gilmour explained that the pursuer's account was similar to the two victims that he had spoken to in July 2013 and was similar to other victims that were subsequently spoken to. Dc Gilmore explained that the accounts given by the victims were "very, very similar".

[63]

Professor Gary Macpherson's evidence

[64] A summary of Professor Macpherson's evidence is as follows. Professor Macpherson is a Consultant Forensic Clinical Psychologist. His qualifications include a BA in psychology, a masters degree in clinical psychology and a doctorate in clinical psychology. He is a registered psychologists, clinical psychologist and forensic psychologist. He is also a Fellow of the British Psychological Society. Professor Macpherson's current role was the lead Psychologist at the State Hospital, Carstairs. He had been in this role for over 20 years. Professor Macpherson had been giving expert evidence for over 25 years in a range of cases, including cases in the High Court.

[65] Professor Macpherson had prepared a report (production 5/12).

Professor Macpherson explained that he had had sight of, amongst other things, the pursuer's medical records, two reports from Dr Scott, Consultant Psychiatrist (skilled witness for the pursuer) and a report from Dr Friedman, Consultant Psychiatrist (skilled

witness for the defender). Professor Macpherson explained that prior to preparing his report he had spoken to the pursuer on the telephone during May 2020 for about 1 hour. He had also visited the pursuer at his home in 2015 for about 90 minutes in order to assess what the most appropriate special measures were for the pursuer to give evidence in the criminal trial.

[66] Professor Macpherson explained that the pursuer presented in a flat and objectively depressed manner. He had a strong local accent with his speech being mumbled and indistinct, although he was able to express his views and wishes. Professor Macpherson: (i) could elicit no history from the pursuer of hallucinations or abnormal perceptions or delusions or unusual beliefs arising from a mental disorder; (ii) formed the view from the pursuer's use of language and level of understanding that he functioned within low normal limits intellectually; (iii) found no evidence to suggest that the pursuer was being evasive or exaggerating – indeed Professor Macpherson considered that the pursuer was reluctant to talk about events at the school and formed the impression that the pursuer was doing his best not to talk about events at the school (Professor Macpherson explained that the pursuer did not go into detail about the abuse he suffered at the school); and (iv) confirmed that the pursuer denied being the subject of abuse, victimisation or neglect prior to attending the school.

[67] Professor Macpherson took a history from the pursuer and also had regard to his GP records. Professor Macpherson noted that the pursuer initially use inhalants (glue and butane gas) from the age of 13 years old (it was suggested to Professor Macpherson that the pursuer started using solvents at age 11 but Professor Macpherson explained that the pursuer told him he started using solvents and gas when he was 13 years old). He then moved onto cannabis, then temazepam and subsequently developed a heroin habit, which

has endured over a long period of time. The pursuer told Professor Macpherson that he used heroin to deal with his psychological symptoms and those emanating from the abuse he suffered in childhood. Professor Macpherson noted that the pursuer was, at the time he spoke to him, on a methadone program and smoking heroin around twice a week.

Professor Macpherson noted that the pursuer only became a problem drinker in his thirties and had gone on to develop cirrhosis of the liver. Professor Macpherson noted that he was aware that the pursuer had a limited employment history (he was not aware that the pursuer found work between the ages of 16 and 20 years old) and explained that the pursuer: (i) struggled to trust others; (ii) struggled to be in the company of others; and (iii) preferred social isolation.

[68] Professor Macpherson explained that, looking at the pursuer's records overall, it seemed that the pursuer had had difficulties in disclosing what happened to him at the school. The pursuer had had multiple attendances with mental health professionals, multiple failures to engage and sometimes he attended with mental health professionals in an intoxicated state because he was anxious about disclosing what happened to him.

Professor Macpherson accepted that the pursuer did not disclose the details of the abuse he suffered until he spoke to the police. Professor Macpherson's view was that the pursuer had always been detached from others and had not been able to form close relationships with others. This had caused the pursuer personal problems and Professor Macpherson considered that when you are detached you are not able to tell anyone about the abuse you have suffered.

[69] Professor Macpherson noted that delayed disclosure of child abuse was the norm, particularly with males. Most children did not disclose as a child. Professor Macpherson explained that he previously gave expert evidence about delayed disclosure of child abuse,

but recent legislation meant that juries are now advised that they should not draw any adverse inference from delayed disclosure [*see section 288DA of the Criminal Procedure (Scotland) Act 1995, which was brought into force on 24 April 2017*].

[70] Professor Macpherson accepted that it was not uncommon for all the details from a child abuse victim not to emerge in the first interview with the police. He explained that sometimes victims get overwhelmed and have to stop the interview and complete it the next day.

[71] Professor Macpherson was taken through his review of the pursuer's medical records (pages 5/12/9 to 5/12/13). Professor Macpherson noted the diagnosis in the letter of 11 April 2014 (5/1/109 – see paragraph [23] above) of "Subsyndramol Post Traumatic Stress Disorder" and explained that "Subsyndramol" was not a word he would use, but understood it to mean that the diagnosis did not meet the full criteria for PTSD. Whilst he noted that the pursuer's records did contain numerous references to the post-traumatic stress, he accepted that the letter of 11 April 2014 was the first formal diagnosis of PTSD.

[72] Professor Macpherson formed the view that: (i) the pursuer's experience of emotional, physical and sexual abuse had had a profound and devastating impact on his personality in general and psychological functioning in particular; (ii) the pursuer had been significantly traumatised by the abuse he suffered at the school; (iii) the pursuer attempted to cope with his mental health symptoms over the years by abusing alcohol and substances; (iv) the pursuer made numerous attempts to engage with mental health services but ultimately felt the process was too demanding for him; and (v) the build up to the criminal trial and the aftermath of his oral evidence had a major impact on the pursuer's mental state.

[73] Professor Macpherson explained that there was extensive literature demonstrating that childhood experiences of sexual abuse increased an individual's vulnerability to a range

of physical, psychological, and behavioural impairments in adulthood and meta-analytic reviews had correlated childhood sexual abuse with anger problems, depression, dissociation, interpersonal problems, post traumatic symptoms, self-harm, substance use and suicidal ideation. Professor Macpherson considered that the pursuer presented with depression, interpersonal problems (which including not being able to hold down a job and feeling people were staring at him), post traumatic symptoms, self-harm, substance use and suicidal ideation. The pursuer did not, however, suffer from dissociation or anger problems.

[74] Professor Macpherson reviewed the impact of the abuse the pursuer suffered on his functioning with reference to the Diagnostic and Statistical Manual for the Social Sciences, Fifth Edition (hereinafter referred to as "DSM-5"). Professor Macpherson, after considering both the history given to him by the pursuer and his medical records, came to the following diagnosis:

(1) That the pursuer presented with various chronic depressive features including low mood, irritability, problems with appetite, tearfulness, feelings of hopelessness, anhedonia (the inability to gain pleasure from enjoyable experiences), thoughts of worthlessness, problems with sleep, suicidal thoughts, self-harm, and a long-standing history of low esteem. That, overall, he presented with symptoms of a Persistent Depressive Disorder (DSM-5) spanning at least three decades. This was a low level depressive condition or sub-clinical condition which had a large personality overlay.

(2) That the pursuer presented with a history of Generalised Anxiety Disorder (DSM-5) with panic attacks. This diagnosis was characterised by excessive, uncontrollable, irrational worry and apprehensive expectation about events and

symptoms of anxiety including sweating, tightness of chest, facial flushing, avoidance, racing thoughts and sleep problems.

(3) That the pursuer presented with a history of PTSD (DSM-5) including rumination, traumatic nightmares and recurrent intrusive memories or flashbacks; persistent negative trauma-related emotions, including self-blame and guilt; alterations in arousal and reactivity, including sweating, panic, problems with sleep, problems with concentration and social withdrawal. Professor Macpherson noted that the pursuer had been maintained on anti-depressants and anxiety reducing medication for many years.

(4) That the pursuer had a history of alcohol use and substance use problems.

[75] Professor Macpherson noted that the pursuer also presented with relationship and intimacy problems and chronic low self-esteem. He explained that they were not separate diagnoses to the disorders he had diagnosed, but were rather related problems which the pursuer had had over the years.

[76] Professor Macpherson, under reference to the criterion for a diagnosis of PTSD (DSM-5) (5/12/23 to 5/12/24) explained that the "Criterion A: stressor" was the abuse the pursuer suffered at the school. The pursuer had a range of factors under "Criterion B: intrusion symptoms" including the nightmares he suffered, being reminded of events when child abuse was mentioned in the news or in film and suffering intrusive thoughts during marital relations. The pursuer had a range of factors under "Criterion C: avoidance" including removing himself when watching a film with his family that mentioned child abuse, staying at home for years with the curtains shut and being unable to talk about the abuse he suffered. The pursuer again had a range of factors under "Criterion E" including problems with concentration, sleep disturbance and self-destructive behaviour (in the form

of his drug abuse). Professor Macpherson explained that his diagnosis was not “complex Post Traumatic Stress Disorder” but simply “Post Traumatic Stress Disorder”. However, the constellation of the pursuer’s symptoms was complex.

[77] Professor Macpherson explained that he was aware that the pursuer came from a disadvantaged family background, that he been in care from the age of 18 months until he was 4 years of age due to neglect and maternal health problems (which was possibly mental health problems). He was not aware that the pursuer was at another children’s home prior to attending the school.

[78] In terms of causality, Professor Macpherson noted that he did not have a full chronology of every moment of the pursuer’s life, but he had reconstructed the pursuer’s life as best he could from what the pursuer had told him and what his records disclosed.

Professor Macpherson’s opinion on causality was as follows:

“There is no absolute means of reliably assessing the level and quality of a pursuer’s functioning or capacity before an adverse event(s) nor a reliable means of separating the effects of one prior trauma or experience from another. There is no controversy however that traumatic events can *cause* mental health problems. I am of the view in the absence of any prior significant traumatic events or traumatic events post adverse events that [*the pursuer’s*] Persistent Depressive Disorder (DCM-5); Generalised Anxiety Disorder (DSM-5) with panic attacks; complex Post Traumatic Stress Disorder (DSM-5); social, relationship and intimacy problems and academic and occupational limitations are directly related to the experience of emotional and physical and sexual abuse during his time at St Ninian’s school. I apply the same logic to [*the pursuer’s*] lifelong abuse of substances as the prevalence of substance use amongst adult survivors of institutional abuse is far higher than in the normal population and I am of the view that he is likely to have dabbled in cannabis and other recreational substances but he would have been unlikely to have developed an addiction to substances and heroin in particular were he not exposed to abuse at St Ninian’s. I also note that he began abusing substances to manage levels of anxiety stemming from the abuse at St Ninian’s. Overall I am of the view that his psychological, social, academic and occupational functioning would be significantly higher were he not exposed to abuse in St Ninian’s.”

Professor Macpherson considered that the abuse the pursuer suffered at the school resulted in him experiencing a whole range of mental health conditions. The pursuer did not have

the skills to manage these conditions and he used substances to manage them and distract him from his thoughts. Professor Macpherson's view was that pursuer's substance use was, and is, to manage his psychological *sequelae*.

[79] Professor Macpherson considered that the pursuer's capacity to work was limited to non-existent. His view was that the abuse at the school had had a profound impact on the pursuer's mental health and capacity to work and was associated with the pursuer's failure to sustain employment. The pursuer's social functioning had also been significantly disrupted by his time at the school with the pursuer having spent most of his adult life as a virtual recluse avoiding social contact.

[80] Professor Macpherson did not think there would be any major changes to the pursuer's current symptoms but that he may benefit from CBT.

[81] In cross examination Professor Macpherson accepted that: (i) memory can change and be distorted over time; (ii) a person's memory could be corrupted by a suggestive question or hearing new information; (iii) the wait for a criminal trial and to serve a prison sentence would be stressful for most persons; and (iv) for a diagnosis of PTSD there had to be post traumatic symptoms that would have to have a severe impact on the pursuer's day to day life (Professor Macpherson explained that the pursuer's PTSD had had a significant impact on the pursuer's social and occupational functioning).

[82] Professor Macpherson explained that valium was generally prescribed to reduce anxiety. It was suggested to Professor Macpherson that the pursuer being prescribed valium prior to his conviction in September 1984 could be due to those criminal proceedings. Professor Macpherson said it could be about anything.

[83] Professor Macpherson explained that he had not been aware of the attack of the pursuer's step-father but agreed that it was a potentially traumatic event that you would

expect a reasonable person to remember. He had also not been aware that [REDACTED] had held a gun to the pursuer's head in February 1991, but again agreed that most people would consider that to be a traumatic event. Professor Macpherson agreed that that these events could, potentially, explain why the pursuer was using temazepam and valium in April 1991 (see letter of 17 April 1991 (5/1/201) at paragraph [23] above).

[84] Professor Macpherson accepted that a persistent depressive disorder and a general anxiety disorder could be explained by multiple different causes. He accepted that the pursuer's chaotic family life before attending the school, being involved in crime and the two terrifying events set out above, could have possibly led to these disorders. However, Professor Macpherson explained that he would have expected to see reference in the pursuer's medical records to the two terrifying events if they had had a significant impact of the pursuer's mental health. There was in fact no references at all to these events and what the pursuer's records showed was persistent low mood and anxiety related to the pursuer being in care. In the circumstances Professor Macpherson thought that the two terrifying events might not be as traumatic as suggested. It was suggested to Professor Macpherson, under reference to Dr Melrose referral of 24 July 2003 (5/1/189 – see paragraph [23] above) that: (i) the "stress, depression and panic attacks" could be partly explained by the two terrifying events; (ii) the "anxious a lot of time particularly in busy places" could be explained by the pursuer's heroin use; and (iii) it was clear that Dr Melrose did not think there was any actual physical abuse, but that neglect and rejection were significant issues for the pursuer. Professor Macpherson stated in response: (i) that it was possible, but he would have expected the pursuer to have mentioned the two terrifying events; (ii) that he did not think that was a recognised symptom of taking heroin, but it was possible; and (iii) that he considered the reference to neglect and rejection related to the family home of the pursuer.

[85] Professor Macpherson disagreed with Dr Friedman's opinion that the pursuer's symptoms were well below the threshold for a diagnosis of PTSD. Professor Macpherson noted there were numerous references to trauma and panic attacks in the pursuer's records and that it remained his view that the pursuer has long-standing PTSD.

Keith Carter's evidence

[86] A summary of Keith Carter's evidence is as follows. Mr Carter was an employment consultant. He has a MA in sociology. He initially worked in the public sector analysing the labour market and setting up training programmes for people from disadvantaged backgrounds. He then progressed into consultancy work and had built up considerable experience.

[87] [87] Mr Carter was referred to both his initial report, dated February 2019 (production 5/5) and his supplementary report, dated November 2020 (production 5/14). Mr Carter explained that he was aware that the pursuer had had a very limited work record and had lived on state benefits. Mr Carter noted that one of the pursuer's brothers was a production worker and he noted EF's occupation.

[88] Mr Carter explained that the pursuer had done some work in a warehouse and had also been employed for a period as forklift driver. The pursuer had also expressed interest in a driving job. Mr Carter explained that he used data provided from the Office of National Statistics in their publication the Annual Survey of Hours and Earnings (hereinafter referred to as "ASHE" – Mr Carter explained that ASHE was a national salary survey undertaken each year since 1949) to work out what the pursuer may have earned in each year of his working life up to the date of Mr Carter's second report. Mr Carter explained that he had looked at the earnings for the categories of "All Manual Males" (Mr Carter explained that

there were figures for a category called "All Manual Males" but the figures for that category stopped with the category going forward simply being "All Males", however Mr Carter had made an adjustment to take out higher earning males), "Forklift Truck Drivers" and "HGV drivers" for the period when the pursuer would have started working, at age 16 (1983), to the date of his supplementary report (2020). Mr Carter had then worked out what the annual salary of a person in each of those categories would have been between 1983 to 2020. Mr Carter explained that he had used the lower decile figure between 1983 and 1984 (when the pursuer would have been 16 to 18) and the lower quartile figures for 1985 to 1987 (when the pursuer was 18 to 21). Thereafter, Mr Carter had used the average figures (because the pursuer may have been a high or a low earner). However, Mr Carter noted that the difference between average and median for "HGV drivers" in 2020 was 0.66% and for "Forklift Truck Drivers" was 5.48%.

[89] Mr Carter produced figures showing an "ideal" work record (this was a work record where there were no gaps in employment). Mr Carter then considered how unemployment might have effected matters. Mr Carter noted that unemployment rates were high in 1983 and for periods after that (1993 and 2010) but that there had been a general increase in employment, with 2019 being the lowest rate of unemployment since 1974. Mr Carter looked at figures which showed the average number of weeks a person had been unemployed for and the average number of jobs a person was likely to have over their working life. Mr Carter found that the average number of weeks a male was unemployed for was 36.5 weeks and assumed that a person would have 10 jobs over their working life. That resulted in an individual being likely to spend 365 weeks (7 years) unemployed. That would then suggest a deduction in earnings of 13.76% over the course of a 51 year working career (16 to 67 years) (7 years is 13.76% of 51 years). Mr Carter considered that a 13.76%

reduction to the “ideal” work record would result in a “normal” work record. Mr Carter, then, in order to take account of additional factors that could have made continuous employment difficult, produced figures for a “poor” work record and a “bad” work record. For the “poor” work record Mr Carter assumed that a person would spend 20% more time unemployed than someone with a “normal” work record. For the “bad” work record Mr Carter assumed that a person would spend 40% more time unemployed than someone with a “normal” work record. He therefore increased the average amount of time between jobs by 20% (in the case of a “poor” work record) and 40% (in the case of a “bad” work record). That resulted in someone with a “poor” work record being unemployed for 438 weeks (8 years and 5 months – and a deduction from the “ideal” work record of 16.52%) and someone with a “bad” work record being unemployed for 511 weeks (9 years and 10 months - and a deduction of 19.27% from the “ideal” work record).

[90] The table for net pay for the category of “All Manual Males” set out net earnings for years 1983 to 2020 for each of the “ideal”, “normal”, “poor” and “bad” work records. The total net pay for each work record (i.e. the annual net pay between 1983 to 2020 added up) was as follows:

All Manual Males

Year	“Ideal” work record	“Normal” work record – 13.76% deduction	“Poor” work record – 16.52% deduction	“Bad” work record – 19.27% deduction
1983	£3,436	£3,063	£2,988	£2,913
to				
2020	£25,409	£22,414	£21,813	£21,214

Total net pay between 1983 and 2020	£573,874	£504,633	£490,741	£476,900
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[91] The table for net pay for the category of “Forklift Truck Driver” also set out net earnings for years 1983 to 2020 for each of the “ideal”, “normal”, “poor” and “bad” work records. The total net pay for each work record (i.e. the annual net pay between 1983 to 2020 added up) was as follows:

Forklift Truck Driver

Year	“Ideal” work record	“Normal” work record – 13.76% deduction	“Poor” work record – 16.52% deduction	“Bad” work record – 19.27% deduction
1983 to 2020	£3,804 £22,300	£3,380 £19,733	£3,295 £19,218	£3,210 £18,705
Total net pay between 1983 and 2020	£489,984	£432,279	£420,702	£409,175

[92] Mr Carter noted that the net salary for year 2020 would be probably the same for 2021. Mr Carter confirmed that if the 2020 figures were used for projecting forward they

would not be more beneficial for the pursuer. Mr Carter confirmed that no assumptions had been made that the pursuer would achieve qualifications or get promoted.

[93] Given that the pursuer left work with no qualifications, Mr Carter did not think that the pursuer would have had an “ideal” work record. The pursuer, when he entered labour market, was a working class boy and there would be likely to be periods of unemployment. Mr Carter acknowledged that the level of downward adjustment from the “ideal” work record was a matter for the court but noted that given Professor Macpherson considered the pursuer’s occupational functioning would have been significantly higher if the abuse had not occurred, it may be that the “normal” or “poor” work records may be appropriate. Mr Carter noted that: (i) if the court took the view that the pursuer was a bit of tearaway then the pursuer may have gone longer without work: (ii) looking at the national statistics only 1% of people did not work once they had responsibilities.

[94] In cross examination Mr Carter advised that he was offering an opinion on quantum. The question of causation was for the court to determine on the medical evidence. Mr Carter advised that he was not sure what the pursuer would work as (meaning the type of job the pursuer would obtain) and so that is why he had used the “All Manual Males” category. He had also included the “Forklift Truck Driver” category because the pursuer had previously worked in that role. Mr Carter accepted that there was an element of speculation in his calculations because it was not known what the pursuer would have done had the abuse not occurred. Mr Carter did not disagree with the following passage in Mr Govan’s report, dated 23 July 2019 (production 6/10):

“Even had the abuse not happened, it is on balance probable that [*the pursuer*] would have been significantly disadvantaged due to a disrupted childhood, time spent in care and early involvement in criminal activity. It is, however, outwith my expertise to determine the extent to which the disadvantages [*the pursuer*] was likely to have

suffered would have impacted on his education and employment had the abuse not happened.”

However, Mr Carter pointed out that whether or not criminal activity was a factor would depend on the nature of criminal activity and that offending (and particularly minor offending) often dropped off with maturity. It was suggested to Mr Carter he had not taken account of: (i) high rates of unemployment in Scotland when the pursuer entered the labour market; and (ii) the particular difficulties faced by young persons from disadvantaged backgrounds, at that time. Mr Carter noted that when the pursuer entered the labour market, unemployment in Scotland was at 18%. However, the pursuer told Mr Carter that he entered a YTS in upholstery. Mr Carter considered, at the time, employment for 16 and 17 year olds was quite high, but then there was a drop off for older persons. There were still, however, as a matter of generality, more people in work than out of work.

Dr John Pollock's evidence

[95] A summary of Dr Pollock's evidence is as follows. Dr Pollock is an actuary who was in business on his own account.

[96] Dr Pollock had prepared a report (production 5/18). Dr Pollock noted that the pension provision offered to workers in Scotland had changed over the period from 1980 to 2021. In the 1980s and 1990s occupational pension provision was typically of the defined benefit scheme, offering a pension of 1/60th of final pensionable pay for each year of service. As the cost of such arrangements increased with declining interest rates and improving longevity, most defined benefit schemes closed to future accruals and replacement schemes tended to be of the defined contribution type, with a typical employer contribution being 6% of pay. From October 2012 to April 2017 the workplace pension and auto-enrollment

became commonplace. Currently all employees earning over £10,000 p.a. are now auto-enrolled into an occupational scheme. From April 2019 the minimum level of contributions to the workplace pension was 8% of band pay between £6,240 and £50,270. The contributions are split into a 3% employer contribution, a 4% employee contribution and 1% contribution in the form of tax relief. The contributions were 5% of this band of pay each year from April 2018 to March 2019 and 2% of this band of pay before that time.

[97] Dr Pollock explained that he used the gross figures produced by Mr Carter in his supplementary report for the “All Manual Males” and “Forklift Truck Driver” categories and then used the “normal” and “poor” work records and took an average of those figures to arrive at gross earnings for 2020 of £25,225 p.a. Dr Pollock then calculated the pursuer’s pension loss until the age of 67 years on the basis of three scenarios. The first scenario assumed that the pursuer only joined a workplace pension in 2012. The second scenario assumed that the pursuer joined a defined contribution scheme, with a 6% employer contribution, in 2000. The third scenario assumed that pursuer joined a defined benefit scheme between 1990 and 2000 and thereafter joined a defined contribution scheme.

Dr Pollock made clear that each scenario was an alternative to other scenarios. Dr Pollock’s calculations produced the following figures for the pursuer’s pension loss until the age of 67:

Pension Scheme Arrangement	Pension Loss
Workplace Pension since October 2012	£26,340
Defined Contribution since 2000	£73,940
Defined Benefit from 1990 to 2000 and Defined Contribution thereafter	£166,460

[98] Dr Pollock noted that it is possible for an employee to opt out of a workplace pension. However, after 3 years the employee who opted out would be auto-enrolled back into the workplace pension but would then, again, be able to opt out.

Dr Jacqueline Scott's evidence

[99] A summary of Dr Scott's evidence is as follows. Dr Scott's qualifications included a MBChB and a MRCPsych. She is a member of the Royal College of Psychiatrist. She had been a consultant psychiatrist since 2008. Dr Scott's current role involved the psychiatric assessment, diagnosis and treatment of the adult population within South Ayrshire.

Dr Scott conducted three clinics a week and would normally see patients, at each clinic, who had PTSD. She also dealt with patients who suffered from addictions.

[100] Dr Scott had prepared a report, dated August 2018 (production 5/3) and an addendum report, dated August 2020 (production 5/13). Dr Scott noted that she had had sight of the pursuer's GP records (production 5/1), the pursuer's updated GP records (production 5/11), the pursuer's police statement (production 5/6), Dr Macpherson's report (production 5/12) and Dr Friedman's report (production 6/8).

[101] [Dr Scott explained that she had a face to face meeting with the pursuer in July 2018, prior to completing her first report and a telephone discussion with the pursuer, prior to completing her addendum report.

[102] Dr Scott explained that when she met the pursuer in July 2018, the pursuer was very slim, appeared older than his actual age and was very, very anxious. The pursuer was not sweating profusely, was not under the influence of substances and Dr Scott was able to take a history from him. Dr Scott explained the meeting with the pursuer had lasted for about one hour, with the pursuer's history taking up about half of the meeting. Dr Scott was taken

through the history the pursuer provided to her (paragraphs 12 to 33 of the production 5/3). The pursuer told Dr Scott, amongst other things, that: (i) he was physically and sexual abused at the school; (ii) the physical abuse included being battered with a belt and punched; (iii) the physical abuse occurred several times a week; (iv) he was regularly sexually abused at the school; (v) the sexual abuse included penetrative anal sex as well as having to perform oral sex; (vi) Brother Ryan was prolific for the sexual abuse; (vii) he believed the culmination of all the abuse he suffered had led to his entire life changing – he had developed nightmares of the abuse, which continued even after he left the school; this was associated with anxiety and panic attacks, which had remained throughout his life; (viii) he remained socially isolated and preferred to keep to himself and avoid social contact where possible; (ix) when he left the school and was living at home, he went off the rails, began misusing drugs and alcohol and, as a result, was involved in criminality (the pursuer told Dr Scott that he felt he was in self-destruct mode); and (x) he had not suffered any abuse or trauma prior to going to the school.

[103] Dr Scott explained that the pursuer told her that during periods of intimacy the pursuer would re-live the abuse he suffered. As a result, he did not want to have an intimate relationship. Intimacy reminded the pursuer of the abuse he suffered. The pursuer described chronic poor concentration and memory, motivation and low self-worth. The pursuer also described persistent nightmares and flashbacks of his abuse, which could be triggered by memories or reminders of the abuse (Dr Scott was not aware of the pursuer having a nightmare where a Brother entered his dormitory at night). The pursuer told Dr Scott that he suffered from anxiety and panic attacks all his life. He also had a compulsion to count number plates, with both counting and not counting number plates making the pursuer anxious. The pursuer also explained to Dr Scott that when he was at the

school anyone could enter his room and since then he had required his room and house to be locked.

[104] Dr Scott did not consider there was any evidence of abnormalities in the pursuer's thought form or content. The pursuer did not have paranoid delusions and there was no evidence of psychosis. The pursuer did, however, describe feeling hyper vigilant and believed that people may be watching, following or staring at him. Dr Scott explained that her interpretation of the history provided by the pursuer was that he would have been likely to have been on high alert at the school that something would happen and that caused him to be hyper vigilant. Dr Scott noted that hyper vigilance was a symptom of PTSD and an anxiety condition, but was more prominent in PTSD. Dr Scott explained that hyper vigilance was something that people describe, rather being able to see it during a psychiatric assessment. What you tended to see in a psychiatric examination was the patient being anxious and the pursuer did appear very, very anxious during Dr Scott's assessment in July 2018.

[105] Dr Scott did not consider it uncommon for physical and sexual abuse not to be disclosed. That was particularly so when the abuse occurred at a younger age. Many persons repressed the abuse and did not even disclose to their own families. Dr Scott explained that repression was a basic psychological defence mechanism where one submerges the abuse in order to cope with life. It was a way children managed the abuse they suffered and they often only disclosed when they realised what happened was wrong. Dr Scott explained that repression could cause psychological issues, such as trust/attachment issues, difficulties in relationships, anxiety, low mood, addiction issues and self-harm. Dr Scott explained the pursuer told her that he thought his wife might have suspected

something had happened to him but that he did not disclose the abuse he suffered to her until the police spoke to him.

[106] Dr Scott noted the pursuer was prescribed nitrazepam in 1989 and explained that that was a drug used to treat anxiety and insomnia. Dr Scott noted the pursuer was open about taking substances and she considered, having considered his records, that the pursuer used substances as a coping mechanism to manage his thoughts about the abuse he suffered.

[107] Dr Scott noted it was apparent that the pursuer, prior to going to the school, had a difficult and chaotic childhood and would therefore have been vulnerable to developing psychological and psychiatric difficulties. What the pursuer required at the school was stability, routine, warmth and emotional attachments. If the pursuer suffered emotional, sexual and physical abuse that would result in the pursuer having a poorer prognosis.

[108] Dr Scott considered the pursuer had, on a number of occasions, attributed his problems to his time in children's homes. Dr Scott accepted the pursuer was first referred for psychological input in 2003. She also accepted the referral by Dr Melrose on 24 July 2003 (5/1/189 – see paragraph [23] above) referred to children's homes as opposed to *a* children's home and made no reference to abuse, trauma or flashbacks. However, Dr Scott noted that Dr Melrose was not a trained psychiatrist or psychologist. Dr Scott, under reference to the letter from Dr Wild, dated 19 August 2004 (5/1/186 – see paragraph [23] above), noted the pursuer told psychology in 2004 about traumatic and abusive incidents from his time in care. Dr Scott explained a formal diagnosis of the PTSD might not have been made at that time because the pursuer did not attend follow up appointments. She also noted the contents of Dr Sewell's letter of 18 May 2006 (5/1/177 – see paragraph [23] above) regarding the pursuer telling Dr Sewell about panic attacks, a sense of paranoia and self-harm dating back to his long term care in a children's home. Dr Scott noted the pursuer's alcohol abuse

came after his drug abuse and she considered that one substance was replaced with another. These substances overlapped the pursuer's anxiety and low mood.

[109] Dr Scott accepted the pursuer had attempted suicide in 2010 due to his wife leaving him and suffering a bereavement (Dr Scott accepted it appeared that the pursuer's wife left him well before he disclosed the abuse he suffered to the police). Dr Scott accepted the only formal diagnosis of PTSD was from the letter of 11 April 2014 (5/1/109 – see paragraph [23] above). Dr Scott did not know what “subsyndramol” meant, but noted that the pursuer's suicidal thoughts were most prominent at that time. Dr Scott, under reference to letter dated 22 November 2019 from Dr Brooks, FY2 in Psychiatry (5/11/20), accepted that the pursuer: (i) was diagnosed with depression; (ii) did not identify a trigger for his suicidal thoughts at that time; and (iii) was informally admitted to hospital; but she stated that she did not think that persons clearly distressed had to give a reason for being distressed and that it would have been a junior doctor making that assessment. Dr Scott also accepted that, at that time, the pursuer had suffered a bereavement, which may have resulted in him struggling.

[110] Dr Scott considered the pursuer's disclosure to the police and the subsequent criminal trial were very traumatic for the pursuer and probably exacerbated his mental health difficulties. The pursuer had previously used drugs and alcohol as a coping mechanism but Dr Scott considered, at that time, the records showed more trauma related symptoms.

[111] Dr Scott, having assessed the pursuer and reviewed his records, considered that the pursuer's symptoms were indicative of:

- (1) F43.1 Post Traumatic Stress Disorder, current symptoms, moderate to severe;
- (2) F10.2 Mental & Behavioural Disorder due to the use of Alcohol, currently abstinent having been dependent;

(3) F41.2 Mixed Anxiety and Depressive Disorder, current symptoms moderately severe.

[112] Dr Scott explained PTSD was diagnosable because the pursuer described trauma in the form of the abuse he suffered at the school (and in particular the sexual abuse). Associated with the trauma the pursuer had symptoms of PTSD. These included reoccurring dreams, hyper vigilance, being easily startled, flashbacks (caused by reminders and intimacy), social avoidance, isolation and difficulties establishing trust. These symptoms had continued. Dr Scott noted the symptoms for PTSD could fluctuate over time. Dr Scott thought that this is what occurred with the pursuer (i.e. sometimes the pursuer's symptoms were more severe and at other times they were less severe) and she considered the pursuer had described clear symptoms of PTSD. Dr Scott noted the majority of individuals recover from PTSD but a percentage develop a chronic course with an eventual transition to an enduring personality change. Dr Scott's opinion was that the trauma suffered by the pursuer had led to severe symptoms of PTSD, which were now likely to be an enduring presentation. The pursuer's current symptoms of PTSD were moderate to severe and Dr Scott noted the pursuer had received little or no treatment to address his symptoms.

[113] Dr Scott had diagnosed mixed anxiety and depressive disorder but explained that other psychiatrists may separate them. Dr Scott noted the symptoms for anxiety were constant apprehension, nervousness, feeling on edge, palpitations, sweating, hyperventilating and thoughts that something terrible was going to happen. Dr Scott noted the pursuer presented with these symptoms. The pursuer was agoraphobic. He did not want to go out or meet people. Dr Scott noted the symptoms for depression as being poor concentration, lack of sleep (Dr Scott noted that people suffering from PTSD and anxiety

could suffer from poor sleep), low self esteem, suicidal thoughts, feelings of guilt, loss of appetite, agitation and loss of libido. Dr Scott noted the pursuer's most prominent symptoms were general anxiety and PTSD, which then affected his mood. The pursuer's low mood was masked underneath these other symptoms.

[114] In terms of treatment, the pursuer's anxiety would be treated with anti-depressant medication, however, consideration would have to be given to his liver condition. The main treatment for the pursuer would be psychological treatment, although Dr Scott considered its effectiveness might be limited and that it would be distressing for the pursuer to undertake. Dr Scott thought the pursuer may benefit from 8 to 10 sessions of supportive CBT and then, if appropriate, 10 to 12 sessions of trauma focused CBT. The cost of each session would be between £80 and £120.

[115] Dr Scott considered the pursuer's capacity for employment had been markedly impacted by his psychiatric symptoms. These had impacted on his ability to engage with others in social environments, impacted on his concentration and memory, as well as led to poor coping. Dr Scott consider the anxiety that the pursuer suffered must have made it very difficult for him to work. Dr Scott considered the pursuer had deteriorated since she saw him in July 2018 and considered that, even with CBT, he would not be fit for employment in the future.

[116] Dr Scott's opinion on causality was as follows:

"In relation to causality, it is my opinion his family environment prior to his transfer to the children's home undoubtedly increased his vulnerability to later psychiatric and psychological symptoms. In the absence of the abuse suffered at St Ninian's he would not have developed symptoms of Post Traumatic Stress Disorder. He would likely have however been likely to have developed symptoms of Mental & Behavioural Disorder due to the use of Multiple Psychoactive Substances however the severity would be unlikely to have been to the same extent, duration or chronicity. In the absence of the abuses, he would have been more likely to have

been able to engage in treatment / recovery. He acknowledged using substances as a coping mechanism for his poor mental health.

In addition, he would also have likely presented with low mood and anxiety however again the severity would not have been expected to have been as severe, chronic or enduring.

He remains significantly disabled by his psychiatric symptoms.”

[117] Dr Scott considered the combination of early childhood vulnerability and then the trauma of abuse contributed to the pursuer’s addiction history. This had been further exacerbated by poor / limited emotional resilience of the pursuer’s part. Dr Scott explained she had considered Dr Friedman’s report. Dr Scott explained that: (i) Dr Friedman had seen the pursuer some time after Dr Scott had seen him in July 2018; (ii) by the time of Dr Friedman’s assessment of the pursuer, the pursuer had deteriorated and presented as more frail; and (iii) she felt the pursuer gave a much clearer history to her than he did to Dr Friedman. Dr Scott explained that after considering Dr Friedman’s report she remained of the view the pursuer had PTSD. The PTSD had been caused by the abuse he had suffered at the school. The PTSD would have been likely to have occurred within weeks or months after the abuse, but the pursuer would not have been able to express how he was feeling (Dr Scott noted that children do not get diagnosed with PTSD). The pursuer has then used coping mechanisms that were dysfunctional.

[118] Dr Scott considered that, if the pursuer had not been abused, he would have still have been likely to experience low mood and anxiety. He also may have used substances. However, she did not think either would have been as severe or chronic. If the abuse had not happened, Dr Scott’s view was that the pursuer: (i) would have been able to sustain a level of employment; (ii) would have been able to develop long term relationships; and (iii) whilst the pursuer may have had relapses in terms of his mental health, he would have been likely to have recovered and been able to function at a far better level.

[119] In cross examination, Dr Scott explained that the diagnosis of PTSD was based on symptoms and not on severity of symptoms or the how the pursuer coped with the symptoms. The severity of the pursuer's PTSD symptoms determined the impact it had on him and the severity of his symptoms fluctuated over time. Dr Scott explained that flashbacks were a symptom of PTSD. Flashbacks did not need to be vivid, they tended to be visual but could be associated with smell. They could take the form of a reoccurring dream and tended to be about the trauma suffered or associated with it. Dr Scott noted that ICD-10 is used in the NHS and that she used the criteria in ICD-10 to make her diagnosis of PTSD and the other conditions. Dr Scott explained that PTSD could exist with other conditions so that a person could have underlying PTSD, other psychiatric symptoms and withdrawal symptoms. Dr Scott agreed that PTSD was a different condition from a generalised anxiety disorder. They had different criteria. Dr Scott accepted that it was important to take a careful history from a patient before diagnosing PTSD. Dr Scott explained that she had considered the pursuer's records but primarily based her diagnosis on what the pursuer told her. Dr Scott noted persons could have symptoms of PTSD but not attend their doctor.

[120] It was suggested to Dr Scott that a person's memory could be destroyed over time. Dr Scott accepted, as a general proposition, that memory could fade over time, but explained that was not the case with trauma. Trauma was not something that was forgotten, rather the person struggles to forget and is not able to stop the nightmares. Dr Scott accepted that chronic alcohol abuse could cause memory deficits but noted that it tended to be short-term memory that was affected.

[121] Dr Scott accepted the pursuer was smoking heroin in 2017, had failed to turn up for an appointment with a psychologist in July 2018 and tested positive for opiates, cocaine and benzodiazepines in July 2019.

[122] Dr Scott was not aware the pursuer had started using solvents in 1978 (there was no evidence to support that the pursuer had in fact used solvents in 1978). She was not aware of the incident involving the attack on the pursuer's step-father. She was not aware the pursuer had looked for work when he was 16, but was not surprised by this and noted that people with psychiatric conditions can work. She was not aware that [REDACTED] had put a gun to the pursuer's head in 1991. She was not aware of the pursuer's offending history in any detail (Dr Scott did know that the pursuer had previously been sent to prison) and was not aware the pursuer had been sentenced to 3 months detention in 1984. Dr Scott did not know why the pursuer had been prescribed valium a few months before that sentence was imposed, but noted that valium is prescribed for anxiety and sleep, but not for short-term anxiety. Dr Scott considered that being a heroin user resulted in a harmful and risky lifestyle, but was not sure that it was stressful in its own right. She accepted that it could be stressful living in temporary or homeless accommodation, but noted that additional support was sometimes provided. Dr Scott accepted that there was some history of alcohol abuse in the pursuer's family. Dr Scott explained that there must be trauma before PTSD could be diagnosed. The pursuer's symptoms were specific to the trauma he suffered at the school. The flashbacks, nightmares and lack of libido were all specific to the sexual abuse he suffered. Dr Scott was not aware of the pursuer having reminders about anything other than the abuse he suffered at the school.

[123] Dr Scott did not agree with Dr Friedman's opinion at paragraph 58 of this report. She considered that it was not possible to say that someone using substances did not have an underlying depressive disorder. It was, in fact, normally the reverse.

Olivia Gomes Bell's evidence

[124] A summary of Ms Bell's evidence is as follows. Ms Bell is an independent registered forensic psychologist. She was a trainee psychologist with East Dunbartonshire Council in 2008 and had, after qualifying, set up her own business in 2014. She now specialised in the investigative interviewing of children and the forensic risk assessment and therapy of children.

[125] Ms Bell had not conducted research into the workings of a person's memory. She had, however, some training on the workings of a person's memory and had read around the subject. Ms Bell explained that there were three main stages of the memory system:

- (1) Encoding: how information initially comes into the memory system (what gets attended to and how it gets represented in memory). As children get older, their additional capacity increases enabling them to encode more information in less time;
- (2) Storage: some of the encoded information gets in short-term storage, and some memories enter the long-term store. There are developments in storage capacity and efficiency as children get older;
- (3) Retrieval: retrieval of stored information. As children get older, their retrieval skills develop but are affected by factors including the speed of processing, motivation to retrieve, willingness to co-operate with an interviewer and appreciation of what is important to recall.

[126] Ms Bell noted that the memories are reconstructive and therefore vulnerable to distortion and suggestion. This could help account for why evidence sometimes changes from one statement to another. Memory could be distorted at various stages of encoding and storage, for example, due to a child's interpretation of a potentially abusive event or if

the event was reoccurring, then again on retrieval with influence from interviewers, co-witnesses, friends/family and therapy.

[127] Ms Bell explained that reliable memory about the core features of an event are often accompanied by minor inconsistencies, such as dates, times, number of people present at an event, particularly with delayed disclosure. Rather than a general decline in memory, research pointed towards different rates of decline for specific types and stages of memory with age. Psychologists had also focused on individual differences in social, emotional, personality and health factors, and their interaction with cognitive factors. Research had found that adults who recalled documented historical sexual abuse experienced 10-20 years earlier, were able to accurately recollect core features of these experiences. However, these narratives were typically sparse on peripheral information and contain reconstructive errors. Adults' accounts of experiences that took place so many years ago often contained information out of order, gaps, guesses and incorrect details.

[128] Ms Bell noted that a person's memory could be influenced by 'post event information'. This could be from individuals who shared the same experience or from media, photographs, films or questioning at the inquiry. Being exposed to 'post-event information' after an event could change memories of that event and research had found that it could lead to persons falsely recollecting minute details of an event or falsely remembering entire events, including abuse.

[129] Ms Bell explained that investigative interviewing could also influence the accuracy and amount of detail provided by a witness. Free recall elicited the most complete and reliable evidence. Recognition memory (which is the retrieval of a memory with a stimulus) could lead to a witness forgetting certain elements of the experience. Suggestive questions introducing undisclosed information or implying a particular response, had the potential to

contaminate any further information provided by the witness. Suggestive and leading prompts that implied details of abuse could implant false memories of details.

[130] Ms Bell explained some studies stated that cannabis use could induce false memories. However, other studies stated that the use of drugs did not distort memory

[131] Ms Bell accepted the literature supported that victims of child sexual abuse were at great risk of developing mental health problems, such as depression, PTSD, experiencing suicidal ideation and committing suicide.

[132] Ms Bell had not met the pursuer and was not in a position to comment on any aspect of the pursuer's memory of the abuse he suffered at the school.

Douglas Govan' evidence

[133] A summary of Mr Govan's evidence is as follows. Mr Govan is an independent employment consultant. He had 33 years' experience in working in career guidance and career/skills development.

[134] Mr Govan had prepared a report, dated 3 June 2019 (production 6/9), a brief second report, dated 23 July 2019 (production 6/10) and a brief third report, dated 8 January 2020 (production 6/11).

[135] Mr Govan explained that he remained of the view he had set out in his second report (that view is set out a paragraph [94] above) that it was outwith his expertise to determine that extent to which the disadvantages that the pursuer suffered, prior to the attending the school, would have impacted on his education and employment had the abuse at the school not taken place.

[136] Mr Govan, under reference to a report entitled "Education Outcomes for Scotland's Looked After Children 2009/2010", explained that the data in that report highlighted that

care leavers were less likely, than those who had not been in care, to be in education, employment or training when they left school (although he accepted that 59% of care leavers were on that positive destination) and those care leavers who had secured education, employment or training were less likely to sustain that. Mr Govan noted that it is argued that whilst the opportunities for care leavers may be there, care leavers cannot always sustain them because they were still dealing with a lot of emotional impact of being brought up in care and the experiences they had before that. Mr Govan explained there were no figures for the 1970s and 1980s but he doubted whether the situation for care leavers would have been any better and thought that they may have been worse.

[137] Mr Govan advised he was not an expert on the 1980s but noted that he did work with young people at that time. Care leavers would be likely to be leaving school at 16 years without support and face the prospect of finding accommodation, feeding themselves and negotiating the benefits system.

[138] Mr Govan explained that when the pursuer would have entering the labour market, at 16 years of age, unemployment was at record levels. Mr Govan, under reference to a study entitled "The Industrial Destination of Scottish School Leavers 1977-81", by the University of Edinburgh, explained that the number of school leavers whose first destination after school was unemployment rose from 6,700 in 1979 to 18,700 in 1981. This increase would have been significantly more dramatic had it not been for the government funded Youth Opportunities Programme (hereinafter referred to as "YOP") for unemployed young people. The annual average male unemployment in Scotland was 9.5% in 1979, 9% in 1979, but had soared to 16% in 1981. Between 1971 and 1981 school-leaver recruitment fell more than three times as much, in proportionate terms, as total (all age) employment in Scotland. Mr Govan explained that YOP was replaced by the YTS in 1983. The YTS had two strands.

The first strand was employer led and was closer to an apprenticeship. The second strand was in the form of a workshop where the young persons may have been introduced to basic skills, but would not necessarily be placed with an employer. Mr Govan explained that young persons with no qualifications often ended up in the second strand and were disillusioned because they knew there was no job when the YTS came to an end. Mr Govan explained that longitudinal studies had showed that prolonged periods of unemployment for young persons resulted in scarring and had an adverse impact on earnings for a considerable period, with some studies stating that there could be an impact on a person's earnings until their early 40s. Mr Govan noted that the transition of young persons from disadvantaged backgrounds to employment was particularly difficult and had been shown to have prolonged effects on earnings. They may have longer periods of unemployment, lower earnings and the least secure employment.

[139] Mr Govan noted, under reference to the Scottish Government Yearbook 1987, that in April 1986 unemployment in the Strathclyde area reached 18.4% and had 45% of its unemployed out of work for over a year, compared with 36% in the rest of Scotland. In 1983 men from unskilled or semi-skilled jobs were four times as likely as men in non-manual work to have had any time unemployed in the previous 12 months. In 1983 the chance of any unemployment was one in three for the unskilled and semi-skilled. Mr Govan noted that the economic change going on at that time was acutely felt by the unskilled and semi-skilled workers. Mr Govan considered that whether the pursuer would have secured and sustained regular paid employment was a matter of speculation and conjecture.

[140] Mr Govan explained the ASHE annual survey and noted that it dated back to 1997. Prior to that it was New Earning Survey and Mr Govan noted that Mr Carter must have used that survey for calculating earnings prior to 1997. Mr Govan explained that the decile

figure in the ASHE annual survey was the highest or lowest 10% of earners in a particular work category. The quartile figure was the lowest or highest 25% of earners and the median was the middle figure. Mr Govan preferred the median to the average because that was the advice ASHE gave. Mr Govan had looked at the earnings, as at the date of his report, for a number of manual jobs. He had then taken the average of the median figure for each of the manual jobs to arrive at the gross annual earnings figure of £21,545 (£18,033 net of tax and National Insurance). He then conducted the same exercise but used the lowest decile figure. That resulted in a gross annual earnings figure of £16,207 (£14,403 net of tax and National Insurance). Mr Govan thought that if the court considered that the pursuer could, but for the abuse, have sustained regular unbroken employment throughout his working life, it would be reasonable to use the median figure. If, however, the court concluded that the pursuer, as result of social circumstances and probable disadvantages, would have worked intermittently with periods of unemployment, the lowest decile figure may be more realistic when the pursuer was holding down regular employment.

[141] Mr Govan did not think that Mr Carter was correct to say that it was not possible to determine whether the pursuer would have achieved a craft level qualification or gone into unskilled or semi-skilled employment. Mr Govan was of the view that unskilled or semi-skilled work would have been more likely for the pursuer due to the pursuer's difficult background and the very high levels of youth employment at that time. Mr Govan also considered that, again, given the very high levels of unemployment at the time, that periods of unemployment would be significantly higher than periods of three to six weeks.

Mr Govan did not know how Mr Carter had arrived at the figure of a 20% deduction for a "poor" work record and a 40% deduction for a "bad" work record.

[142] Mr Govan noted that the UK Drug Policy Commission reported that up to 80% of problem drug users were unemployed. They also noted that work had been shown to be an important component of rehabilitation and reintegration into society, reducing the likelihood of relapse. Problem drug use impacted on 'job-readiness' and may result in problem drugs users presenting with a range of characteristics that made them appear less employable than others in the recruitment market. Mr Govan explained that a study in 2004 of 30 current and recovering drug and alcohol users found two main types. The first type were those who were in occasional employment, which altogether amounted to a few years over a period of decades. The second type were those in more or less continuous employment that was short term low paid unskilled labouring, typically in factories and warehouses. Mr Govan considered that the pursuer had had a similar pattern to those in the first type.

[143] Mr Govan considered it was very difficult to predict what the pursuer's employment trajectory would have been had he not suffered abuse. Mr Govan explained that he would defer to medical opinion and was not able to quantify the impact the abuse had on the pursuer's employment prospects. He did, however, think that the disadvantages that the pursuer suffered in early life, prior to attending the school, had to be considered. Mr Govan did not think that the pursuer had a realistic prospect of securing a job going forward.

[144] In cross examination Mr Govan accepted that the pursuer had told him that after he left the school, he returned home deeply affected by his experience and described himself as being angry all the time. He accepted that both Mr Carter and himself were in agreement that: (i) the only work that the pursuer may have been able to undertake was manual or low skilled work; and (ii) no assumption should be made as regard the pursuer: (a) attaining qualifications of any kind; or (b) gaining promotion. Mr Govan accepted that: (i) the abuse

the pursuer had suffered had impacted on his ability to secure and sustain employment and, because of this, the pursuer had sustained loss of earnings and loss of pension; (ii) the degree to which the abuse suffered by the pursuer was responsible for the pursuer's lack of employability over the years will be a matter for the court to determine; and (iii) since 2012 employers have been required to provide a workplace pension.

[145]

Mr Govan thought that if the pursuer's chaotic and disadvantaged background was true, that would have adversely impacted on his transition to the labour market. If the pursuer had been involved in serious criminality, that would have worsened the pursuer's position. Mr Govan accepted that: (i) he had only produced a salary estimates as at the date of his report; (ii) there was nothing before the court to show that he had completed the exercise of calculating what those salaries would have been, each year, from 1983 onwards.

Dr Trevor Friedman's evidence

[146] A summary of Dr Friedman's evidence is as follows. Dr Friedman has been a consultant psychiatrist since 1990. He had a particular interest in the assessment and management of adults who were sexually, physically and emotionally abused in childhood. He had assessed over two thousand such cases and had prepared reports and given evidence in court. These cases included the Frank Beck cases in Leicestershire. Dr Friedman had also published research in this area and lectured widely on the topic. Dr Friedman continued, as part of his clinical practice, to see patients who had suffered from child sexual abuse and regularly saw patients who were suffering from PTSD.

[147] Dr Friedman had prepared a report, dated 4 November 2019 (production 6/8).

Dr Friedman noted that at the time of preparing his report he had seen, amongst other things, the pursuer's GP records. He had subsequently seen the two reports prepared by Dr Scott and the report prepared by Professor Macpherson, but had not looked at these for some time.

[148] Dr Friedman explained that PTSD was a rather unusual condition. It occurs after a traumatic event and the patient get nightmares, flashbacks, distressing memories of the incident, avoidance (avoiding situations that remind them of the incident), mood associated with the trauma and dissociation. Dr Friedman noted that it was important to understand that after traumatic experiences many people will have nightmares and intrusive memories, but that was not PTSD. For a diagnosis of PTSD the symptoms had to be significant and affect the person's day to day functioning. Examples of such an effect may be that a person: (i) is unable to work; (ii) is unable to leave the house; (iii) is unable to have relationships; and (iv) may harm themselves. However, these effects had to be due to PTSD and not some other condition. Dr Friedman explained that DSM-5 makes clear at paragraph G and H of the criteria for a diagnosis of the PTSD that:

“G. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.

H. The disturbance is not attributable to the physiological effects of a substance (e.g., medication, alcohol) or another medical condition.”

Dr Friedman explained that DSM-5 was produced by the American Psychiatric Association.

Its main use was setting criteria, which if met, allowed a person to be treated by an

American psychiatrist. ICD-10 was a common classification system produced by the World

Health Organisation. In the NHS the coding system of ICD-10 was used, however, in reality

an experienced psychiatrist would know what was contained in both DSM-5 and ICD-10,

but would not need to actually look at either of them because they know what they are looking for and know how to diagnose.

[149] Dr Friedman accepted that a person suffering from PTSD may have nightmares, be hyper vigilant and suffer from panic attacks and explained that much will depend on the account given by the patient. Dr Friedman accepted that flashbacks could be a symptom of PTSD but explained that he considered that the word “flashback” had been used so widely that its meaning had been lost. Dr Friedman considered that a flashback was actually feeling like you were back in the moment when the trauma occurred. An example would be a soldier with PTSD who could hear a noise and freeze for 10 to 20 seconds. During that time they would feel like they were back in Afghanistan and would smell the smoke.

Dr Friedman noted that flashbacks could differ in severity. A person may simply suffer intrusive memories or just a memory. Dr Friedman explained that for a diagnosis of PTSD the clinician would look at severity, frequency and the degree of impairment a flashback caused, together with any other symptoms of PTSD (Dr Friedman noted that a diagnosis of PTSD could be made without the person suffering flashbacks).

[150] Dr Friedman explained that whilst serious child sex abuse was a traumatic event, it did not always cause PTSD (but it could do). The position was the same for an act of violence. Much would depend on the person’s subjective experience of the incident. Some may find it traumatic, others may not. Dr Friedman explained that everyone understood that a traumatic event could cause PTSD, but most people who had been through a traumatic experience did not develop PTSD. It was uncommon. For example, after the London Bombings only about 4% of the persons involved actually developed PTSD. Most people who had been through a traumatic event would have bad dreams, would feel distress and suffer flashbacks, but the vast majority would get better on their own. A small

proportion of people did get chronic PTSD with varying levels of severity, which continued to impact on their day to day life. However, a person who simply suffered the occasional post traumatic dream or were reminded about the traumatic events was not suffering from PTSD. Therefore, a person could have some symptoms of PTSD but not be actually suffering from PTSD. It was also possible to have cases where a person's symptoms fluctuate to the extent where some of the time they were suffering from PTSD but at other times they did not meet that threshold. This could occur in child abuse cases where PTSD could reoccur many years after the event when the person is contacted as part of the police historic abuse investigation (but again most people would get better when the legal process came to an end).

[151] Dr Friedman explained that a person was more likely to develop PTSD if they had pre-existing psychiatric conditions (such as depression, anxiety and substance misuse) and had suffered previous trauma. By contrast a person was less likely to develop PTSD if they came from a stable and supportive upbringing. However, Dr Friedman noted that these were weak predictors and it was difficult to predict who would develop PTSD and who would not. Dr Friedman considered that both children and adults would develop PTSD immediately after the trauma. The main treatment for PTSD was actually just to leave the person alone, because most get better by themselves. Therapy could actually make the person worse. If treatment was considered appropriate it would normally take the form of trauma focused psycho therapy and anti-depressant medication. Eye Movement Desensitisation Reprocessing (hereinafter referred to as "EMDR") was also now widely used.

[152] Dr Friedman noted it was important, when considering what intervention to make, to distinguish between PTSD, on the one hand, and an anxiety or depressive disorder, on the

other hand, although it was not always easy to decide. PTSD did also include symptoms of other disorders including anxiety and depression.

[153] Dr Friedman explained that PTSD is diagnosed by taking a history from the person about their symptoms and considering their records. It might also be helpful to speak to a family member. The history taken should be comprehensive and cover the traumatic incident, family history, psychiatric problems in the family, personal history (including childhood, schooling and employment), relationships, previous medical problems, previous psychiatric problems, medication, history in respect of drugs and alcohol, current level of functioning and current psychiatric problems. Dr Friedman explained that you were making an assessment based on the whole history provided. He did not think it was possible to do so over the telephone as it was important to see if the person was distressed or tearful. It was also important to understand how the person perceived the traumatic event and obtain a chronological history of PTSD symptoms. Dr Friedman explained that in child abuse cases the victim often did not, at the time, think they were being abused (and only later realised) and would, therefore, not normally develop PTSD. Dr Friedman explained that he would ask the person their understanding of why they were abusing substances. However, Dr Friedman noted the reason that a person gave for abusing substances might not, in fact, be correct, but it was nevertheless part of the history provided. Dr Friedman considered the records of a person could be helpful in both setting out a history of PTSD or setting out no history of PTSD. Dr Friedman was interested in the nature of problems disclosed in the records and whether there was any historical account of the trauma.

[154] Dr Friedman explained that he interviewed the pursuer on 30 October 2019 in Glasgow. At that time the pursuer was not intoxicated but appeared physically unwell.

Dr Friedman explained he was in fact concerned that the pursuer was going to die of liver cirrhosis. Dr Friedman advised that the pursuer was a poor historian. Dr Friedman struggled to get any details from the pursuer. The pursuer's answers tended to be short and without explanation. As a result, Dr Friedman's report contained less detail about the pursuer's life than would be included in one of his normal reports. Dr Friedman did not consider the pursuer was of low mood or clinically depressed or anxious when he saw him.

[155] Dr Friedman noted that he could not get much from the pursuer by way of a family history. Dr Friedman [REDACTED] was aware of a troubled and difficult background. [REDACTED]

[REDACTED] Dr Friedman [REDACTED] [REDACTED] was aware of a history of substance misuse for the pursuer's father and siblings and noted that if a person had grown up with an alcoholic parent, they would have a 50% chance of developing alcohol problems themselves.

Dr Friedman explained the pursuer could not say why he went into care or why he went to the school. The pursuer was able to give some basic details about the school, however, he was reluctant to discuss the abuse he suffered. The pursuer initially told Dr Friedman that, day to day, the school was alright. He recalled regularly being hit with a belt or a cane and described Kelly seriously assaulting him when he was returning from the tuck shop. The pursuer spoke about running away from the school, but Dr Friedman found it difficult to ascertain the frequency of this. The pursuer, after being prompted by the contents of his police statement, briefly discussed the sexual abuse he suffered from Brother Ryan and Brother Farrell, but not in any detail (see paragraph 20 and 21 of production 6/8).

Dr Friedman noted someone with PTSD would remember the trauma they suffered.

Dr Friedman asked the pursuer about his employment history but could not really get an answer out of the pursuer, although he did ascertain that he worked as a forklift driver for a period of time. Dr Friedman could not get an account of the pursuer's early teenage years.

The pursuer did not say why he was on anti-depressants. Dr Friedman noted there did appear to be a period in the pursuer's life, when his daughter was young, when he was relatively stable (even though the pursuer was taking drugs). Dr Friedman noted the pursuer appeared to have used drugs and alcohol throughout his life. The pursuer now had stage 4 liver cirrhosis but told Dr Friedman he had not been drinking for the past 3 years.

[156] The pursuer told Dr Friedman he started sniffing glue in his teenage years. He then used cannabis and then progressed to opiates in his twenties. He had also used temazepam.

Dr Friedman explained that the pursuer had used opiates for most of his life and told

Dr Friedman he had smoked heroin one week before meeting him. Dr Friedman noted in his report at paragraph 38:

"I asked the [pursuer] whether he felt that his use of alcohol and drugs was related to the abuse at St Ninian's. He said that he did not know why he had a serious alcohol and drug problem and did not relate this directly to his experiences at St Ninian's."

During his evidence, Dr Friedman went further and said the pursuer told him that he did not think his use of drugs or alcohol had anything to with the abuse he suffered at the school.

[157] The pursuer told Dr Friedman he had not told his wife or daughter about the abuse prior to the police visiting him. The pursuer said that he found giving evidence in the criminal trial distressing.

[158] Dr Friedman explained the pursuer did tell him about suffering a nightmare where the Brothers were coming into to his dormitory. The pursuer said that: (i) these nightmares occurred once a month; (ii) there were periods when they did not occur at all; (iii) they have

occurred more since the court case; (iv) they occur more when he is stressed; and (v) he would wake up with these nightmares when married but would go back to sleep, so that his wife was not aware of them. Dr Friedman considered the pursuer's account was of occasional nightmares about the school. Dr Friedman explained that: (i) the pursuer did not give an account of the nightmares starting immediately after the abuse; (ii) persons with PTSD generally have a nightmare about the actual abuse; and (iii) persons with PTSD struggle to get back to sleep after having a nightmare related to the trauma. Dr Friedman also noted the pursuer described getting a nightmare about an incident when he was younger when men turned up and tried to kill his step-father. The pursuer did not tell Dr Friedman about ■■■ holding a gun to his head. Dr Friedman thought that this would have been a frightening experience but did not think that incident would have caused a psychiatric disorder.

[159] Dr Friedman noted the pursuer told him that his experience at the school would come to mind if there was some trigger in the media. However, this would only occur occasionally and the pursuer would generally successfully push away and suppress those memories. Dr Friedman did not consider that the pursuer was pre-occupied by the abuse. Dr Friedman did not know what effect suppression of thoughts had on a person's memory. However, he noted that if an incident was recorded it is probably reliable but if someone remembers out of the blue it was hard to know if it was correct.

[160] Dr Friedman, under reference to the letter from Dr Reynolds, dated 31 August 2012 (5/1/127 – see paragraph [23] above), noted, at that time, that the pursuer was described as having an alcohol and opiate dependence on a 20 year background of dysthymia (which was low grade depression). Dr Friedman was referred to Dr Wild's letter of 5/1/186 – see paragraph [23] above), the referral by Dr Melrose, dated 22 September 2005 (5/1/81 – see

paragraph [23] above) and the letter by Dr Sewell, dated 18 May 2006 (5/1/177 – see paragraph [23] above – Dr Friedman accepted that that letter stated the pursuer’s panic attacks, sense of paranoia and self-harm dated back to his time at a children’s home but noted part of the letter was redacted and it also referred to other factors) and said that he did not consider that the pursuer’s records made any further mention of the school or PTSD prior to 2010.

[161] Dr Friedman was referred to the letter from Dr Wilson and Dr Masson, dated 11 April 2014 (5/1/109 – see paragraph [23] above). He explained he must have missed that letter in his review of the records. He explained that “Subsyndromal Post Traumatic Stress Disorder” meant the pursuer had post traumatic symptoms but not PTSD. Dr Friedman noted the pursuer was admitted to hospital in 2010 following a suicide attempt.

Dr Friedman explained he did not ask the pursuer whether the suicide attempt was related to the abuse and the pursuer did not say it was related to the abuse. Dr Friedman, under reference to a letter by Dr Masson, Consultant Psychiatrist, dated 3 March 2020 (5/11/11), noted Dr Masson: (i) diagnosed opiate dependence syndrome and a moderate depressive episode that had now resolved; (ii) found no evidence of depression; and (iii) despite knowing about the abuse, did not identify any symptoms of PTSD.

[162] Dr Friedman considered that: (i) the pursuer had a very troubled and deprived early upbringing; (ii) the pursuer was always at significant risk of having significant problems in adult life; and (iii) there was a significant history of substance misuse in the family, so the pursuer was always at an increased genetic and environmental risk of developing these problems in his life.

[163] Dr Friedman considered the pursuer’s experiences at the school and, in particular the sexual abuse, were distressing and upsetting for him. However, he did not think the

pursuer had very marked symptoms of PTSD. He did not have a large number of nightmares or intrusive memories, his functioning had not be affected (although he was more troubled around the police inquiry) and the child abuse did not feature prominently in the records. Dr Freidman thought that the pursuer's symptoms were well below the threshold for a diagnosis of PTSD and that he did not have PTSD.

[164] Dr Friedman made the following diagnoses:

(1) F14.2 [*Dr Friedman accepted in cross examination that this was the wrong number*]

Mental and behavioural disorders due to use of opiate drug use. Dependence syndrome – a cluster of behavioural, cognitive and physiological phenomena that develop after repeated opiate use and that typically include a strong desire to take the drug, difficulties in controlling its use, persisting in its use despite harmful consequences, a higher priority given to drug use than to other activities and obligations, increased tolerance and sometimes a physical withdrawal state.

(2) F10.2 Mental and behavioural disorders due to use of alcohol. Dependence syndrome – [*Dr Friedman gave the same description as number (1) above*]

Dr Friedman made both diagnoses because the pursuer's substance misuse had affected all areas of his life, including his health and employment. Dr Friedman explained it was important to recognise that it can be extremely difficult to diagnose depressive disorder and anxiety in people who were significantly misusing drugs. Disturbances of mood and anxiety were almost always secondary to the substance misuse, rather than separate diagnoses of depression and anxiety. Dr Friedman accepted the pursuer had, at times complained of low mood, helplessness, suicidal thoughts and of feeling on edge. However, Dr Friedman explained he had to decide whether these symptoms were due to a separate disorder, such as anxiety or depression, or whether they were part of the substance misuse.

Dr Friedman's opinion was that they were part of the pursuer's substance misuse and that was supported by Dr Masson's letter of 3 March 2020 (5/11/11).

[165] Dr Friedman noted if the pursuer had PTSD as a result of the abuse at the school, then there would be a clear causal link, because the diagnosis depended on the event where the trauma occurred. However, with most other psychiatric disorders it was much more difficult to say what caused them. There can be more than one cause or no obvious cause at all. That was particularly so when there was drug and alcohol abuse. Often people attributed depression or the drinking of alcohol to a life event but that was often not correct. Dr Friedman considered that the abuse the pursuer suffered at the school only contributed a small amount to his psychological problems. There was very little evidence of a temporal link. Dr Friedman reiterated the pursuer did not say his drug and alcohol problem was caused by the abuse. If the pursuer had said that, Dr Friedman would have taken it into his account when making his assessment. There needed to be evidence of a link between the abuse and the taking of drugs and alcohol. Dr Friedman did not think that there was any such evidence within the pursuer's records. Dr Friedman noted the pursuer's trajectory in relation to drugs and alcohol was similar to a lot of people with his type of background who had not been abused. Dr Friedman thought, on balance, that the abuse had small effect on the pursuer in terms of not trusting people, self-confidence issues and self-esteem issues. Dr Friedman did not think the abuse was a major factor in the pursuer's substance abuse problems, rather it was a minor factor.

[166] Dr Friedman thought the pursuer's drugs and alcohol misuse impacted on his ability to work. He did not think he was prevented from working because of PTSD. Dr Friedman considered that the pursuer's life was likely to continue on the same trajectory as it had done before. He was still smoking heroin and was likely to continue to do so. Dr Friedman's

view was that after this case concluded the pursuer might occasionally think of the abuse, but it would not be a serious problem for him.

[167] Dr Friedman thought the pursuer would be a poor candidate for trauma focused therapy because he had failed to attend previous psychological appointments. Further, it is not appropriate to offer therapy to someone who was on drugs. In any event, it would be entirely unreasonable to offer the pursuer trauma focused therapy. The pursuer did not have PTSD and the therapy would only upset him.

[168] In cross examination Dr Friedman explained that he did not know whether the pursuer trusted him during the assessment. Dr Friedman explained the difficulty was that the pursuer told him very little. At the time Dr Friedman put that down to the pursuer not feeling well. Dr Friedman thought the pursuer was either not telling him things or could not remember. Dr Friedman explained he gave the pursuer every opportunity to tell him about the sexual abuse, but the pursuer did not provide details and did not tell him about any anal rape. Dr Friedman accepted the pursuer might have felt that he could not tell him about the sexual abuse, but pointed out that, in the cases he deals with where people have PTSD, they gave him an account of the trauma suffered. Dr Friedman accepted if he did not get a full history from the pursuer then that may have prevented him making a diagnosis that another psychiatrist or psychologist could make with the benefit of a full history provided, however, he pointed out he also had the benefit of a large number of medical records.

[169] Dr Friedman accepted he had seen cases where child abuse victims had taken a long time to disclose, however, he pointed out if the victim presented to psychiatric services and was asked directly about abuse, it would be uncommon for them not to disclose.

Dr Friedman accepted a person may disclose partially, but noted that a person with PTSD is able to talk about the abuse they suffered. Dr Friedman accepted that, given the pursuer's

background, he would have been extremely vulnerable going to the school. Dr Friedman accepted, as a generality, that people who had been abused were more likely to develop psychiatric conditions, but noted that was also true for people who had been in care but not abused. Dr Friedman explained outcomes for persons who had been abused were highly variable and it was not inevitable that the pursuer would suffer serious damage from the abuse.

[170] Dr Freidman accepted it was possible to make a psychiatric diagnosis when someone was abusing substances, however, he noted it made it much more difficult and he preferred to make a diagnosis when the person was not abusing substances. Dr Freidman acknowledged Dr Scott had made a diagnosis of mixed anxiety and depressive disorder and explained that diagnosis meant that the pursuer's symptoms had not met the threshold for a diagnosis of: (i) an anxiety disorder; and (ii) a depression disorder; and was a lot milder condition.

The agreed evidence

[171] Parties had entered a joint minute of admissions, which ran to some 48 paragraphs. The majority of the evidence agreed in the joint minute was formal in nature but it also agreed the following matters:

- (1) That the pursuer was a resident at the school between 16 February 1980 and 10 April 1981;
- (2) That the National Insurance Contributions record for the pursuer recorded that the pursuer's disclosed gross earnings from employment for period from 26 April 1983 to 2019 were £28,351.40;

(3) That on 22 July 2016 Brother Farrell was convicted after trial in the High Court of Justiciary of the four charges set out in finding in fact 32 [*the joint minute referred to three charges but it was agreed that production 5/9 set out the charges that Brother Farrell was convicted of and it contained four charges*];

(4) That on 22 July 2016 Kelly was convicted after trial in the High Court of Justiciary of the six charges set out in finding in fact 33;

(5) That on 12 August 2016 Brother Farrell was sentenced to five years imprisonment and Kelly was sentenced to 10 years imprisonment.

Submissions

[172] Multiple objections were taken by both parties throughout the proof, however, in the end only two legal points required to be decided. The first was the admissibility of the evidence of Ms Bell and the second was whether the part of the claim directed against the actions of Brother Ryan should proceed. My decisions as regards these two points are set out at paragraphs [211] to [227] below.

[173] Senior Counsel for the pursuer produced a 50 page written submission. Senior Counsel for the defender produced a 41 page written submission. Both Senior Counsel supplemented those submissions with oral submissions. What follows is a summary of the submissions made.

Submissions for the Pursuer

[174] Senior Counsel for the pursuer sought decree for £1,741,107. Senior Counsel contended that the pursuer was a credible and reliable witness who was doing his best to tell the truth. His evidence was supported by the extra judicial admissions made in the

SCAI by the defender, where the defender accepted that: (i) Brother Ryan, Brother Farrell and Kelly were habitual predatory paedophiles who preyed on boys with impunity (see paragraph 31 of production 5/16); (ii) a culture of abuse existed at the school (see paragraph 32 of production 5/16); (iii) a number of Brothers and staff engaged in punishment to the point of brutality (see paragraph 39 of the production 5/16); and (iv) survivors of abuse are to be believed (see 5/15/35). The court could attach great weight to those admissions. The pursuer's evidence was also supported by the evidence of EF, which was not seriously challenged by the defender, and the agreed evidence of what Brother Farrell and Kelly were convicted of in the criminal trial. That evidence: (i) established that a number of other children were physically and sexually abused in a similar way to the pursuer around the same time as the pursuer attended the school; (ii) demonstrated a single course of crime systematically pursued against a number of victims; and (iii) was relevant and admissible for the purposes of mutual corroboration (*B and C v Sailors' Society* [2021] CSOH 62 at paragraph 200). Dc Gilmore also explained how upset the pursuer was when he finally disclosed the abuse. The defender had not led any evidence to contradict the pursuer's account and, in the circumstances, the court should draw the inferences that were most favourable to the pursuer's case.

[175] In terms of causation, the pursuer had already had a difficult upbringing before he arrived at the school and was very vulnerable as a result. What he needed at the school was care, warmth and protection. What he was subjected to was atrocious sexual and violent child abuse by three different men who were supposed to be looking after him. The pursuer's long-term psychological and addiction issues were not simply co-incidental to the abuse the pursuer suffered. Rather, they were firmly rooted in his experiences from the school. Since he left the school, aged 13, the pursuer had been haunted by his memories of

the abuse, which has resulted in him developing serious psychiatric disorders. That was the only conclusion that the court could reasonably arrive at standing: (i) the evidence of the pursuer; (ii) the contents of the pursuer's medical records; and (iii) the opinions reached by both Professor Macpherson and Dr Scott. Indeed Professor Macpherson correctly summarised the position when he stated that the pursuer's experience of emotional, physical and sexual abuse had a profound and devastating impact on his personality in general and psychological functioning in particular (see paragraph [72] above).

[176] The pursuer did not disclose the abuse until the police visited in 2013 but he regularly went to his GP in the decades prior to that complaining of psychological symptoms. However, the abuse the pursuer suffered was never expressly narrated in his records because he had not yet disclosed. The pursuer had, however, in evidence explained how the entries in his records related to the abuse at the school and Professor Macpherson considered that the records supported his view on causation. When the pursuer's records were considered against the pursuer's evidence, a clear and compelling picture emerged of the cause of the pursuer's psychological problems. These psychological problems started at around the time he left school and were primarily due to the abuse he suffered at the school. There was ample evidence to show that the pursuer's dependence on drugs and alcohol was caused by his psychological problems and not the other way around. As Professor Macpherson explained: (i) the drugs and alcohol were used by the pursuer as coping mechanism to cope with the psychological symptoms that the pursuer did not know how to manage; and (ii) those psychological symptoms emanated from the abuse the pursuer suffered. The pursuer took glue, then cannabis, then heroin and then alcohol after leaving the school. There was no evidence before the court that he abused drugs before

attending the school. The abuse had materially contributed to the pursuer's psychiatric condition and severely impacted on his functioning.

[177] There was a wealth of evidence before the court that supported the diagnoses of Professor Macpherson and Dr Scott. The pursuer suffered reoccurring nightmares, flashbacks during intimate relations, problems with relationships, trust issues, panic attacks and agoraphobic symptoms. He had also engaged in self-harm and suicide attempts and had had several admissions to psychiatric units. The letter of Dr Wilson and Dr Masson, dated 6 March 2014 (5/1/109 – see paragraph [23] above) was of crucial importance because it came shortly after the pursuer had disclosed to the police in November 2013. In that letter it was noted that the pursuer had increasing suicidal thoughts after the emergence of childhood trauma and was suffering flashbacks (which was a classic symptom of PTSD) and gave a diagnosis of: (i) subsyndromal PTSD; and (ii) adjustment disorder. That letter revealed a deterioration of the pursuer's mental health and provided a clear link between the abuse and the symptoms being suffered by the pursuer.

[178] Dr Friedman had ignored, disregarded or omitted to consider vital aspects of the evidence. He had not noticed the letter, dated 6 March 2014 (5/1/109) and had therefore not taken it into account. He had not been able to obtain a full history from the pursuer. It also appeared he had paid little attention to the histories obtained by Professor Macpherson and Dr Scott or to what the pursuer said in evidence (Dr Friedman listened to at least part of the pursuer's evidence). His review of the pursuer's records had been cursory and he had not referred to any entries in the crucial period prior to 2004. Unlike what occurred when the pursuer gave his evidence in chief, Dr Friedman did not ask the pursuer to explain relevant entries in his records, which documented psychological symptoms (albeit, at that time, they were not specifically attributed to the abuse). In the absence of obtaining a full history,

Dr Friedman ought to have conducted a careful and thorough perusal of the pursuer's records, but he had not done so. The combination of a lack of full history and the lack of thorough perusal of the records resulted in Dr Friedman's opinion, on the effect the abuse had on the pursuer, being undermined.

[179] Professor Macpherson and Dr Scott had both been able to obtain a much fuller history from the pursuer. Both were clear that the pursuer told them the pursuer had made a link between his substance abuse and the abuse (which was in accordance with the pursuer's evidence). By contrast, Dr Friedman said in his report the pursuer did not relate his substances misuse to the abuse and then went further in evidence and stated that the pursuer denied such a link. Dr Friedman's change of emphasis during his evidence discredited his evidence on this point. Professor Macpherson and Dr Scott had both carried out a more careful analysis of the pursuer's medical records. Both, on the basis of the histories they had obtained and the careful analysis of the pursuer's records that they conducted, had a sound basis for making the diagnoses that they made. They had also taken full account of Dr Friedman's report before arriving at their final opinion. Dr Friedman did not suggest that Professor Macpherson or Dr Scott were not entitled to make the diagnoses they did on the basis of the information that was available to them. In all the circumstances the evidence of Professor Macpherson and Dr Scott ought to be preferred to the evidence of Dr Friedman.

[180] The court ought not to attach any weight to the allegations of criminality put to the pursuer [REDACTED]. Any notion that the pursuer was running a [REDACTED] drugs business was ridiculous. The pursuer's limited criminal record was before the court and was of extremely limited relevance. The defender had placed weight on the attack of the pursuer's step-father and [REDACTED] holding a gun to the pursuer's head in order to suggest that if

the pursuer did have PTSD, then it could have been caused by one of these events.

However, Professor Macpherson considered if that had have been the case, then one would have expected to see evidence of that in the pursuer's records. There was no such evidence, which was in contrast to the numerous entries referring to symptoms relating to the pursuer's time in care.

[181] The evidence of Professor Macpherson and Dr Scott supported the contention that the abuse had resulted in the pursuer's employment capacity being almost completely destroyed. Both also considered the pursuer's prognosis was bleak and that it was unlikely his current symptoms would significantly improve.

[182] In terms of *solatium*, Senior Counsel contended, under reference to the Judicial College Guidelines, *FZO v Adams* [2019] EWHC 1286 (QB), *JM v Fife Council* 2009 SC 163, *J v Fife Council* 2007 SLT 85, *A v N* 2014 SCLR 26, *A v B & C* 2018 SLT 1194, *T v The English Province of the Congregation of Christian Brothers* [2020] SC EDIN 13, and *A v Glasgow City Council* [2021] CSOH 102 that: (i) the court ought to assess the value of three discrete aspects of the claim, namely: (a) the pain, affront and humiliation experienced by the pursuer while at the school; (b) the emotional and psychiatric consequences which the pursuer experiences after leaving the school; and (c) damages for the future consequences of the abuse; (ii) whilst the abuse in this case may have been less severe and less prolonged than in other cases, the effects of the abuse in the form of a disabling, chronic, enduring, life-long psychiatric injury had been more serious; and (iii) in all the circumstances a reasonable total award for *solatium* would be £120,000.

[183] In terms of loss of earnings, Senior Counsel submitted, under reference to *Moeliker v Reyrolle* [1977] 1 WLR 132 CA, *British Transport Commissioners v Gourlay* [1956] AC 186 at p 212, *FZO, A v Glasgow City Council, Bullock v Atlas Structures Limited* [2008] EWCA Civ 194

at paragraphs 19 to 21 and *Robertson CB v Anderson* 1996 SC 217 at p 244A, that the injuries caused by the abuse and the associated addictions had resulted in the pursuer's employment capacity being destroyed. But for the abuse, the pursuer would have been able to have worked full-time in an unskilled or semi-skilled manual role. The court ought to assess past wage loss on the basis advanced by Mr Cater. Mr Carter had used a similar approach in *A v Glasgow City Council* and the court accepted his approach to be appropriate. The defender's employment expert, Mr Govan, accepted the pursuer had sustained both a loss of earnings and a loss of pension as a result of the abuse the pursuer suffered. However, Mr Govan had only produced a figure for the pursuer's current earning capacity and had not conducted the same exercise as Mr Carter to show what the pursuer's likely earnings would have been from 1983. As such, there was no alternative to Mr Carter's approach, before the court, in relation to quantification of past wage loss. Future loss should be assessed on a multiplier / multiplicand approach even if that could only achieve a very rough estimate of the present value of the pursuer's prospective loss. Making a lump sum award would not be appropriate; rather a rigorous and properly reasoned approach was required.

[184] A reasonable approach to the assessment of past wage lost would be to split the difference between Mr Carter's "normal" and "poor" work records for both the "All Manual Males" and "Forklift Truck Driver" work categories and then take an average between the two figures. When earnings for 2021 were factored in, this resulted in a figure of £481,564. When the pursuer's agreed earnings between 1983 and 2019 of £28,351 were deducted that left a figure of £453,033 for past wage loss. This approach was justified because: (i) the pursuer, despite his symptoms and addictions, had demonstrated he was capable of working as a forklift truck driver; (ii) it had been assumed the pursuer would not achieve any future qualifications or gain promotion; and (iii) account had been taken, by use of the

“normal” to “poor” work records, of the pursuer’s lack of qualifications, periods of high unemployment and the possibility that the pursuer may have still experienced less severe mental health problems (even absent of the abuse). However, it was accepted that the court could apply a greater discount if it considered it to be appropriate.

[185] In terms of future loss of earnings, both the medical and employment skilled witnesses were in agreement that the pursuer would not work again. The pursuer was now 54.58 years old. He would be due to reach state pension age at 67 in April 2034, which was in 12.42 years. The adjusted Ogden multiplier to retirement was 12.67 (Tables 9/11). The discount factor for contingencies other than mortality was 0.81 (Table A, Employed, Level 1) and gave an adjusted multiplier of 10.06 ($12.42 \times 0.81 = 10.06$). When the mid-point between Mr Carter’s “normal” and “poor” work records for both “All Manual Males” and “Forklift Truck Driver” work categories were calculated and then an average taken between the two figures, that gave a multiplicand of £20,795. Future loss of earning was therefore $£20,795 \times 12.42 = £258,274$ (it was not clear why the pursuer had used a multiplier of 12.42 when they had arrived at an adjusted multiplier of 10.06).

[186] In terms of pension loss, it was accepted there must be an element of uncertainty in relation to exactly what the pursuer’s pension arrangements would have been. In the circumstances a reasonable approach would be to take an average between the three scenarios offered by Dr Pollock. On that approach pension loss would be £88,913.

[187] In terms of cost of treatment, Dr Scott stated that the pursuer should consider CBT. She considered the pursuer was likely to require 8 to 10 sessions of supportive CBT and, if appropriate, at least 10 to 12 session of trauma focused CBT. The cost of each session would be in range of £80 to £120. The pursuer made clear in evidence he would engage with

therapy if he thought it would help him. In the circumstances a reasonable award for cost of treatment would be the modest sum of £2,200.

Submissions for the Defender

[188] Senior Counsel for the defender sought decree of absolutor. If the court was not with the defender on granting decree of absolutor, damages ought to be restricted to *solatium* only, in the sum of £30,000. If the court was minded to award any damages for patrimonial loss, it ought to be restricted to a lump sum award of £15,000.

[189] Senior Counsel, under reference to *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, *Hornal v Neuberger Products Ltd* [1957] 1 QB 247 and *Joyce v O'Brien* [2012] PIQR P18 contended that when serious allegations were made of criminal activity in the course of civil proceedings, the court had to proceed with care in applying the civil standard of proof and be assiduous in requiring cogent evidence. Under reference to *B v Murray (No 2)* 2005 SLT 982 at paragraphs 21 to 24, *Gestmin SGPS SA v Credit Suisse & Others* [2013] EWHC 3560 (Comm) at paragraphs 15 to 22, *AB v The Catholic Child Welfare Society* [2016] EWHC 334 (QB) at paragraphs 22 to 24, *Kimathi & Others v The Foreign and Commonwealth Office* [2018] EWHC 2066 at paragraphs 95 to 98, *Martin v Kogan* [2020] ECDR 3 at paragraphs 88 to 100, *R (on the application of Dutta) v General Medical Council* [2020] Med LR 426 at paragraph 42, *BXB v Watch Tower & Bible Tract Society* [2020] 4 WLR at paragraphs 12 to 16, *Witness Testimony in Sexual Cases, Evidential, Investigative and Scientific Perspectives* (edited by Radcliff *et al*, Oxford University Press, 2016, p 230 at paragraph 14.22), *Rhesa Shipping Co SA v Edmunds (The Popi M)* [1985] 1 WLR 985 at p 955 to 956 and *Morrison v J Kelly and Sons Ltd* 1970 SC 65 at p 80, Senior Counsel contended that: (i) memory was especially unreliable when it comes to

recalling past beliefs, which are revised to make them more consistent with our present beliefs; (ii) the process of civil litigation itself subjects the memories of witnesses to powerful biases, particularly where the witness is a party to the litigation; (iii) emphasis should be placed on contemporaneous documentation; (iv) the best approach for a judge was to base factual findings on inferences drawn from documentary evidence and known or probable facts; (v) a proper awareness of the fallibility of memory did not relieve judges of the task of making findings in fact based upon *all* of the evidence; (vi) it was an error to ask whether a witness should be believed, prior to considering the documents; (vii) reliance on a witness' confident demeanour was a discredited method of judicial decision making; (viii) the court was not always bound to make a finding one way or another and could find that the party on whom the burden of proof lies, had failed to discharge that burden; and (ix) the presence or absence of corroboration remained an important consideration for the court when deciding whether or not a fact had been proved.

[190] In the present case the events alleged by the pursuer occurred 41 years ago. The pursuer had forgotten or minimised the adversity he faced before he went to the school and the impact it had upon him. The allegations made by the pursuer to the police on 29 November 2013 should not be seen as "disclosure", rather they should be seen in context. There was no mention in the pursuer's records of a troubled childhood until 2003, some 22 years after he left the school. The pursuer saw mental health professionals in 2004, 2006 to 2009, 2010, 2011 and 2012. Whilst he did mention early traumatic childhood experiences associated with his time in care, during these appointments, he did not allege abuse at the school or, indeed, at all. It was noteworthy when he saw Dr Wild in 2004 (see 5/1/186 at paragraph [23] above) that he was too muddled to provide Dr Wild with a clear chronology of his early traumatic experiences associated with his time in care. Dr Friedman

explained if a person was seen by psychiatric services it was more common for them to disclose abuse if they were asked about it directly. However, the pursuer, in this case, had not done so.

[191] Dc Gilmour described phoning the pursuer prior to visiting him on 29 November 2013. Therefore, Dc Gilmour's evidence was not, contrary to what the pursuer said, that he attended at the pursuer's home unannounced. Dc Gilmour's evidence as regard the taking of the statement from the pursuer was unsatisfactory. He did not retain a professional scepticism about the allegations of abuse at the school and treated the pursuer as "victim" and his statement as "disclosure". Dc Gilmour told the pursuer that his reason for visiting the pursuer was in relation to an ongoing abuse inquiry at the school and that the pursuer had been identified as a former pupil. In the circumstances it was reasonable to conclude that there was at least an element of suggestiveness during the taking of the pursuer's statement. However, even if the pursuer was telling the truth (whether entirely or to some extent), it was likely that the pursuer's recollection would have deteriorated. The pursuer's recollection would also likely to have been corrupted by the passage of time, discussion with others (including with EF, mental health professionals and the police) and repeated recounting of his childhood experiences.

[192] Both the pursuer and EF ought to be found to be incredible and unreliable witnesses (it was accepted that CD was a credible and reliable witness). The pursuer's evidence seemed to be rehearsed and was self-interested. It was not suggested there was a conspiracy, but it was obvious the pursuer had been over the abuse in his head and had come to believe what he was saying was true. There were large gaps in his evidence. There were crucial gaps about his formative years, adolescence and in relation to entering the world of work. Further, the pursuer accepted he was close to EF and it was inconceivable

that the pursuer would not have spoken to EF about [REDACTED] the allegations of abuse or that EF had made a statement to the police on 14 November 2013 about the abuse he suffered. EF's evidence was given, [REDACTED]

That impacted on the weight of his evidence in that regard. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] In all the circumstances the pursuer's and EF's evidence should be rejected.

[193] Senior Counsel contended that the court should follow the recent guidance issues in negligence cases by the Supreme Court in the case of *Meadows v Khan* [2021] 3 WLR 147. In that case the majority held that there were six interrelated questions (the six interrelated questions are set out a paragraph [209] below) to be answered. In the present case there was no dispute the defender was vicariously liable for the acts and omissions of Brother Ryan, Brother Farrell and Kelly when acting in the course of their employment. There was also no doubt the claim was actionable and therefore question (1) (the actionability question) ought to be answered in the affirmative. However, all the other questions were contentious.

[194] As regards question (2) (the scope of duty question), it was accepted the Brothers had a duty not to assault the pursuer (whether physically or sexually). That duty included risk of injury, including psychiatric injury. The duty also included the risk of patrimonial loss arising from the harm caused. The duty did not extend to the quality of the pursuer's education, the negative impact of the care system on those in care or to general economic disadvantage. The duty did not protect the pursuer against the risk of general, commonly experienced psychiatric ill-health or against freely chosen drug use.

[195] As regards question (3) (the breach question), both Brother Farrell and Kelly were acquitted of the charges in respect of the pursuer in the criminal case. Brother Ryan was dead before the pursuer spoke to the police and could not challenge the pursuer's account. There was no corroboration of the allegations. There were no contemporaneous accounts of abuse at the school. The history of the pursuer having a troubled childhood came more than 20 years after the alleged abuse. In the circumstances (and also for the reasons given at paragraphs [189] to [192] above), a breach of duty had not been proved.

[196] As regards question (4) (the factual causation question), Senior Counsel contended that a claim would fail if the most that could be said was that the pursuer's injury was likely to have been caused by one or more of a number of disparate factors, one of which was attributable to a wrongful act or omission of the defender – in such a case the pursuer will not have shown as a matter of probability that the factor attributable to the defender was one of two or more factors which operated cumulatively to cause it (*Williams v Bermuda Hospitals Board* [2016] AC 888 at paragraphs 40 to 42). In the present case even if a breach of duty was established there was nothing beyond the immediate consequences of the alleged abuse that was causally related to the abuse. The pursuer had a disadvantaged background prior to attending the school. By the mid 1970s he was involved in stealing. The pursuer accepted he was inhaling gas prior to going to the school. He had no recollection of being hit over the head with a brick in 1978. He was present when the attack on his step-father occurred, prior to going to the school, and accepted that this was a terrifying experience. The pursuer denied in evidence he still had nightmares about this incident but that is not what he told Dr Friedman. The description in the referral by Dr Melrose, dated 24 July 2003 (5/1/189 – see paragraph [23] above) that the pursuer “had a troubled childhood spending much of it in various children's homes” was an accurate description of the pursuer before he

went to the school and it was not surprising that, around that time, the pursuer had “feelings of rejection and neglect” (5/1/182 – see paragraph [23]). The pursuer also ran away from the school prior to any abuse occurring.

[197] Whilst the pursuer was prescribed valium in July 1984, it was reasonable to suggest that this prescription related to his conviction on 19 September 1984. The pursuer accepted ■■■ put a gun to his head and that this was a frightening event. Around the same time (1991) the pursuer was noted as being a cannabis user and was regularly buying temazepam and valium because of his nerves (see 5/1/201 – see paragraph [23]), however, there was nothing to suggest this was anything to do with his childhood. The pursuer accepted that he was a heroin addict by 1994. On no occasion before his police statement of 29 November 2013 did the pursuer: (i) seek any medical assistance in respect of the abuse; or (ii) complain or receive a diagnosis of PTSD.

[198] Senior Counsel submitted that the pursuer did not and does not suffer from PTSD. There was no contemporaneous evidence of the pursuer suffering clinically significant PTSD. Dr Friedman made clear the symptoms of PTSD required to be severe and persistent enough to have a significant impact on the person’s day to day life. That included not being able to: (i) work; (ii) leave the house; or (iii) have a relationship. The pursuer did not describe such symptoms. He did not describe flashbacks of the abuse. He did not describe reliving the abuse, rather he described a dream of someone coming into his dormitory. The pursuer also accepted that he had dreams of the attack on his step-father. His evidence regarding intimate relations was unclear. Dr Scott thought that the severity of symptoms was just that and did not determine the presence or absence of a diagnosis of PTSD. The history set out in her report did not fit with the pursuer’s evidence. She was not clear whether, and if so, when, the pursuer repressed his memories. She attempted to meet the

analysis of Dr Friedman by asserting that the pursuer's symptoms had fluctuated in severity. The only record of the pursuer suffering post traumatic symptoms was in 2014, but the diagnosis of "subsyndromal" PTSD indicated that the pursuer's symptoms were not clinically significant. The pursuer made no complaints of being unable to function to his GP in the years after leaving the school. He appeared to have looked for work in or around 1983. His marriage lasted for around 20 years and he still has a good relationship with his wife and daughter. Dr Friedman made clear that PTSD was an over diagnosed condition. He had greater knowledge and experience of PTSD and addictions than Dr Scott. He had the benefit of meeting the pursuer face to face (unlike Professor Macpherson who accepted that a telephone appointment was not the gold standard). Professor Macpherson's opinion seemed to be based on a review of the records and was of no assistance. In all the circumstances Dr Friedman's opinion, that the pursuer did not and does not suffer from PTSD, should be preferred to that of Professor Macpherson and Dr Scott.

[199] Senior Counsel contended that the pursuer's other psychiatric symptoms were not causally related to the alleged abuse. Dr Friedman explained that most psychiatric disorders were multifactorial and it was not clear what caused them. There was evidence before the court that the pursuer had inhaled gas prior to attending the school. The pursuer did not attribute his drug use to the alleged abuse at school in his account to Dr Friedman and Dr Friedman explained the pursuer's drug use followed a typical trajectory. The pursuer suggested in evidence he was taking drugs to make himself feel normal and clear his memory, but that was not supported in the records (the pursuer was first noted as being a cannabis user in 1991, 10 years after leaving the school, and did not describe problematic use of heroin until the mid 1990s, some 14 years after leaving the school). Therefore the pursuer's suggestion was simply a rewriting of history. The pursuer's suicide

attempts were temporally connected with events other than the allegations of abuse. His suicide attempt in 2010 followed closely on from the death of his father and his wife leaving him. His suicide attempt in 2019 did not have a clear trigger, but closely followed the death of another family member.

[200] Dr Friedman explained the difficulty in diagnosing anxiety and / or depression where someone had a substance misuse disorder. Dr Friedman considered that disturbance of mood and anxiety were almost always secondary to the substance misuse rather than separate diagnoses of depression and anxiety. Dr Friedman's opinion ought to be preferred and the court should not find that the pursuer had a separate diagnosis of depression or anxiety.

[201] There were no contemporaneous records to show the pursuer's fitness to work or any attempt to find work. By the mid 1980s the pursuer had a criminal record and no secondary education, at a time when youth unemployment was very high. Mr Govan had particular experience of working with young people at that time and where there was a difference between his evidence and that of Mr Carter, Mr Govan's evidence should be preferred. By the mid 1990s the pursuer's inability to work was due to his substance misuse.

[202] When the evidence was looked at in its entirety there were numerous factors that could have caused the pursuer's psychiatric difficulties (as described by Dr Friedman), including: (i) disadvantage prior to going to the school; (ii) the attack on his step-father; (iii) his involvement in the criminal justice system; (iv) ■■■ holding a gun to his head; and (v) substance misuse over many years. In the circumstances the alleged abuse was, as explained in *Williams*, one disparate factor that was not causally potent. In all the circumstances, the pursuer's psychiatric difficulties, were not caused or materially contributed to by the alleged abuse he suffered at the school.

[203] As regards question (5) (the duty nexus question), there was insufficient nexus between the allegations of the abuse and psychiatric injury. The defender's analysis of the factual causation question applied with equal force in relation to this question.

[204] As regards question (6) (the legal responsibility question), the defender ought not to be legally responsible for the pursuer's claim for patrimonial loss. It was reasonable to suggest that the pursuer chose: (i) not to go to secondary school; (ii) not to actively look for work; (iii) to engage in criminality (as evidenced by his criminal record); and (iv) to use and abuse substances.

[205] [205] In relation to *solatium*, Senior Counsel contended, under reference to *FZO, J v Fife Council* 2009 SC 163, *A v N, A v C* 2018 SLT 1194, *LXA v Wilcox* [2018] EWHC 2256 (QB), *KD v Gaisford* [2019] EWHC 339 (QB), *BXB v Jehovah's Witnesses* [2020] EWHC 156 (QB), *T*, and *A v Glasgow City Council*, that if the court was minded to make an award for *solatium* it ought to disregard the attempted rape and the purported diagnosis of PTSD and award the sum of £30,000 to reflect the severity of the abuse set out in the pursuer's police statement. In the event the court was minded to accept the attempted rape and the diagnosis of PTSD an award in the sum of £80,000 ought to be made to reflect the fact that the assaults were less invasive and prolonged than in *T* or in *A v Glasgow City Council*.

[206] In relation to wage loss, no award ought to be made for past or future wage loss. The pursuer had not provided any evidence of comparators (such as his other siblings who did not attend the school). The evidence of Mr Carter ought to be disregarded. The tables that Mr Carter produced in no way reflected the size and scale of the pursuer's pre-existing disadvantage and the inevitable difficulties the pursuer would have faced on the labour market. They also did not reflect the free choices the pursuer made that limited his capacity to work. The pursuer's position was radically different to the pursuer in the case of *T* who

had a long, albeit interrupted, work history and a disadvantage in the labour market that was linked to the abuse he had suffered. If the court were minded to make an award for disadvantage in the labour market the court ought to take Mr Govan's figures as a starting point and limit any award to £15,000.

[207] In relation to pension loss, the same analysis applied with equal or greater force.

There was no factual evidence on which to base an award of pension loss and there were too many imponderables to quantify this head of claim. In the circumstances no award for pension loss should be made.

[208] In relation to cost of treatment, Dr Friedman's evidence ought to be accepted in this regard and no award made.

Discussion

[209] In the Supreme Court clinical negligence case of *Meadows* a woman wished to establish whether she was the carrier of the haemophilia gene. Her GP instructed the wrong test and provided negligent advice that led the woman to believe she was not a carrier of the gene, when she in fact was. The woman subsequently gave birth to a son who suffered from haemophilia. Four years later the son was diagnosed with autism, which was unrelated to the haemophilia. It was accepted by the defendant that: (i) had the woman had the correct testing she would have terminated the pregnancy; and (ii) the woman was entitled to recover the additional costs associated with her son's haemophilia. The defendant argued that the woman could not recover the costs associated with her son's autism. The Supreme Court, in upholding the defendant's argument, held that in a claim for negligence a defendant was only liable in damages in respect of losses of a kind which fell within the scope of his or her duty of care. The risk of the son developing autism was not within the

scope of defendant's duty of care. In the course of the judgment of the majority the Supreme Court, at paragraph 28, identified that a helpful model when considering the tort of negligence was to consider the following six inter-related questions:

- (1) Is the harm (loss, injury or damage) which is the subject matter of the claim actionable in negligence? (the actionability question)
- (2) What are the risks of the harm to the claimant against which the law imposes on the defendant a duty to take care? (the scope of duty question)
- (3) Did the defendant breach his or her duty by his or her act or omission? (the breach question)
- (4) Is the loss for which the claimant seeks damages the consequence of the defendant's act or omission? (the factual causation question)
- (5) Is there a sufficient nexus between a particular element of the harm for which the claimant seeks damages and the subject matter of the defendant's duty of care as analysed at stage 2? (the duty nexus question)
- (6) Is a particular element of the harm for which the claimant seeks damages irrecoverable because it is too remote, or because there is a different effective cause (including *novus actus interveniens*) in relation to it or because the claimant has mitigated his or her loss or has failed to avoid loss which he or she could reasonably have expected to avoid? (the legal responsibility question)

In *Meadows* the Supreme Court made clear, at paragraph 29, that it was quite possible to address more than one of the above questions at the same time. Senior Counsel for the defender invited the court to use the same model in this case.

[210] I found the Supreme Court model to be helpful guidance and considered that it was appropriate to have regard to it. However, unlike *Meadows*, this was a case of alleged

intentional wrongs committed by the Brothers and, as with the vast majority of cases seen in this court, in the end there was no dispute as regards some of the questions posed in the model (e.g. in many cases the issue will simply be the breach question). In the present case the pursuer accepted that he had to prove that he was abused, in the form of physical and indecent assaults, by the Brothers and that that abuse was a cause of the harm suffered by him. The defender accepted that: (i) the claim was actionable; (ii) they were vicariously liable for the acts and omissions of the Brothers in the course of their employment; (iii) the Brothers were under duty to take reasonable care of the pursuer and, in particular, not to assault the pursuer; and (iv) the risks of harm to the pursuer against which the law imposed on the Brothers' a duty to take care, included physical injury, psychiatric injury and patrimonial loss. Therefore, even if it was necessary to invoke the concept of a duty of care in relation to intentional wrongs, there was no dispute as regards the actionability question or the scope of duty question. I did not consider that it was necessary to consider the duty nexus question or the legal responsibility question separately from the factual causation question because the defender's position, in respect of those two questions, was, essentially to return to the factual question and contend that there was no evidence to show that the abuse *caused* the pursuer psychiatric difficulties and therefore: (i) there was insufficient nexus between the allegations of abuse and the pursuer's psychiatric difficulties; and (ii) the defender ought not to be held legally responsible for the pursuer's psychiatric difficulties. In the circumstances, after including the issues identified at paragraph [172] above and having regard to the Supreme Court model, I considered that the issues for determination in this case were:

- (1) Whether the evidence of Ms Bell was admissible;

- (2) Whether the part of the claim directed against the actions of Brother Ryan should proceed;
- (3) Whether the pursuer was abused at the school;
- (4) Whether the loss for which the pursuer seeks damages for was the consequence of the abuse;
- (5) The consideration of damages in light of the answers to issues (3) and (4)

I will now consider each issue in turn.

Issue 1 – Whether the evidence of Ms Bell was admissible

[211] [211] In short, Senior Counsel for the pursuer contended, under reference to Walker and Walker, *The Law of Evidence in Scotland*, 5th Edition at paragraph 16.3.4, that Ms Bell's evidence was inadmissible because it did not relate to the pursuer and did not provide the court with any assistance. Senior Counsel for the defender contended that this case was dealing with events that took place over 40 years ago and the evidence of Ms Bell did provide assistance to the court in relation to the general operation of memory. If, however, the court considered that Ms Bell's evidence was inadmissible then the court ought to follow the approach of Leggatt J in *Gestmin* at paragraphs 15 to 22 and find that the fallibility of memory was a matter that was within judicial knowledge.

[212] In the Supreme Court case of *Kennedy v Cordia (Services) LLP* 2016 SC (UKSC) 59

Lord Reed and Hodge state at paragraph 44:

“44. In *R v Bonython* the court was addressing opinion evidence. As we have said, a skilled person can give expert factual evidence either by itself or in combination with opinion evidence. There are in our view four considerations which govern the admissibility of skilled evidence: (i) whether the proposed skilled evidence will assist the court in its task; (ii) whether the witness has the necessary knowledge and experience; (iii) whether the witness is impartial in his or her presentation and assessment of the evidence; and (iv) whether there is a reliable body of knowledge or

experience to underpin the expert's evidence. All four considerations apply to opinion evidence, although, as we state below, when the first consideration is applied to opinion evidence the threshold is the necessity of such evidence. The four considerations also apply to skilled evidence of fact, where the skilled witness draws on the knowledge and experience of others rather than or in addition to personal observation or its equivalent. We examine each consideration in turn."

[213] In the present case, it was the first consideration that required to be determined. In *Kennedy* Lord Reed and Hodge, when examining the first consideration, went on to state at paragraph 45:

"45. It is for the court to decide whether expert evidence is needed, when the admissibility of that evidence is challenged. In *R v Turner*, a case which concerned the admissibility of opinion evidence, which Prof Davidson cites in his textbook (*Evidence*, para 11.04), Lawton LJ stated (p 841):

'If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary.' ..."

[214] In the English High Court commercial case of *Gestmin* Leggatt J stated at paragraph 15 to 22:

"15. An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.

16. While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.

17. Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that

memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).

18. Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.

19. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.

20. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been 'refreshed' by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.

21. It is not uncommon (and the present case was no exception) for witnesses to be asked in cross-examination if they understand the difference between recollection and reconstruction or whether their evidence is a genuine recollection or a reconstruction of events. Such questions are misguided in at least two ways. First, they erroneously presuppose that there is a clear distinction between recollection and reconstruction, when all remembering of distant events involves reconstructive

processes. Second, such questions disregard the fact that such processes are largely unconscious and that the strength, vividness and apparent authenticity of memories is not a reliable measure of their truth.

22. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.”

I will return to the case of *Gestmin* when considering Issue 3, but for the present purposes I considered that Ms Bell’s general evidence about the operation of a person’s memory and, in particular, that memory can decline and be vulnerable to distortion and suggestion, were matters within judicial knowledge. Ms Bell made clear that she was not offering any opinion as regard the operation of the pursuer’s memory and I did not consider that her evidence provided assistance to the court. In the circumstances I considered that: (i) I could form my own view on the evidence without the need for help from the evidence of Ms Bell; (ii) Ms Bell’s evidence could not be described as necessary; and (iii) Ms Bell’s evidence was inadmissible.

Issue 2 - Whether the part of the claim directed against the actions of Brother Ryan should proceed

[215] Section 17A to 17D of the Prescription and Limitation (Scotland) Act 1973 (all references are to this Act unless otherwise stated) came into force on 4 October 2017.

Section 17A, 17B and 17D provide:

“17A Actions in respect of personal injuries resulting from childhood abuse

(1) The time limit in section 17 does not apply to an action of damages if—

- (a) the damages claimed consist of damages in respect of personal injuries,
- (b) the person who sustained the injuries was a child on the date the act or omission to which the injuries were attributable occurred or, where the act or omission was a continuing one, the date the act or omission began,
- (c) the act or omission to which the injuries were attributable constitutes abuse of the person who sustained the injuries, and
- (d) the action is brought by the person who sustained the injuries.

(2) In this section—

“*abuse*” includes sexual abuse, physical abuse, emotional abuse and abuse which takes the form of neglect,

“*child*” means an individual under the age of 18.

17B Childhood abuse actions: previously accrued rights of action

Section 17A has effect as regards a right of action accruing before the commencement of section 17A.”

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

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

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

(3) This subsection applies where—

- (a) the defender satisfies the court that, as a result of the operation of section 17B or (as the case may be) 17C, the defender would be substantially prejudiced were the action to proceed, and
- (b) having had regard to the pursuer's interest in the action proceeding, the court is satisfied that the prejudice is such that the action should not proceed.”

[216] Senior Counsel for the defender, contended, under reference to *JXJ v Province of Great Britain of the Institute of Brothers of the Christian Schools* [2020] EWHC 1914 (QB), *A v XY Ltd* 2021 SLT 399, and *B and C v Sailors' Society*, that: (i) the defender was substantially prejudiced in terms of section 17D(3)(a) due to Brother Ryan having passed away on 6 July 2013 (it was accepted that the onus was on the defender to prove they had been substantially prejudiced); (ii) whilst it was recognised that the Sheriff Appeal Court case of *M v DG's Executor* [2021] SAC (Civ) 3 had held that the issue of a fair hearing was one that should be dealt with *in limine*: (a) that case had been decided after further procedure had been determined in this case; and (b) given there were claims against a number persons, it was appropriate for an argument in terms of section 17D(3) to be made at the proof to avoid the same point being litigated twice; (iii) section 17D(1), as read with section 17A(1), should be interpreted to allow part of a claim not to proceed; and (iv) the part of the claim against Brother Ryan should not be allowed to proceed any further because: (a) the severity of the allegations; (b) the allegations occurred in secret and therefore there were no independent witnesses to confirm or challenge the pursuer's account; (c) the description of Brother Ryan at the SCAI by the defender as a habitual predatory paedophile had the effect of colouring the consideration of whether Brother Ryan had abused the pursuer; (d) more than 40 years had passed since the allegations and the pursuer's memory may have deteriorated or been corrupted; (e) Brother Ryan died on 6 July 2013, which was before the police spoke to the pursuer in November 2013 and therefore Brother Ryan had no opportunity to refute the pursuer's allegations; and (f) the first evidence of an allegation of rape against Brother Ryan was made by the pursuer (as far as the defender was aware) to Dr Scott when she assessed the pursuer in July 2018 - this should not be seen as a "disclosure" and it was not possible to explore the discussions the pursuer had with his solicitor prior to that due to client privilege.

[217] Senior Counsel for the defender accepted that if the pursuer's claim in respect of Brother Ryan was excluded he would lose a substantial part of his claim, however, he would still have the opportunity to attempt to prove his allegations against Brother Farrell and Kelly and, in the circumstances, the court could, after having regard to the pursuer's interest in the action proceeding, be satisfied that the substantial prejudice to the defender was such that the action, in so far as it was directed against Brother Ryan, should not proceed any further.

[218] Senior Counsel for the pursuer contended that: (i) an argument under section 17D(1) and (3) required to be taken *in limine* and was now too late; and (ii) section 17D(1) was concerned with the action as a whole and therefore it was not permissible to allow part of the action not to proceed. In any event, all the defender's pleadings said was:

"Explained and averred that Brother Ryan died on 6 July 2013 before proceedings were raised against him. What his answer to the allegations against him might have been is not known. The defenders are materially prejudiced as a result of being unable properly to investigate the pursuer's case against Brother Ryan."

Those pleadings did not identify how the defender had been substantially prejudiced and they had not led any evidence which set out how they had been substantially prejudiced. It was accepted that the defender would not be able to ask Brother Ryan anything about the pursuer's allegations but that was against the background of the defender admitting at the SCAI that Brother Ryan was a habitual predatory paedophile and it was not known if the police had confronted Brother Ryan about other allegations when he was alive. Both Brother Farrell and Kelly were alive and could have given evidence, but the defender, for whatever reason, chose not to call them. The defender may have made the same decision in respect of Brother Ryan. The pursuer's case was that he had been abused by all three Brothers and it was not clear how the removal of Brother Ryan from the case would impact

on the analysis of the effect of the abuse on the pursuer. In all the circumstances the defender had not proved substantial prejudice and had not addressed the balancing act that required to be conducted in considering the pursuer's interest in the action proceeding.

[219] In the present case the defender did not contend that it was not possible for a fair hearing to take place. The defender instead relied on section 17D(3), which, as Lord Woolman explained in *A v XY Ltd*, at paragraph 38 to 40, sets out a two-stage test:

“[38] This case concerns the application of s.17D(3) . It contains a number of open textured terms. It does not define “substantially prejudiced” or “pursuer's interest in the action proceeding” . In my view this is deliberate. The Scottish Parliament intended that the court should apply the two stage test in a broad manner.

[39] While the defender has the onus in respect of the first branch of the test, there is no onus in respect of the second branch. In carrying out the balancing exercise, the court can take all relevant factors into account in exercising its judgment.

[40] I approach the 2017 Act on the footing that it introduces a new line of jurisprudence. In my view it is therefore not helpful to refer to prior decisions based on different provisions. In particular, there is no need to engage in an arid discussion about whether “substantially prejudiced” (as used in the new legislation) is synonymous with “significant prejudice” as used by Lord Drummond Young in *B v Murray (No.2)* .”

I agree with Lord Woolman's approach but before consideration is given to that two-stage test, it is first necessary to consider whether the defender's argument comes too late.

[220] Section 17D(1) makes clear that a court may not allow an action to proceed if either of section 17D(2) or 17D(3) apply. In my view if an action were allowed to proceed it would proceed to proof and therefore I consider that Section 17D(1) indicates that a defender ought to raise an argument under section 17D(2) or 17D(3) before an action is allowed to proceed to proof. In *A v XY Ltd* Lord Woolman was considering the two-stage test in the course of a debate and said at paragraph 24:

“[24] I agree that there are distinct advantages in deciding the time bar point at this stage. It means that no “knock out” point overshadows the proof. Neither party has to lay out further unnecessary expense in respect of what may prove to be a time barred claim.”

In *M v DG’s Executor* the sheriff had allowed a proof before answer on all issues, having not been satisfied at debate that a fair hearing would be impossible. The Sheriff Appeal Court in recalling the sheriff’s interlocutor and allowing a preliminary proof stated:

“[15] The cumulative effect of subss. (1) and (2) of s.17D is that if a defender satisfies the court that it is not possible for a fair hearing to take place, the court may not allow an action brought by virtue of s.17A(1) to proceed. Where pleaded, the issue of a fair hearing is one which requires to be dealt with *in limine*. It cannot be held over until the end of a proof. In reaching her decision as to further procedure, the sheriff allowed the action to proceed to a proof before answer on all issues in circumstances where a fair hearing may not be possible. To that extent, the sheriff erred.

[16] The sheriff was correct to conclude that a decision on the fairness of the hearing could not be made in the abstract and that evidence required to be heard. In the present case, it is appropriate that such evidence is heard by way of a preliminary proof to determine whether s.17D(2) of the 1973 Act applies. We shall remit to the sheriff to proceed as accords. ...”

M v DG’s Executor therefore makes it clear that the issue of a fair hearing: (i) is one which “requires” to be dealt with *in limine*; (ii) cannot be held over until the end of a proof; and (iii) ought to be dealt with, when evidence is required, by way of a preliminary proof. In *B and C v Sailor’s Society* Lady Carmichael was considering arguments under section 17D(2) and 17D(3) of the 1973 Act at a preliminary proof. *M v DG’s Executor* is a decision that is binding upon me and in light of that decision I consider that an argument under section 17D(1) and 17D(3) also ought to be dealt with in the same way as the Sheriff Appeal Court, in that case, explained how an argument under section 17(D)(2) of the 1973 Act ought to be dealt with. I would, however, observe that there may be cases where the court may wish to consider an approach which would avoid a situation where a pursuer or a witness, alleging that they have suffered childhood abuse, has to give live evidence more than once

(in *B and C v Sailors' Society* no live evidence was led at the preliminary proof (which was conducted on the basis of, amongst other things, affidavits, statements and agreed evidence)) and that the court will still need to monitor the fairness of any subsequent proof (*B and C v Sailors' Society*, per Lady Carmichael at paragraph 199).

[221] In the present case a proof (not a proof before answer) was first allowed on 1 March 2019. That was prior to the decision in *M v DG's Executor* being issued on 23 December 2020. However, the defender still had almost a year to take procedural steps to discharge the proof and fix a preliminary proof in respect of their averments in respect of section 17D(3). The defender did not do so and I consider that, in all the circumstances, they are not entitled to raise this argument at the end of the proof.

[222] If I am, however, wrong about that, the next issue would have been whether section 17D(1) (as read with section 17A(1)) can be interpreted as allowing the court to not allow part of an action to proceed if either subsection 17D(2) or 17D(3) apply to that part of the action. I did not consider that I heard full argument on this point. I did, however, consider that section 17A(1)(b) and (c) referred to an "act or omission" and therefore, a pursuer would be able to raise an action in respect of one instance of abuse by one alleged perpetrator. In such circumstances a defender could make an argument under section 17D(1) that the action should not be allowed to proceed. If, however, the same pursuer raised an action alleging multiple instances of abuse by a number of perpetrators over perhaps a lengthy period, a defender, would not, according to the submission advanced for the pursuer, be able to make an argument under section 17D(1) if he only considered that section 17D(2) or section 17(3) applied to some of the allegations of abuse. It seemed to me that two of the purposes of the section 17A to 17D were, first, to improve access to justice for survivors of childhood abuse and, second, to strike a fair balance

between the parties' respective rights. I did not consider that the pursuer's submission in this regard would result in the second purpose being achieved. I also considered that both purposes would not be achieved if a court could order that an action should not be allowed to proceed if section 17D(2) or section 17D(3) applied to only some of the allegations of abuse. In *JXJ*, Chamberlain J stated at paragraph 103:

“Although s. 17D(1) of the 1973 Act precludes the court from allowing “an action... to proceed if either of the tests in s. 17D(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 causes of action pleaded.”

In the circumstances, my view, based on the limited argument I heard, is that the defender's submission would have been preferred and that section 17D(1) ought to be interpreted as allowing a court to not allow an action or a particular part of an action to proceed.

[223] I then turn to the two-stage test, which I considered would turn on the particular facts of the case. In *A v XY Ltd* Lord Woolman took the view, in that case, that in terms of the first stage of the test the defender was substantially prejudiced because, for many years they had no potential liability, but now faced a claim for £1.5 million. In the present case the defender is in the same position and facing a higher value claim, but it was not contended that those circumstances amounted to substantial prejudice. Rather, it was contended that the matters set out at paragraph [216] above resulted in substantial prejudice being established.

[224] The defender had extremely limited averments as regards how they would be substantially prejudiced by the operation of section 17B (the defender's averments are set out at paragraph [218] above). Clearly, the onus was on the defender to prove that they had been substantially prejudiced but there was little evidence before the court in that regard. There was no evidence about: (i) what investigations the defender would wish to make;

(ii) what investigation they could not make as result of the death of Brother Ryan; or

(iii) what investigations they could make despite the death of Brother Ryan. There was no evidence about: (i) whether or not Brother Ryan had been interviewed or spoken to by the police, the defender or other third party about alleged abuse at the school prior to his death and what his response, if any, had been; (ii) whether or not the police, the defender or other third party had taken steps to, and been able to, interview or speak to other members of staff about the activities of Brother Ryan at the school at the material time; (iii) whether or not the police, the defender or other third party had taken steps to, and been able to, interview or speak to other pupils at the school about the activities of Brother Ryan at the material time (or whether there were good reasons not to do so (such as re-traumatising the former pupils)); (iv) whether the defender had any difficulty accessing relevant documents and, if so, how that hampered them, if at all; and (v) the defender's financial position and whether there was any form of insurance (if there was the defender and the insurer would be treated as one composite unit: *A v XY Ltd*, per Lord Woolman at paragraph 41). It was accepted that both Brother Farrell and Kelly were alive at the time of the proof but they did not give evidence and there was no evidence before the court about whether Brother Farrell and Kelly had been spoken to or been interviewed by the police, the defender or other third party about the activities of Brother Ryan at the material time (or indeed their own activities). However, it was suggested to the pursuer, in cross examination, that his evidence about what Brother Ryan, Brother Farrell and Kelly did to him was untrue.

[225] The defender suggested there were no independent witnesses who may confirm or challenge the pursuer's account. I did not consider that to be correct. For reasons explained at paragraphs [229] to [230] and [237] to [238] below, I considered that the mutual corroboration rule could apply in civil cases and that EF corroborated the indecent assaults

on the pursuer by Brother Ryan. EF explained that he had read the SCAI report on the school and had seen that there were a number of accounts of abuse that were similar to what he experienced. It was a matter of agreement that the defender was a core participant in the SCAI and would have heard that evidence at SCAI hearings (which took place after detailed investigations had been undertaken by the SCAI). As such, the defender would have been able to ascertain whether other pupils at the school corroborated the pursuer's account. It is clear from the evidence in this case that the defender did not challenge any of the accounts given by former pupils at the SCAI (5/16/2) and that they accepted in their closing submission after hearing the evidence that: (i) Brother Ryan was a habitual predatory paedophile who groomed and preyed on boys with impunity; and (ii) that there was a culture of abuse at the school. There was no evidence in this case as regards the material that the defender had access to as a result of the SCAI and no evidence about what enquires could or could not be made as a result of that material.

[226] I accepted that the alleged abuse occurred over 40 years ago and that there was a risk of memories deteriorating or being corrupted, but that, as I have explained, is a matter within judicial knowledge and can be taken into account by the court when assessing the evidence. Criminal juries regularly assess the evidence in historic child abuse cases involving offences of a similar age (although the accused will of course be available to provide his or her agent with instructions and can give evidence if he or she chooses to do so). I also, of course, accepted that the death of Brother Ryan, whilst he is not alleged to be the sole abuser, was prejudicial to the defender. It was clearly prejudicial to the defender that the pursuer only made his allegations after Brother Ryan died and therefore Brother Ryan had no opportunity to give his response to the pursuer's allegations. However, I did not consider that the death of one of three alleged abusers automatically

resulted in the defender proving substantial prejudice in so far as the case is directed against Brother Ryan. In my view the defender, in order to prove substantial prejudice based on investigative difficulties, had to lead evidence to show how the death of Brother Ryan and any other relevant factors, taken together, resulted in their investigations being hampered to the extent that they had been caused substantial prejudice as a result of the operation of section 17B (in *B and C v Sailors' Society* there was a significant amount of evidence before the court as regards the difficulties the defender was having in investigating the matters raised in the action (see paragraphs 20 to 55 of that case). In the present case the defender may possibly have suffered significant prejudice, however, having considered the very limited evidence before the court in this regard and the submissions made by the defender, I would, if it had been necessary, have come to view, in the absence of the kind of evidence I have identified above, that the defender had failed to prove that they had been substantially prejudiced.

[227] If, however, I am wrong about that, and the defender was substantially prejudiced on the basis on the limited evidence before the court or by the fact that they, for many years, had no potential liability and were now exposed to significant claim (or a combination of the two) I would have, in any event, found that in conducting the balancing act required in section 17D(3)(b), that the scales tipped in favour of the pursuer. The defender was not suggesting that the pursuer's action as directed against Brother Farrell and Kelly ought not to proceed. The alleged abuse perpetrated by them occurred around the same time as the alleged abuse by Brother Ryan took place. The removal of the action in so far as directed against Brother Ryan would potentially add further complexities to the pursuer's already complex claim. The pursuer had a financial interest in the action proceeding. He also had a vital interest in securing justice. The alleged abuse was extremely serious in nature and was

committed in circumstances where the pursuer was vulnerable and the Brothers were in a position of trust. The consequences for the pursuer of the alleged abuse were contended to be severe and lifelong. In all the circumstances I would have considered that even if the defender was substantially prejudiced that, after having regard to the pursuer's interest, the action, in so far as directed against Brother Ryan, should nevertheless proceed further.

Issue 3 - Whether the pursuer was abused at the school

[228] Before considering this issue it is first convenient to address three points. The first is the application of the mutual corroboration rule in civil cases. The second is the operation of section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 (hereinafter "the 1968 Act") and the third is the approach to take to the evidence in light of the comments of Leggatt J in *Gestmin* that I have set out in some detail at paragraph [214].

[229] As regards the first point, whilst similar fact evidence is general inadmissible (see Walker and Walker at paragraph 7.2.1) it was accepted by both parties that it would be admissible if the mutual corroboration rule could be applied (see *B and C v Sailors' Society* at paragraph 200, where Lady Carmichael agreed with that approach; and Walker and Walker at paragraph 7.3.1).

[230] I was not referred to any case law in respect of the mutual corroboration rule but numerous recent cases have made clear that in considering whether the mutual corroboration rule can be applied what the court looks for are the conventional similarities in time, place and circumstances in the behaviour proved such as to demonstrate that the individual incidents are component parts of one course of criminal conduct persistently pursued by the accused. Whether these similarities exist will be a question of fact and degree requiring, in a solemn case, assessment by a jury. There is no rule that what might be

perceived as less serious criminal conduct cannot provide corroboration of what is more serious conduct.

[231] As regards the second point, I have set out at finding in fact 32 and 33 above, the charges which Brother Farrell and Kelly were convicted of. The defender has not sought to prove that Brother Farrell or Kelly did not commit these offences and therefore, by virtue of section 10(1) and (2) of the 1968 Act, both Brother Farrell and Kelly are, for the purposes of this case, taken to have committed the offences set out in the said charges.

[232] As regards the third point, Leggatt J's observations were considered recently in the English Court of Appeal case of *Kogan v Martin* [2020] ECDR 3. In that case Floyd LJ (giving a judgment which all the members of the court contributed) said at paragraph 88 and 89:

“88. ...First, as has very recently been noted by HH Judge Gore QC in *CXB v North West Anglia NHS Trust* [2019] EWHC 2053 (QB), *Gestmin* is not to be taken as laying down any general principle for the assessment of evidence. It is one of a line of distinguished judicial observations that emphasise the fallibility of human memory and the need to assess witness evidence in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed. Earlier statements of this kind are discussed by Lord Bingham in his well-known essay *The Judge as Juror: The Judicial Determination of Factual Issues* (from *The Business of Judging*, Oxford 2000). But a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon *all* of the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence.

89. Secondly, the judge in the present case did not remark that the observations in *Gestmin* were expressly addressed to commercial cases. For a paradigm example of such a case, in which a careful examination of the abundant documentation ought to have been at the heart of an inquiry into commercial fraud, see *Simetra Global Assets Ltd v Ikon Finance Ltd* [2019] EWCA Civ 1413 and the apposite remarks of Males LJ at [48]–[49]. Here, by contrast, the two parties were private individuals living together for much of the relevant time. That fact made it inherently improbable that details of all their interactions over the creation of the screenplay would be fully recorded in documents...”

The present case is, of course, not a commercial one. It concerns allegations of historic abuse at the school. Given the nature of the allegations it is unlikely that there would be any

documentation that would have assisted the court in determining whether or not the pursuer was abused in the manner he has described. There is however, amongst other things, the evidence of EF, the evidence of charges that Brother Farrell was convicted of, the extra judicial admissions made the defender at the SCAI, the pursuer's emotional reaction when the police came to see him and the pursuer's GP records. In assessing the pursuer's evidence I have had regard to Leggatt J's observations about the fallibility of memory and, with those observations firmly in my mind, have made findings in fact on the basis of my assessment of all the evidence before the court, applying the normal civil standard of proof. I have assessed the evidence of both the pursuer and EF (it was accepted that CD was a credible and reliable witness) by comparing and contrasting their evidence with the other evidence that was agreed or that I accepted. I have also kept in mind that the pursuer and EF are brothers, who are on good terms, and that, therefore EF could not be described as an impartial witness.

[233] I now turn to the pursuer's evidence as regards the alleged abuse. The pursuer had a very strong accent. This initially made his evidence quite difficult to follow but I found I quickly tuned in to his accent. At times the pursuer gave evidence in a rather detached manner but at other times he became emotional. He did not look in the best of health and came across as having turmoil within him. I considered that he gave his evidence in an uncomplicated, straightforward and rather sad manner. The pursuer was quite vague as regards the details of the abuse that he alleged occurred in the school. However, I considered that this was entirely understandable, given the passage of time since the events occurred, the repeated nature of the alleged abuse and his age at the time of the events. The pursuer did manage to explain, in albeit brief terms, some detail about abuse he was subjected to by the Brothers and was able to give evidence about the frequency of the abuse

(although there was some internal inconsistency with regard to his assessment about the amount of times he had been sexual abused by Brother Ryan). He also remembered the David Bowie song and I considered that was something that was likely to stick in a person's mind. The pursuer allegations, whilst extremely serious, were limited in terms of frequency and I did not consider he was exaggerating in any way.

[234] Whilst it is perhaps easy for evidence to be internally consistent when it is vague to begin with, I considered that the pursuer's evidence was, for the most part, internally consistent (although see paragraph [233] above). I accepted the pursuer's reasons for not disclosing the abuse until the police came to visit him. I considered that it was entirely plausible that the pursuer did not want to tell his wife and daughter about the abuse he suffered and, as the skilled witnesses explained, it was well known that some victims of childhood abuse only disclosed in later life.

[235] I considered that the pursuer's evidence was generally consistent with his police statement. I did not consider that the defender's criticism of Dc Gilmour was well founded. I considered that it was appropriate for Dc Gilmour to explain to the pursuer that: (i) they were investigating abuse at the school; and (ii) they were aware that the pursuer was a former pupil; and thereafter obtain the pursuer's free recall without further prompting. I considered this approach reduced the chances of the pursuer's memory being corrupted by suggestion or additional information. I considered that the pursuer's emotional reaction during the providing of his police statement, as described by Dc Gilmour, was consistent with someone disclosing abuse after many years of not disclosing what happened to him. I did not consider the fact that the pursuer failed to include the attempted rape in his police statement was particularly significant. As the pursuer said, he had been bottling up the abuse for 30 years and I consider that his explanation of it maybe being too hard to say or

just forgetting, in circumstances when he was disclosing the abuse for the first time and in an emotional state, was reasonable and in line with the evidence of Dc Gilmore (see paragraph [61]) and Professor Macpherson (see paragraph [70]).

[236] I formed the impression that the pursuer had been extremely reluctant to talk about the abuse he had suffered (his GP records showed the pursuer did discuss difficulties at children's homes and went as far as recalling traumatic and abusive incidents associated with his time in care (see letter from Dr Wild, dated 19 August 2004 (5/1/186) at paragraph [23] above) but he did not provide any further detail) and I considered that he found it hard to discuss it during his evidence. Both the pursuer and EF were adamant that they had not discussed with each other the detail of the abuse they suffered and I considered that it was entirely understandable why they would not wish to do so. I found EF's explanation for not doing so (see paragraph [53] above) to be compelling and I accepted that EF and the pursuer did not discuss the detail of the abuse they had suffered with each other.

[237] Whilst in the present case I was entitled find a fact proved on the basis of acceptable uncorroborated evidence, I considered it of importance in this case to test the pursuer's evidence and consider whether there was any corroboration for any part of the pursuer's account. I considered that the mutual corroboration rule could be applied in relation to a number of aspects of the pursuer's account. I considered that the pursuer's account of abuse was corroborated in following way:

- (1) The attempted anal penetration of the pursuer by Brother Ryan was closely linked in time, place and circumstances to the anal digital penetration of EF by Brother Ryan;

(2) The other indecent assaults committed against the pursuer by Brother Ryan were closely linked in time, place and circumstances to the anal digital penetration of EF by Brother Ryan;

(3) The indecent assaults committed against the pursuer by Brother Farrell were closely linked in time, place and circumstances to: (i) the offences committed by Brother Farrell set out in charges (001), (040) and (063); and (ii) Brother Farrell masturbating EF.

(4) The physical assault committed against the pursuer by Brother Farrell was closely linked in time, place and circumstances to the offences committed by Brother Farrell set out in charge (060);

[238] Clearly, all the corroborating evidence that I have referred to above came from EF and other former pupils of the school. I have already noted that EF could not be described as an impartial witness but there was no suggestion that the pursuer had had any contact, since leaving the school, with the complainers in the charges that Brother Farrell had been convicted of. I considered that the corroborating evidence, in respect of each point above, was closely linked in time, place and circumstances to the pursuer's allegation such as to demonstrate that the individual incidents were component parts of one course of criminal conduct persistently pursued by the particular Brother in question (the corroborating evidence, for each point above, were very similar offences, committed at the school, against pupils of the school who were a similar age to the pursuer at around the same time that the pursuer was at the school). The pursuer did not have any averment about being made to stand in the long hall and did not identify who made him do so, but his evidence in that regard did have a striking similarity to part of charge (060) that Brother Farrell had been convicted of. Further confirmation or support of the pursuer's account of physical assaults

by Brother Farrell and Kelly could have come from EF who described Brother Farrell and Kelly using violence against the pursuer, however, no further details of this violence were provided.

[239] It was accepted that the extra judicial admissions made by the defender in their closing submission to the SCAI were admissible (see Walker and Walker at paragraph 9.4). In those submissions the defender accepted that: (i) boys at the school had been abused by the deliberate acts of individual men who lived and worked there (5/16/2); (ii) Brother Ryan was a predatory paedophile: (a) who appeared to have entirely unrestricted access to boys for his whole time at the school; (b) who preyed on boys with impunity; and (c) who abused boys by being clandestine, violent or by using grooming tactics (5/16/10); (iii) Brother Farrell and Kelly indulged in similar behaviour to that of Brother Ryan (5/16/10); (iv) there was a culture of abuse within the home (5/16/10); and (v) a number of Brothers engaged in punishment to the point of brutality and that a substantial number of children are likely to have lived in fear (5/16/12). I accepted that these extra judicial admissions were not made in respect of the pursuer or EF but they were admissions to conduct by Brother Ryan, Brother Farrell, Kelly and in general at the school that was closely linked to the allegations made by the pursuer in time, place and circumstances.

[240] I considered that EF was a credible and reliable witness. He gave his evidence in a dispassionate and calm way. I did not consider that EF was asked to detail all the abuse he suffered at the school, but the evidence that he did give about the abuse he has suffered was, for the reasons I have already given, in the main corroborated by the pursuer's account and the commission of sexual offences that Brother Farrell had been convicted of. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[241] The pursuer [REDACTED]

[REDACTED] When it was put to him he had been a drug dealer he said that was a ridiculous suggestion. This was in accordance with EF's un-contradicted evidence and I accepted the pursuer's evidence in this regard. The pursuer accepted he had the convictions set out at paragraph [24]. I considered that the pursuer's previous convictions, were in the main, committed when he was very young and I did not think they (or a concession that the pursuer may have stolen sweets as a younger child) had any bearing on whether or not the abuse occurred (I did, however, consider they were a factor which supported the contention that the pursuer had a disadvantaged upbringing). I did not think any valid criticism could be made of the pursuer for not remembering being hit in the head with a brick in 1978 (indeed there was no evidence to suggest that the pursuer was hit on the head with a brick for a reason that ought to cast an unfavourable light on the pursuer) and, in any event, I did not think it had a bearing on whether or not the abuse occurred (nor did I consider that it had a bearing on any other issue in the case). I did not consider that the acquittal of Brother Farrell and Kelly of the charges they faced in respect of

the pursuer (it was not clear whether these were verdicts of not guilty or not proven) was a significant point. The detail of those charges were not before this court. In any event, this case required to be decided on the evidence before this court on the civil, rather than the criminal, standard of proof. In this case the defender did not lead any evidence to contradict the pursuer's evidence as regards the abuse and they were unable to shake his evidence in that regard on cross examination.

[242] When I considered all the evidence, and, in particular the evidence of EF, the agreed evidence of the commission by Brother Farrell of offences set out in the charges he was convicted of, the extra judicial admissions made by the defender, the pursuer's emotional reaction when giving his police statement and, to a limited extent, the content of the pursuer's GP records, I considered there was a considerable amount of evidence that supported the pursuer's account of the abuse he suffered. In the circumstances I came to the view that the pursuer was a credible and reliable witness and found, on the balance of probabilities, that the pursuer was abused at the school in the manner he described. In such circumstances I concluded that: (i) Brother Ryan deliberately attacked and indecently assaulted the pursuer; (ii) Brother Ryan attempted to have unnatural carnal connection with the pursuer; (iii) Brother Farrell deliberately attacked and indecently assaulted the pursuer; (iv) Brother Farrell deliberately attacked and physically assaulted the pursuer; and (v) Kelly deliberately attacked and physically assaulted the pursuer. As such the defender, being vicariously liable for the Brothers' foregoing intentional wrongs, is under a delictual obligation to compensate the pursuer for the losses he sustained from his injuries.

Issue 4 - Whether the loss for which the pursuer seeks damages for was the consequence of the abuse

[243] Having established he was the subject of intentional wrongs by the Brothers, the pursuer must go on to prove that those intentional wrongs was the cause of the harm sustained by the pursuer. The pursuer must normally prove, on the balance of probabilities, that 'but for' the defender's breach of duty or intentional wrong, the harm to the pursuer would not have occurred. However, where there are two sources of harm to the pursuer, which operate concurrently, the source for which the defender is responsible will be regarded as the factual cause of the pursuer's injury if it materially contributed to the injury. A contribution which comes within the exception of *de minimis non curat lex* is not material but any contribution which does not fall within that exception will be regarded as material.

[244] The pursuer contended that the abuse suffered by the pursuer at the school caused or at least materially contributed to the pursuer's later psychiatric difficulties. The defender contended that the pursuer was not suffering from PTSD and that any abuse that he did suffer was not causally linked to the pursuer's later psychiatric difficulties.

[245] Both parties accepted that the pursuer had a deprived background prior to attending the school. It was undisputed that, prior to attending the school: (i) the pursuer had been placed in two care homes; (ii) the pursuer's mother was suffering from mental health difficulties, which necessitated hospital admissions; and (iii) the pursuer was present when the attack on his step-father occurred. The pursuer accepted that he might have been involved in the stealing of sweets prior to attending the school.

[246] The defender contended that the pursuer accepted he was inhaling gas prior to attending the school but I did not consider the pursuer gave evidence to that effect. Prior to that passage of evidence the pursuer had been asked about events in ■ Street from 1975, but

I considered that the pursuer was talking more generally when he was asked about inhaling gas from a fire extinguisher. The pursuer accepted he had inhaled gas at some point, but could not remember whether it was from a fire extinguisher. EF, [REDACTED]

[REDACTED] was also asked about the inhaling of gas from a fire extinguisher when he was living at [REDACTED] Street. EF said he thought this was the craze at the time, that one of his friends died from it [REDACTED]

[REDACTED] EF could not say whether the pursuer was involved in inhaling gas at that time. I did not consider the pursuer accepted that he inhaled gas prior to attending the school. Rather, the pursuer's evidence was that he had inhaled gas at some point in his childhood (and Professor Macpherson's evidence was that the pursuer told him he started using solvents and gas at the age of 13 (the pursuer was aged 12 when he started attending the school and left shortly before his 14th birthday) – see paragraph [67]).

[247] The pursuer's account of the manner of how he ended up at the school (by way of his step-father providing a note to the pursuer and EF and them then attending the social work department) was not challenged, nor was it challenged that the pursuer and EF were at the school for anything other than care and protection. I did not consider there was really any dispute that, by the time the pursuer reached the school, he was vulnerable due to his early life experiences.

[248] The pursuer was adamant, during his evidence, that all his difficulties were caused by the abuse he suffered and explained how it had affected him. In short, he said that after leaving the school his nerves were shattered and he started to abuse substances. He took glue, cannabis, temazepam, valium and then heroin. He then turned to alcohol, which resulted in him suffering from liver cirrhosis. All these substances were taken to cope with the abuse he suffered. The pursuer also suffered from depression, panic attacks, suffered

from the reoccurring dream about the Brother coming into his dormitory, and found it difficult to trust people in authority. When he heard the David Bowie song it took him right back to his dormitory and he had difficulties with intimacy due to the abuse coming into his head.

Drug and Alcohol misuse

[249] The pursuer's evidence was consistent with the history he gave to Professor Macpherson and Dr Scott about how the abuse had affected him. The pursuer told both Professor Macpherson and Dr Scott he misused substances to cope with the abuse he suffered. However, the pursuer, unfortunately, did not give a clear history to Dr Friedman and, in particular, said to Dr Friedman, contrary to what the pursuer told the court, Professor Macpherson and Dr Scott, that he did not think his use of drugs or alcohol had anything to do with the abuse he suffered at the school.

[250] Dr Friedman diagnosed the pursuer as suffering from mental and behavioural disorders due to the use of both opiates and alcohol, because the pursuer's substance misuse had effected all areas of his life, including his health and employment. Dr Friedman explained that there needed to be evidence of a link between the abuse and the taking of drugs and alcohol. He emphasised that the pursuer did not say that his drugs and alcohol problems were caused by the abuse and he did not consider that there was evidence of a link in the pursuer's GP records. Dr Friedman noted that the pursuer's trajectory in relation to drugs and alcohol was similar to a lot of people with his type of background who had not been abused. Dr Friedman did not think the abuse was a major factor in the pursuer's substance abuse problems, rather it was a minor factor.

[251] Professor Macpherson diagnosed the pursuer with, amongst other things, a history of alcohol use and substance use problems and Dr Scott diagnosed the pursuer with, amongst other things, a mental and behavioural disorder due to the use of multiple psychoactive substances. Both Professor Macpherson and Dr Scott were of the opinion the pursuer had abused drugs and alcohol as a coping mechanism to manage his thoughts/anxiety about the abuse he suffered. Professor Macpherson thought that whilst the pursuer may have dabbled in cannabis and other recreational substances, he would have been unlikely to have developed an addiction to substances and heroin (in particular), were he not abused at the school. Similarly, Dr Scott thought that the whilst the pursuer would have been likely to have developed symptoms of mental and behavioural disorder due to the use of multiple psychoactive substances had the abuse not occurred, it would have been unlikely to have been to the same extent and chronicity. Professor Macpherson, in contrast to the Dr Friedman, thought that the pursuer's GP records showed the pursuer as having a persistent low mood and anxiety related to being in care.

[252] It seemed to me that there was not really any dispute among the three skilled witnesses as regards the process of making a psychiatric diagnosis. Both the history provided by the pursuer and his medical records would be of particular importance. Indeed Dr Friedman accepted if he did not get a full history from the pursuer then that may have prevented him making a diagnosis that another psychiatrist or psychologist could make with the benefit of a full history being provided (although Dr Friedman did point out that he also had the benefit of a large number of medical records). The pursuer's GP records showed, amongst other things, that the pursuer:

- (1) in 1984 (aged 17) was prescribed valium (which is prescribed for anxiety);

- (2) in 1989 (aged 22) was prescribed nitrazepam (which is prescribed for anxiety and insomnia);
- (3) in 1991 (aged 23) was buying temazepam and valium because of “his nerves” and smoking cannabis;
- (4) by 1992 (aged 25) was using heroin;
- (5) in 1996 (aged 29) was prescribed nitrazepam and methadone;
- (6) in June / July 2003 (aged 36) was reporting that: (i) he had been suffering stress, depression and panic attacks for as long as he can remember; (ii) he felt anxious in busy places; and (iii) he had a troubled childhood in various children’s homes;
- (7) in February 2004 (age 36) was reporting that his nerves were worse and he could not sleep;
- (8) in August 2004 (age 37) was reporting to Dr Wild: (i) symptoms consistent with social anxiety and acute periods of panic; (ii) significant levels of social withdrawal and avoidance; (iii) thinking work colleagues were staring at him and talking about him; and (iv) a variety of traumatic incidents and abusive incidents associated with his time in care;
- (9) in July 2005 (age 38) was reporting: (i) a troubled childhood in various children’s homes; (ii) using drugs to cope with his feelings of anxiety and depression; and (iii) that he was so anxious about attending the appointment with Dr Wild in August 2004 that he required to use substances in order to keep his appointment;
- (10) in May 2006 (age 39) was reporting that his panic attacks, sense of paranoia and self-harm on his arms dated back to his long term care in a children’s home;

(11) in October 2008 (age 41) was reporting his main complaint was that he felt agitated and anxious all the time and that he was also suffering from occasional chest pains;

(12) in August 2012 (age 45) had had an alcohol and opiate dependence on a 20 year background of dysthymia.

[253] I considered the pursuer's GP records set out a history of the pursuer presenting, from a young age, with anxiety, depression, panic attacks and problems with sleep. Those records also disclosed the pursuer had made repeated references to childhood troubles from his time in care and that he went as far as recalling traumatic and abusive incidents associated with his time in care. It was also clear from those records that the pursuer had a long history of substance misuse.

[254] In my view the pursuer's GP records supported the evidence the pursuer gave in court and the histories he provided to Professor Macpherson and Dr Scott. As I have already noted, I did not accept there was any evidence before the court that confirmed that the pursuer had inhaled gas before he went to the school. I did accept that the entries in the pursuer's GP records, which I have referred to, started at a rather lengthy period after the pursuer had left the school and did not include a clear reference to the pursuer suffering abuse at the school. However, that is against a background of the pursuer not wishing to disclose the abuse. I also considered it unlikely that a teenager, from a disadvantaged background, who was abusing substances and in self-destruct mode (see Dr Scott's evidence at paragraph [102] above), would attend his GP as soon as his anxiety and other difficulties arose.

[255] Dr Friedman was clear that the pursuer was unwell when he met with him. It may be that his state of health, at that meeting, contributed to his failure to properly engage with

Dr Friedman. It was, however, not clear why the pursuer said to Dr Friedman that he did not think his substance abuse problems were linked to the abuse he suffered at the school. The pursuer may have been having a bad day or was perhaps being uncooperative because he was meeting with the skilled witness for the defender – I do not know. However, the pursuer's observations, in that regard, then informed the opinion that Dr Friedman reached in respect of there being no link between the abuse and the pursuer's substance misuse.

[256] I accepted, as a result of the pursuer's disadvantaged background prior to attending the school, that he may, absent of the abuse, have ended up following the substance misuse path he ultimately did. I also accepted that the pursuer's disadvantaged background prior to attending the school was one source of his later substance misuse and other psychiatric difficulties. However, even Dr Friedman accepted, despite the pursuer's observations (as regards there being no link between his substance misuse and the abuse), that the abuse he suffered did make a small contribution to the pursuer's substance misuse problems. After considering all the evidence I came to the view that it was more likely that not that the pursuer was, in line with the evidence of Professor Macpherson and Dr Scott, abusing substances to attempt to manage the anxiety he was experiencing as a result of the abuse he suffered at the school. I considered that the pursuer, given his disadvantaged background, may have misused substances even if he had not suffered abuse at the school, but I did not think it would have been as chronic or enduring as it ultimately was. In all the circumstances I considered that the abuse the pursuer suffered at the school could not be dismissed under the *de minimis* principle and that, on the balance of probabilities, it had materially contributed to the pursuer's substance misuse difficulties and his diagnosis of mental and behavioural disorders due to both opiate and alcohol use.

PTSD and other psychiatric diagnoses

[257] Both Professor Macpherson and Dr Scott diagnosed the pursuer with PTSD.

Dr Friedman was of the view that the pursuer's symptoms were well below the threshold for a diagnosis of PTSD. I did not find the question of whether the pursuer had PTSD easy to resolve given the considerable distance between Professor Macpherson and Dr Scott, on the one hand, and Dr Friedman on the other hand.

[258] I considered that both Professor Macpherson and Dr Scott were able to identify numerous symptoms of PTSD (see paragraph [76] in respect of Professor Macpherson and paragraph [112] in respect of Dr Scott) and both confirmed their diagnosis of PTSD even after reading Dr Friedman's report. Dr Friedman did consider that the pursuer had some post-traumatic symptoms but the severity of those symptoms, in his view, were not sufficient to make a diagnosis of PTSD. Rather, Dr Friedman was of the view the pursuer's substance misuse was the cause of the pursuer's difficulties and it was his substance misuse, rather than PTSD, that impacted on all areas of his life, including his health and employment. By contrast, Professor Macpherson considered that the pursuer's PTSD had significantly impacted on the pursuer's social and occupational functioning (see paragraph [81] above). Dr Scott thought the severity of the pursuer's PTSD symptoms would have fluctuated over time.

[259] Professor Macpherson was only able to have a telephone meeting with the pursuer but he had previously seen the pursuer for 90 minutes to assess him for vulnerable witness special measures in the criminal trial (special measures are simply measures put in place to make a witness feel at ease whilst giving evidence; typical special measures would include giving evidence behind a screen or giving evidence by video link). Dr Scott had both met the pursuer and had a follow up telephone appointment with him. Both had been able to

obtain a clearer and fuller history from the pursuer than Dr Friedman. It was clear from the evidence of all three skilled witnesses that before a diagnosis of PTSD could be made, the person required to have suffered a specific traumatic event (and it follows that the traumatic event will be the cause of the PTSD). Given that I have found the pursuer suffered from abuse at the school, the pursuer clearly suffered a traumatic event. I did not consider, for the reasons given by Professor Macpherson at paragraph [84], that the attack on the pursuer's step-father or ■■■ holding a gun to the pursuer's head could have been the trauma that resulted in the pursuer suffering PTSD. I considered the evidence showed that the pursuer had reoccurring nightmares related to the abuse (one of the Brother's coming into the dormitory), was reminded of the abuse when child abuse was mention in the news or in films, had intrusive thoughts during marital relations, engaged in social avoidance, was unable to talk about the abuse he suffered, had problems concentrating, had problems with sleep, had difficulties in establishing trust, was hyper vigilant and engaged in self destructive behaviour (in the form of substance misuse). I accepted these were symptoms of PTSD. The most difficult question was, in my view, whether these symptoms were severe enough to result in a diagnosis of PTSD. I did not find this an easy question to resolve but I again considered Dr Friedman was hampered by the pursuer's lack of engagement with him. I also considered that the pursuer's presentation was complex and that it was more likely than not that the pursuer's social and occupational functioning was being impacted by not only his substance misuse but also by both his PTSD symptoms and his depression/anxiety (on which see paragraphs [260] to [261] below). In the circumstances I accepted Professor Macpherson's evidence that the pursuer's PTSD had impacted on the pursuer's social and occupational functioning. In all the circumstances I accepted Professor Macpherson's and Dr Scott's diagnosis of PTSD and concluded, on a balance of

probabilities that: (i) the pursuer was suffering from PTSD; (ii) the pursuer's PTSD was caused by the abuse he suffered at the school; (iii) the pursuer was suffering PTSD shortly after the abuse occurred; (iv) the severity of the pursuer's PTSD has fluctuated over time; and (v) the pursuer's PTSD impacted on his social and occupational functioning.

[260] As regards the pursuer's depression and anxiety, Dr Friedman was of the view that it was difficult to diagnose depressive disorders and anxiety in people who were significantly misusing drugs and he preferred not to do so. He accepted the pursuer had, at times, complained of low mood, helplessness, suicidal thoughts and of feeling on edge. He explained he had to decide whether these symptoms were due to a separate disorder, such as anxiety or depression, or whether they were part of the pursuer's substance misuse. His opinion was that they were part of the pursuer's substance misuse. Professor Macpherson and Dr Scott again took a different view. I considered that both Professor Macpherson (see paragraph [74]) and Dr Scott (see paragraph [113]), considered this aspect of this case in more detail than Dr Friedman and were able to identify numerous symptoms to support the diagnoses that they ultimately reached. Dr Scott diagnosed a mixed anxiety and depressive disorder but noted that some psychiatrists would separate them into two diagnoses. Professor Macpherson (who, of course, was a psychologist) had in fact done that and reached separate diagnoses of: (i) persistent depressive disorder; and (ii) generalised anxiety disorder. Professor Macpherson explained the persistent depressive disorder was a low level depressive condition, which had a large personality overlay. This meant it was difficult to see what the disorder was and what the personality of the pursuer was. Dr Scott considered it was perfectly possible to make a diagnosis of depression or anxiety even though a person was misusing substance. I considered Dr Friedman was again hampered by the pursuer's lack of engagement with him. I also preferred the fuller analysis by

Professor Macpherson and Dr Scott and I concluded, on the balance of probabilities, that the pursuer: (i) had suffered from persistent depressive disorder for the last 30 years; and (ii) suffered from generalised anxiety disorder.

[261] As Dr Friedman considered that the pursuer's symptoms in this regard were related to his substance misuse problems he did not, understandably, comment separately on the cause of those symptoms (I have already explained his view on the cause of the pursuer's substance misuse problems). Professor Macpherson's view was that the pursuer's persistent depressive disorder and generalised anxiety disorder were directly linked to the abuse he suffered at the school. Dr Scott's opinion was that the pursuer would have likely to have suffered from low mood and anxiety, had he not been abused, but it would not, like his substance misuse difficulties, have been as severe, chronic or enduring. In my view, the pursuer's evidence and his GP records are consistent with the opinions of Professor Macpherson and Dr Scott. The pursuer's GP records contain numerous reference to anxiety, depression and panic attacks which date back to when the pursuer first started to attend his GP as a young man. In all the circumstances and taking account of what I have already said about the pursuer's substances misuse difficulties, I have concluded, on the balance of probabilities, the abuse suffered by the pursuer at the school could, again, not be dismissed under the *de minimis* principle and that, on a balance of probabilities, it materially contributed to the pursuer's persistent depressive disorder and generalised anxiety disorder.

Issue 5 - The consideration of damages in light of the answers to issues (3) and (4)

[262] Given that this case concerns intentional wrongs, the defender is liable to make reparation for all losses suffered by the pursuer which directly arise from the wrongs -

whether or not these losses are reasonably foreseeable (see Professor Thomson, *Delictual Liability*, 5th Edition, at paragraph 16.4).

[263] In the present case, the pursuer, as I have explained, was, due to his disadvantaged background, already vulnerable when he arrived at the school and susceptible to developing substance misuse problems and other psychiatric difficulties. However, I considered that the defender had to take the pursuer as they found him.

Solatium

[264] In *FZO Cutts J* observed:

“...the authorities as a whole demonstrate how difficult it can be assessing damages in cases of this nature. Each case must depend on its own facts. No award of money can compensate for the harm done and its scarring effect on a young person's life and wellbeing which often continues through adult life. As others have observed, the Judicial College Guidelines for psychological injury provide some, but in reality very little, real assistance in cases of sexual abuse. In assessing damages for pain, suffering and loss of amenity in such cases it is necessary to take into account not only the psychiatric effects of the abuse on the claimant but also the immediate effects of the abuse at the time that it was perpetrated.”

I agree with those observations. The chapter of the Judicial College Guidelines (hereinafter referred to as “JCG”) dealing with psychological and psychiatric damage is separated into two parts. Part (A) of the JCG deals with psychiatric damage in general and list the following factors: (i) ability to cope, with life, education and work; (ii) effect on relationships and persons they come into contact; (iii) extent to which treatment would be successful; (iv) future vulnerability; (vi) prognosis; and (v) whether medical help has been sought. The final factor is as follows:

“Claims relating to sexual and physical abuse usually include a significant aspect of psychiatric or psychological damage. The brackets discussed in this chapter provide a useful starting point in the assessment of general damages in such cases. It should not be forgotten, however, that this aspect of the injury is likely to form only part of the injury for which damages will be awarded. Many cases include physical or

sexual abuse and injury. Others have an element of false imprisonment. The fact of an abuse of trust is relevant to the award of damages. A further feature, which distinguishes these cases from most involving psychiatric damage, is that there may have been a long period during which the effects of the abuse were undiagnosed, untreated, unrecognized, or even denied. Awards should take into account not only the psychiatric effects of the abuse on the injured party but also the immediate effects of the abuse at the time that it was perpetrated, including feelings of degradation. Aggravated damages may be appropriate. Cases of prolonged and frequent physical and sexual abuse of a child over many years by a person in a position of trust, involving penetrative violation, are likely to fall into (A)(a) or (B)(a) and reflect aggravated damages, leading to an award towards the top end of the bracket.”

[265] Part (A) also makes clear that some of brackets contain an element of compensation for PTSD. Part (A)(a) deals with the severe bracket and provides a range of £46,780 to £98,750. Part (B) deals with the situation where there is a specific diagnosis of PTSD.

Part (B)(a) deals with the severe bracket and provides a range of £51,070 to £85,880.

[266] In the case of *J v Fife Council* 2009 SC 163 the Inner House upheld an award of £75,000 (the appeal was allowed in respect of the calculation of interest). In that case the Lord Ordinary, at first instance, identified several non-exhaustive factors relevant to the assessment of damages including (see *J v Fife Council* 2007 SLT 85 at paragraph 44):

- (1) The nature and severity of the abuse, and its character — whether sexual, non-sexual but violent, or mental/emotional;
- (2) The frequency of the abuse;
- (3) The duration of the abuse;
- (4) The age of the pursuer at the time of the abuse;
- (5) The immediate effects of the abuse on the pursuer; and
- (6) Whether any apportionment is required to reflect abuse by others, or other causes of the pursuer's problems.
- (7) The emotional and social consequences of the abuse for the pursuer.

(8) Any psychiatric illness or psychological condition suffered by the pursuer as a consequence of the abuse.

[267] In that case the pursuer suffered severe and frequent abuse between the ages of 8 and 15 (indeed the Lord Ordinary considered, at paragraph 45, that it was difficult to imagine a worse case of child abuse), however, the pursuer had managed to gain employment and became a leading figure in a trade union. The Lord Ordinary was unwilling to accept the pursuer's evidence about a psychiatric illness or psychological condition as it was not supported by a skilled witness (had the pursuer's evidence had such support the Lord Ordinary would have awarded £100,000 (which is £146,000 in today's money)). The Inner House made clear that in identifying a global figure for *solatium*, it was appropriate to consider three discrete aspects of that head of claim, namely: (i) the pain, affront and humiliation experienced by the pursuer while at the school; (ii) the emotional, social and psychiatric consequences which the pursuer experienced after leaving the school; and (iii) future consequences of the abuse (if applicable). The Inner House concluded that the appropriate breakdown in that case was, following the same order: (i) £50,000 (which is £73,000 in today's money); (ii) £25,000 (which is £36,500 in today's money); and (iii) nil.

[268] In *A v N* the pursuer was awarded £70,000 (the three discrete aspects following the same order as above were: (i) £50,000 (which is £60,000 on today's money); (ii) £10,000 (which is £12,000 in today's money); and (iii) £10,000) for sexual abuse, including repeated rape, by her uncle, between the ages of 7/ 8 and 16 (the court, however, rejected that the pursuer was suffering from PTSD). In *A and B v C* the court awarded two cousins, A and B, £90,000 in respect of A (the three discrete aspects were: (i) £45,000 (which is £48,150 in today's money); (ii) £22,500 (which is £24,075 in today's money); and (iii) £22,500) and £20,000 in respect of B (the three discrete aspects were (i) £12,000 (which is £12,840 in today's

money); (ii) £5,000 (which is £5,350 in today's money); and (iii) £3,000 (which is £3,210 in today's money)) who had been abused by A's step-father. A was sexually abused, including regular vaginal rape, between the ages of 8 and 19. B was also sexually abused, including one instance of vaginal rape, between the ages of 8 and 11. In *T* (which concerned, amongst other things, physical and sexual assaults by Brother Ryan and Brother Farrell) the court awarded £120,000 (the three discrete aspects were: (i) £40,000 (which is £40,400 in today's money); (ii) £40,000; and (iii) £40,000) to the pursuer who had been raped 10 to 20 times, physically assaulted over a period of around 21 months and suffered from PTSD. In the very recent case *A v Glasgow City Council* the court awarded £135,000 (the three discrete aspects were: (i) £90,000; (ii) £25,000; and (iii) £20,000) to the pursuer who had been repeatedly raped over a period of 5 years and suffered from, amongst other things, PTSD.

[269] The awards in all these cases depended on the particular facts and circumstances of the case. Some of the cases only involved sexual abuse. The majority of the cases involved more severe, frequent and prolonged abuse than that suffered by the pursuer, but all had circumstances where the pursuer had fared better than the pursuer in this case, in later life, in terms of their social and employment functioning. In the circumstances, whilst I have had regard to those cases (and, in particular, regard to the relevant factors identified by the Lord Ordinary in *J v Fife Council*), I did not consider it necessary to conduct a detailed analysis of them.

[270] In the present case the pursuer suffered the abuse set out in finding in facts 15 to 17 over the period of just under 14 months when he was aged between 12 and 13 years. At that time he was, for the reasons already explained, vulnerable and going through a crucial period in his adolescence. The pursuer thought that he was the only boy suffering abuse and I consider that his time at the school must have been miserable for him. I have held that

the abuse materially contributed to both his substance misuse problems and his diagnosis of anxiety and depression. It also caused his PTSD. The pursuer's substance misuse problems, coupled with his anxiety, depression and PTSD (hereinafter collectively referred as the pursuer's "psychiatric conditions") have had a devastating impact on his life. They resulted in the pursuer's employment and social functioning being extremely poor for the entirety of his adult life thus far. He has, apart from a YTS in around 1985 and work in a warehouse in the late 1990s/early 2000s, never been able to work due to these psychiatric conditions.

These psychiatric conditions have also resulted, as Professor Macpherson pointed out, in the pursuer living as a virtual recluse for most of his adult life, avoiding social contact. The pursuer also had to go through the ordeal of thinking about and ultimately giving evidence in the criminal trial. That process exacerbated the pursuer's symptoms and resulted in him making a suicide attempt around four and half months after he disclosed to the police (see the letter from Dr Wilson and Dr Masson, dated 11 April 2014 at paragraph [23] above).

There was no dispute that the pursuer was unlikely to work again. Whilst there was the prospect of some improvement in his psychiatric conditions if the pursuer responded well to CBT, the overall prognosis was very poor.

[271] In all the circumstances, after considering the relevant JCG and the cases I have referred to, against the facts and circumstances of this case, I have assessed *solatium* as follows:

- (1) The pain, affront and humiliation experienced by the pursuer while at the school (so prior to 10 April 1981) - £20,000;
- (2) The emotional, social and psychiatric consequences which the pursuer experienced after leaving the school (so from 10 April 1981 to date) - £50,000; and
- (3) The future consequences of the abuse - £ 25,000

The total award for *solatium* is, therefore, £95,000.

Past wage loss

[272] The pursuer's psychiatric conditions have prevented him (save for the periods identified at paragraph [270] above) from working for the past 38 years (1983 to 2021). The quantification of the pursuer's past wage loss was not a straightforward task. The following factors contributed to the difficulty in carrying out that task: (i) the pursuer came from a disadvantage background and was vulnerable prior to attending the school; (ii) there was no evidence about his academic ability or work ethic; (iii) when the pursuer's entered the employment market in 1983 unemployment was high; and (iv) the pursuer's career never really got off the ground. As a result it was very difficult to make a prediction as regards the pursuer's career progression had the abuse not occurred.

[273] In *FZO* the court was considering the quantification of damages in respect of a case where the claimant had suffered prolonged and severe mental health difficulties (including complex PTSD) since 2011 as result of him coming to understand that he had been abused. Cutts J, in that case, when considering the correct approach to past wage loss, said, at paragraph 23:

"23. I consider that the better approach in this case is to attempt a calculation on a multiplier/multiplicand basis. This cannot however be a matter of precise arithmetic as there are too many imponderables. The task involves judgment as to what is reasonable and that must inevitably be an approximation."

The reference to multiplier/multiplicand in that case was simply a reference to identifying the average net wage for the claimant and years that he ought to have received that wage.

[274] The pursuer contended that the above approach in *FZO* should be followed in calculating past wage loss. The defender contended that if anything at all was to be

awarded then it should be restricted to a lump sum award of £15,000. The purpose of an award of damages is to place the pursuer in the financial position he would have been if the wrongs (here the abuse) had not occurred. In my view, the best way to achieve that purpose, in relation to past wage loss, in this case, was to follow the approach taken in *FZO* and attempt a calculation of the pursuer's past wage based on reasonable assumptions being made. That is the approach that Mr Carter has taken in this case. In short, Mr Carter worked out the average annual net salary between 1983 and 2020 (when his supplementary report was prepared) for the categories "All Manual Males" and "Forklift Truck Driver". From that he was able to calculate (by adding the annual salary for each year together) what the wage loss for the pursuer would have been if he had an "ideal" work record. Mr Carter then made various assumptions to make a downward adjustment from the "ideal" work record to arrive at figures for a "normal" work record, a "poor" work record and a "bad" work record.

[275] There was, unfortunately, no evidence before the court of Mr Govan carrying out a similar exercise. All that was before the court, in terms of figures, was an average net salary of a number of manual jobs in 2019 of £18,033 (if the median figure was used) and £14,403 (if the lowest decile figure was used). There was no evidence before the court as regards what this salary would have been between the years 1983 and 2018. If there had have been then it would have been possible to apply Mr Carter's assumptions to those figures

[276] After considering all the evidence and, in particular, the pursuer's deprived background and vulnerability prior to arriving at the school, Professor Macpherson's view on causality and Dr Scott's view on causality, I came to the view that it would have been likely that, but for the abuse, the pursuer would have developed symptoms of mental and behavioural disorder due to the use of substances and symptoms of anxiety and depression,

which would have impacted on his ability to work. However, as Dr Scott pointed out, these symptoms would not have been so severe, chronic or enduring and the pursuer would have been more likely engage in treatment/recovery.

[277] When what is set out in paragraph [276] is taken with: (i) the high unemployment when the pursuer entered the employment market in 1983; and (ii) the pursuer's lack of qualifications, I considered it was correct to assume that the pursuer would never gain promotion or further qualification. I also considered that the assumptions that Mr Carter made to arrive at a "normal" work record were reasonable ones. I then considered, having regard to all the evidence, that a reasonable approach was to use the figures that Mr Carter had produced for a "bad" work record. That meant an assumption had been made that the pursuer would have been unemployed for almost 10 years out of 51 year career (16 to 67 years of age). The pursuer's limited work record showed that he had managed to secure employment at a Forklift Truck Driver and I considered that it was reasonable to use the average salary for that occupation. That brought out an initial net salary wage loss of £409,175, to the end of 2020. That figure included a full year for 1983 but the pursuer did not reach 16 until a date in April 1983. I have therefore reduced the 1983 net salary by one third to £2,140 (from £3,210). As regards the 2021 net salary I have used the 2020 net salary of £18,705 but calculated it to the date of proof (rounding up slightly) to £15,600. Even though the pursuer's actual earnings were given as a gross figure of £28,351, Senior Counsel for the pursuer was content for that to be deducted from the past wage loss figure. The final figure for page wage lost was therefore:

Mr Carter's past wage loss figure	£409, 175
Deduction of one third of 1983 salary	(£1,070)
Addition of 10 months of 2021 salary	£15,600

Deduction of actual earnings	(£28,351)
Total past wage loss	£395,354

Loss of pension rights

[278] Dr Pollock's evidence was not challenged but I considered it was a matter of speculation as regards whether the pursuer would have joined a defined benefits scheme or a defined contribution scheme. However, the workplace pension was a scheme introduced in 2012 when auto-enrolment took place. I considered it was reasonable to assume that the pursuer would have joined such a scheme. Dr Pollock used an average gross salary of £25,225 for 2020 to arrive at pension loss of £26,340, but I have found that the pursuer would have had a lower 2020 net salary of £18,705 (which is a 2020 gross salary of £22,152 – see Table 4 in Mr Carter's supplementary report). In the circumstances I considered, taking a broad view, that the pension loss should be reduced to £23,100.

Future wage loss

[279] I considered that the evidence was clear that the pursuer would never work again. In the circumstances I considered that a multiplicand/multiplier approach was the most appropriate method of assessing the pursuer's future wage loss. I considered that multiplicand ought to be £18,705. The pursuer's written submission simply referred to what the adjusted Ogden Table multiplier ought to be (which was 12.67 before applying a discount for contingencies other than mortality) and made reference to Table 9 (loss of earnings to pension age 65) and 11 (loss of earnings to pension age 70). I presumed that some simple interpolation had been conducted but it was not clear to me how that multiplier had been arrived at. I also considered that there were potentially errors in the

calculation ultimately conducted to arrive at a figure for future wage loss. The defender, understandably given the position they adopted, did not comment on the appropriate multiplier or the calculation. Parties were agreed that a further hearing ought to be fixed in order to consider the question of interest and, in the circumstances, I considered that it would be appropriate at that hearing, to hear further submissions as regard the multiplier to be applied to the multiplicand that I have arrived at.

Future cost of treatment

[280] Dr Scott said the cost of CBT would be between £80 and £120 per session. She recommended 8 to 10 sessions of supportive CBT, then, if appropriate 10 to 12 sessions of trauma focused CBT. In my view a reasonable figure for the future cost of treatment is £2,200 (22 x £100).

Interest

[281] As I have already noted at paragraph [279], the parties were agreed that a hearing ought to be fixed to consider the question of interest.

Disposal

[282] For the reasons given above, I find that the defender is liable to make reparation to the pursuer. A hearing will be fixed to determine the question of interest, the appropriate multiplier for future wage loss, the appropriate breakdown in terms of section 15(2) of the Social Security (Recovery of Benefits) Act 1997 and expenses. The final decree will pronounced after that hearing.