Neutral Citation Number: [2020] EWCA Civ 180

Case No: B3/2019/1418

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE,
QUEEN'S BENCH DIVISION
Mrs Justice Cutts DBE
HQ16P02040

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/02/2020

Before:

LORD JUSTICE McCOMBE
LORD JUSTICE SIMON
and
LADY JUSTICE NICOLA DAVIES

- -

Between:

LONDON BOROUGH OF HARINGEY	**Appellant**
- and -	
FZO	**Respondent**

- -
- -

Michael Kent QC and Nicholas Fewtrell (instructed by Keoghs LLP) for the Appellant
Robert Seabrook QC and Justin Levinson (instructed by Bolt Burdon Kemp) for the Respondent

Hearing dates: 17-19 December 2019

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Approved Judgment

Lord Justice McCombe:

Introduction

1. This is the appeal of the London Borough of Haringey ("the Appellant") (the Second Defendant to the proceedings) from the order of 23 May 2019 of Cutts J.

2. The judge ordered that there be judgment against the Appellant and a Mr Andrew Adams ("the First Defendant") in favour of FZO ("the Respondent") in the sum of £1,112,390.70, with interest under s.35A of the Senior Courts Act 1981 in the agreed sum of £9,546.91. Permission to appeal was granted to the Appellant by my order of 7 August 2019. The First Defendant has not sought to appeal.

3. By a further order of 7 August 2019, I directed that the Respondent's name be anonymised in court documents by the initials, FZO. I made similar orders in respect of the identities of two witnesses, FZOR and FZOJ respectively. I also gave ancillary directions restricting access to court documents and imposed reporting restrictions in respect of information that might lead to the identification of those persons. The orders made in this second order continued arrangements to similar effect that had subsisted throughout the proceedings in the High Court. Interested parties are directed to the full terms of that order for their full effect.

Background and Issues at Trial

4. The claims brought by the Respondent against the First Defendant and the Appellant, the essential background facts, in outline, and the issues that were tried in the High Court are set out in paragraphs 2 to 8 of the judge's first judgment (on liability and causation), delivered on 20 December 2018 ([2018] EWHC 3584 (QB)). I can do no better than to quote those paragraphs:

> "2. The claimant claims damages for personal injury, loss and damage consequent upon sexual abuse and assaults committed upon him by the first defendant, a teacher at Highgate Wood School, Hornsey, London, where he was a pupil from 1980 until 1982 and then again for a short time in 1983/4. It is alleged that these assaults continued after he left the school up until and including 1988. The first defendant was employed at all material times as a teacher of physical education by the second defendant. Proceedings are brought against the second defendant on the basis that the London Borough of Haringey is vicariously liable for his actions.
>
> 3. On 13th March 2014 at the Crown Court sitting at Wood Green the first defendant pleaded guilty to two counts of indecent assault (one count relating to multiple incidents of kissing and touching between February and September 1980 when the claimant was aged 13 years and the other to a specific occasion when the claimant was required to perform oral sex upon the first defendant at a mosque between 1980 and 1982 when he was aged 14 or 15 years) and two counts of buggery (one count relating to multiple incidents between 1981 and

1982 when the claimant was aged 14 years and a similar count between 1981 and 1982 when the claimant was aged 15 years). On 18th July 2014 he was sentenced to a term of 12 years' imprisonment, later reduced to 8 years' imprisonment by the Court of Appeal, Criminal Division. He has recently been released on licence, having served half of his term.

4. A letter before claim was sent to the second defendant on the 10th August 2015. This defendant agreed to a limitation freeze on 13th November 2015. The proceedings were commenced against both defendants on 9th June 2016. It is the claimant's case that shortly upon his arrival at the school he was raped by another man named John Paul Monteil. Badly affected by this and unable to turn to his parents he confided in the first defendant who had encouraged him so to do. The first defendant told him that this meant that he, the claimant, was gay and that if this became known people would not understand and dislike him and his parents would throw him out of the family home. By contrast he, the first defendant, would understand, like him and be his friend. By this means it is alleged that the first defendant groomed and manipulated the claimant into sexual activity with him which included the anal rape of him almost from the start. There then continued frequent sexual activity between them until the claimant was about 21 years with very occasional contact thereafter. The claimant asserts that he has suffered complex post-traumatic stress disorder as a result of the abuse.

5. The first defendant admits that he had "sexual relations" with the claimant from about September 1980, that such activity constituted an assault and that it was abusive by reason of the claimant's age and his inability to consent to the same. The sexual contact is admitted to have been regular but not daily. There is some dispute as to the precise activity but the first defendant admits raping the claimant. He makes no admissions as to causation or loss. He raises the limitation defence.

6. The second defendant accepts vicarious liability for the first defendant's assaults while the claimant was first at the school between 1980 and 1982 but not thereafter. It asserts that after the claimant left the school there is clear evidence that he was consenting to the activity. It makes no admissions as to causation or loss. It too raises the limitation defence.

7. By notice dated 4th April 2017 the second defendant, should it be found liable to pay damages and/or costs to the claimant, claims indemnity or contribution from the first defendant. This is accepted by the first defendant by letter dated 28th June 2017.

> 8. It is agreed by the parties that the principal issues I am required to determine are these:
>
> i) Should the discretion afforded by Section 33[1] of the Limitation Act 1980 to disapply the limitation period be exercised in favour of the claimant?
>
> ii) What was the nature and extent of the sexual abuse and assaults perpetrated against the claimant? Precise findings are unnecessary.
>
> iii) Did the claimant give a valid consent to the sexual activity after he left the school up until 1988?
>
> iv) To the extent that he could not be said to be consenting is the second defendant vicariously liable for the assaults which occurred after the claimant ceased to be a pupil at the school up until 1988?
>
> v) What is the causation and effect of the claimant's ill-health?
>
> vi) What is the level of damages to which the claimant is entitled?"

Quantum of damage (the judge's issue vi)) was determined in a further judgment delivered by the judge on 23 May 2019, leading to judgment being entered in favour of the Respondent in the sum that I have mentioned.

Grounds of Appeal

5. The appeal is brought upon five grounds as follows (quoting the Grounds of Appeal document, with the Appellant there being referred to as "the Second Defendant"):

> "**Section 33 of the Limitation Act 1980**
>
> 1. The learned judge misdirected herself as to the correct application of section 33 of the Limitation Act 1980.
>
> 2. The learned judge failed, contrary to evidence, to conclude that the Second Defendant was exposed to the real possibility of significant prejudice.
>
> **Consent**
>
> 3. The learned judge was wrong in law and in fact to conclude that the Claimant did not consent to the sexual activity with the First Defendant between 1982 and 1988.

[1] Relevant provisions of the Limitation Act 1980 (for the purpose of the appeal) are set out in the Appendix to this judgment.

Vicarious Liability

4. The learned judge was wrong in law to hold that the Second Defendant was vicariously liable for any assault by the First Defendant after the Claimant first left Highgate Wood School in 1982.

Causation

5. The learned judge's findings on diagnosis and causation were not supported by the evidence and were not adequately explained."

6. Clearly this is a case where the claims were brought well outside the primary limitation period applicable in respect of personal injury caused by assault. That primary period is 3 years from the date of knowledge of injury on the part of the person assaulted: Limitation Act 1980 s.11(4). The Respondent was a minor when first assaulted and for some time thereafter. He attained majority on 13 September 1984. By s.28(1) of the 1980 Act, the relevant period of three years, in respect of assaults prior to the Respondent's majority, began on that date and expired on 13 September 1987. For assaults after the Respondent's 18th birthday, the limitation period was 3 years from the date of each assault. As the judge noted, therefore, the claim was brought between 25 and 30 years after the expiry of the primary limitation period in respect of injury caused by the assaults in issue.

The Facts in Summary

7. The judge's first judgment is a long and careful one of 345 paragraphs and 78 pages. It is necessary to say only a little more about the facts for the purposes of the appeal to provide an overview of the evidence. I begin with the Respondent's account, which was largely accepted by the judge. The Appellant criticises the judge for her approach to issues of credibility between the Respondent and the First Defendant and her approach to the findings of fact in the context of considering whether the limitation period should be disapplied. I do not forget that important question on the appeal and return to it later.

8. The Respondent was born on 13 September 1966 and is now, therefore, 53 years old. He grew up in north London with his parents and older siblings. One of those siblings was a sister, FZOJ, who gave evidence before the judge; no other family member did so.

9. There was a dispute at trial as to the financial means of the Respondent's family. The details do not now matter, save in so far as the Appellant attacked what they argued was an example of a lack of consistency/credibility in the Respondent's account overall. It suffices to say that the family appears to have had enough money for normal needs but was not well off. At junior school, the Respondent excelled at swimming and he claimed he was happy at that school, although text messages emerged during the proceedings in which he had spoken in very disparaging terms about his fellow pupils when, in adult life, he was invited to a former pupils' reunion. He had some involvement in drama at a theatre school for the young and, for a period, was a cast member in an important West End production.

10. He moved to a secondary school at Wood Green and then in early 1980 to Highgate Wood School ("the School") (where the First Defendant was employed as a teacher of physical education) when he was about 13 ½ years old.

11. The essentials of this account of the family background and of the Respondent's early schooling were confirmed by FZOJ in her evidence. A teacher from the Respondent's junior school, in unchallenged evidence, described the Respondent as a happy child, cheerful and a pleasure to teach. He did speak of one other child who, on one occasion, had deliberately broken a model glider owned by the Respondent, but he did not remember any other difficulties between the Respondent and his fellow pupils. The Appellant did not call any other of the Respondent's former teachers, its own former employees, to give evidence.

12. The Respondent said in evidence that he was initially happy at the School (Highgate Wood) where he met the First Defendant. The First Defendant was then in his early thirties.

13. On one occasion, early in the Respondent's time at the School, he was allowed by his parents to stay overnight with a friend with whom he had been performing in a school play on that day. Instead of going directly to the friend's home, they went first, together with others, to the flat of a man called Monteil. Monteil allowed the Respondent's friend and others to smoke and to drink alcohol. The friends became very drunk. The Respondent said that he took his friend, a girl of his own age, back to her home, planning to stay there overnight as had been originally intended; her father was angry and, having taken his daughter into the house, refused to admit the Respondent. The Respondent, fearful of going home, first took refuge in a bus shelter, but then when it became too cold (on this winter night), he returned to Monteil's flat where he asked to stay. While he was there, Monteil then raped him.

14. The Respondent said that he was scared and confused by what had happened and did not tell his parents about it. He was off school, however, for about a week. On his return, the First Defendant seemed to notice something was wrong and encouraged the Respondent to explain. He began to drive the Respondent home after school and eventually the Respondent told him about what Monteil had done to him. Then, as the Respondent explained it, the First Defendant encouraged him to go into detail about what had occurred. The First Defendant told the Respondent that because of what had happened he was gay and would be rejected by his family and by society; however, the First Defendant told him that he would not treat him in that way and that the Respondent could rely upon him and trust him.

15. On one of the drives home after school, not long thereafter, the First Defendant touched the Respondent's thigh and kissed him on the cheek. Shortly after that, he enticed the Respondent into his home and, said the Respondent, anally raped him. This, the Respondent said, became a regular occurrence; rapes, he said, occurred at every opportunity in car parks, in the changing rooms in the School's sports hall and on Hampstead Heath where the First Defendant had taken the Respondent to witness men engaged in sexual activity. There was another such incident, said the Respondent, which occurred on a visit to a mosque; he was also taken by the First Defendant to public lavatories to watch men having sex. He also said that he was made to share a tent with the First Defendant on a school kayaking trip. There was another time when, as the Respondent claimed, he was at the First Defendant's home

and was semi-naked when the School's Deputy Head arrived and saw him in this state but did not intervene.

16. The Respondent said that he felt unable to resist sexual activity with the First Defendant, having become convinced that he would otherwise be exposed as being homosexual and that his life would become dreadful. He began to believe that the First Defendant was the only person that he could trust and that his family would disown him if they learnt what was happening. He began to conceal his times with the First Defendant by pretending that he was spending time with friends at their homes. The Respondent described suffering from anxiety, fear and guilt, adversely affecting his concentration on schoolwork. He was, he said, isolated from his peers and began to be bullied. The First Defendant did not help to protect him.

17. There was a culmination of the bullying outside the school when he was attacked by eight or nine children. This led to the Respondent being taken away from the school and sent to a private school for a short period between 1982 to 1983. However, the Respondent said that he continued to see the First Defendant at his house and on the Highgate Wood school sailing trips which he continued to attend. The sexual activity continued as before. The Respondent left the private school and returned to Highgate Wood for a short time in 1983/1984.

18. It was common ground that the sexual activity between the Respondent and the First Defendant continued until the Respondent was 21 years old and left to work in Australia.

19. The First Defendant gave a different account of what happened between him and the Respondent over these years. His version was that it was the Respondent who had initiated the contact at the School and had encouraged the sexual activity which was always mutually consensual. He denied any such activity at the School premises and he denied a number of other details of the Respondent's account of what had occurred, including the evidence about the visit by the Deputy Head to his house on the occasion when, as the Respondent had said, he had been seen in a state of undress. The First Defendant said it was the Respondent who had initiated the visit to Hampstead Heath and to the public lavatories. In short, it was the First Defendant's case that it was the Respondent who "groomed" him rather than the reverse. The First Defendant said that he had accepted, however, that as a teacher his conduct had been inappropriate, and indeed criminal, and that he had, therefore, pleaded guilty to the criminal charges.

20. Although the Respondent had left school with few, if any, formal qualifications, he had an aptitude for work with computers and obtained a number of employments in that field after leaving school. Initially, while in the United Kingdom, he worked for four different companies. In evidence he said that he still felt "unworthy, evil and toxic" and feared that he would lose his job if his employers found out. He was also concerned that he might have AIDS.

21. In 1988, one employer began to send employees to financial advisers to obtain pension and insurance advice. The Respondent was told he would have to undergo an HIV test. He declined to have the test and then went to Australia for a period, before returning to Europe about a year later. He said further that, when he was about 18 or

19, he discovered that the First Defendant was abusing a younger boy from the school who was aged 16 years. The Respondent said that this made him jealous and upset.

22. While in Australia, on 22 April 1988, the Respondent wrote in affectionate terms to the First Defendant in a letter crediting him with having enabled him to develop from nothing to someone with a career; he told the First Defendant that he loved him always and that he had been the only person in his life that he had loved and respected.

23. The judge recorded that between 1989 and 2011, the Respondent worked for at least 17 different employers in London, Paris, New York, Tokyo, Amsterdam, Dubai, Gibraltar and Costa Rica, and on a part-time (fly-in/fly-out) basis once more in Australia.

24. There was unchallenged evidence in witness statements from a number of employment colleagues of the Respondent from this period.

25. Between 1993 and 1996 the Respondent worked for Cantor Fitzgerald. His employment was terminated in January 1996 because, as his employer claimed in a letter, he did not appear able to progress systems projects beyond basic levels so as to provide colleagues with support on longer term projects; he also was said to have high absence levels. In this period, the Respondent sought medical help from a psychiatrist (Dr Read) for depression, "binge-eating" at night and "self-destructive behaviour". His evidence was that he could not bring himself, at that stage, to be fully frank or to talk about the abuse suffered in his youth.

26. A Mr Pover, a director of Cantor Fitzgerald at the time, said in a statement that the Respondent was smart and capable, but was a little awkward and occasionally "somewhat hyper". They had become friendly, but they were not close; the Respondent had appeared fairly sociable in small groups. Mr Pover spoke of the Respondent's absences from work, his missing of a deadline and his failure to take opportunities offered to him.

27. Between 1998 until the end of 1999, the Respondent was working for Banque Paribas in Paris. A Mr Gordon Stewart, who worked in a similar role, said in his statement that he saw the Respondent on most days, and they would sometimes meet for coffee. The team sometimes socialised in the evenings when the Respondent appeared "vivacious and chirpy"; he got on well with everyone in the office. Mr Stewart described the Respondent as innovative and gifted; he said that he saw nothing to cause him to suspect that the Respondent had psychiatric issues. He had no doubt that the Respondent would continue in a successful career.

28. In 2001 the Respondent was working in Dubai. The office manager at the time, Ms Karen Searle, described the Respondent as highly intelligent, capable and confident; they enjoyed good banter in the office. She described the team as socialising well, including on a trip to Oman one weekend. She said the Respondent was "definitely one of the gang".

29. Similar evidence was given by a Ms Gill Leivesley who worked with the Respondent between April 2003 and 2005 in Gibraltar.

30. In 2005 the Respondent worked for a period in Costa Rica. Mr David Carruthers, the Chief Executive Officer of the company said the Respondent was highly competent and that it was a disappointment when the Respondent decided to leave the company at the end of his probationary period.

31. On return from his first period in Australia, after an initial spell working in London, the Respondent had a number of employments in Paris. During this time, when he was aged 22, he met FZOR, who became his long-term partner. The partnership has continued ever since. The judge summarised this relationship as follows:

> "97. The claimant said that when he was aged 22 and living in Paris he met his partner FZOR who is 10 years older than him. He has been in a relationship with him ever since. Their sexual relationship has always been difficult. He said that he is repulsed by sex and does not enjoy it. He has never been able to ejaculate with anyone. He avoids showing anyone his body. He and FZOR have never shared a bed or a room.
>
> 98. FZOR said that he met the claimant in 1991. Eventually they moved in together. He described the claimant as someone who could be sociable and who was bright and excelled at work. There was however "a dark side" to him that he did not understand. He was terrified of having AIDS but would not get tested. From about 1999 the claimant started to have mood swings with bouts of depression and anxiety about twice per month during which he would shut himself away from the world. The claimant was always anxious about his family. He liked them in some ways but did not want to stay with them for long. FZOR said that the claimant would never stay in any job for long. At the time he would not say why that was. Their sexual relationship had never been easy. They had not had any sex since approximately 2008. They have always had separate rooms at the claimant's request.
>
> 99. FZOJ, the claimant's sister, said that she tried to stay in touch with the claimant through the years. They would talk regularly even when he was abroad. He never seemed happy. They were always asking each other what it was that he wanted. She and their parents often wondered why he changed jobs so frequently. She would go to visit the claimant in Paris from time to time, as would her parents. She knew he lived with FZOR. There was never a discussion about it but since about 1991 she was aware that he was gay."

(I note, in passing, that this is one of the many areas in respect of which the Appellant complains that the judge did not give adequate attention to some inconsistency of the Respondent's evidence, either internally or with other evidence, such as that of FZOJ.)

32. There was also differing evidence from the Respondent and the First Defendant about their ongoing contact and its extent in the period after the Respondent returned to

Europe from Australia in 1989. There was some continued contact. The Respondent's case was that he contacted the First Defendant largely in times of crisis or when he had been drinking or using drugs. The Respondent denied that there was any continuing sexual relationship; he described an incident in Gibraltar in 2003 when there were "fumblings" which he had rejected. The judge recorded that the First Defendant had agreed that the last sexual activity between them was when he visited the Respondent in Gibraltar in 2004 on an occasion when they had both consumed cocaine.

33. The Respondent was shown screen shots of text messages that he had sent to the First Defendant in 2009 to 2011 (any replies to which have not survived or at any rate were not disclosed by the First Defendant); in these the Respondent had written in graphic terms to the First Defendant, including what the Respondent said he wanted the First Defendant to do to him sexually. The Respondent said that he had written these in times of difficulty. He said that when he tried to engage the First Defendant he could only do so when he tried to indulge the First Defendant's sexual fantasies; otherwise there would be no response.

Breakdown in 2011, Treatment and Report to Police

34. The denouement occurred in September 2011 when the Respondent (then 45 years old) suffered a major mental breakdown. At this time, he was working for KPMG in Paris. There was no dispute that this breakdown did indeed occur nor that the Respondent was no longer able to work because of it. A key issue in the case was the extent to which the sexual abuse perpetrated upon the Respondent by the First Defendant contributed to the breakdown and was the cause of his agreed ill-health since then.

35. Following the breakdown, the Respondent initially received medical attention in France and subsequently, from November 2011, at the Capio Nightingale Hospital in London. The Respondent had seven admissions to that hospital in the period up to January 2014. The records from those admissions are conveniently summarised in the report of Dr Jane O'Neill (21 March 2016), the expert psychiatrist witness called by the Respondent. I adopt that summary of the history in what follows below.

36. FZOR, the Respondent's partner, said that it was during this breakdown that the Respondent first disclosed to him, in general terms only, that he had been abused by a PE teacher while at school from the age of 13. It is noteworthy that there had been no such disclosure previously during a relationship that had subsisted from about 1989. It seems that FZOR's evidence was not challenged.

37. The records summarised by Dr O'Neill for the November/December 2011 admission to the Capio refer to "History of abuse of alcohol and cocaine" and to "Abused/affair with teacher. Still in touch." On admission, the Respondent is noted to have said that he drank alcohol "mainly on weekends, 4 glasses of champagne. Cocaine – 1g on weekends, snorting, last used 3 days ago". The discharge letter is said to have diagnosed "ADHD and Generalised Anxiety Disorder".

38. The first significant mention of sex abuse in childhood in the Capio notes seems to have been on his third admission in June 2012; the Respondent had then been interviewed by the police. The Respondent's evidence, recorded by the judge, was

that concerns expressed by doctors at the Capio about whether the Respondent's abuser was still abusing others made him overcome his initial wish not to report the matter to the police. He did then make a report and was interviewed in June 2012; the interview video recorded by the police.

39. Throughout the admissions to the Capio up to August 2013, the Respondent's treating consultant was a Dr Basquille. By June 2013, he was diagnosing Adjustment Disorder and Emotionally Unstable Personality Disorder ("EUPD"), with reference to substance abuse and to childhood sexual abuse. On 5 August 2013, Dr Punukollu – a consultant covering for Dr Basquille – recorded that the Respondent had not had trauma focused therapy and that he would benefit from this. On 9 August 2013 there appears a second opinion from Dr William Shanahan, the Medical Director at the Capio in these terms:

> "Complicated man, problems from childhood, unfortunately I think the sexual abuse has left him indelibly marked psychologically and has affected his personality structure. As is so often the case with abused people, he spent years effectively apologising for having initiated or being complicit in the abuse and with the fact this has left him as a toxic person as he puts it.
>
> I do think FZO is keen on a programme that will intensively address his trauma and abuse"

The psychotherapist, who then saw the Respondent on 13 August 2013, reported a need for "long-term therapy" and a focus "on strategies to cope with hyper arousal and strong emotions [which] should lay the foundations for future traumatic focussed therapy". The notes record (on 20 August 2013) that the health care insurer would not support such therapy.

40. The Respondent first contacted solicitors, with a view to a civil claim, on 7 May 2014. The solicitors asked the police in September 2014 for various documents, including a copy of the Respondent's witness statement in the criminal proceedings (to avoid having to go through all the details once more with the Respondent). There was the pending appeal by the First Defendant against sentence which was dealt with on 13 February 2015. In May 2015, the police agreed in principle to provide the statement which was eventually disclosed on 17 July 2015. On 10 August 2015 the letter before action was sent.

Medical Experts

41. Before turning to the judge's findings and the grounds of appeal, it is necessary to give a short summary of the expert opinions provided to the court. As mentioned already, the psychiatrist instructed for the Respondent was Dr Jane O'Neill. The expert instructed for the Appellant was Professor Anthony Maden. This evidence and the conflict between the experts are material to Grounds 1 and 2 (on limitation) and to Ground 5 (causation). Those grounds are significantly interlinked.

42. The judge dealt with this evidence in two lengthy sections of her judgment, paragraphs 121 to 178 on limitation, and paragraphs 221 to 332 on diagnosis and causation. She clearly (and rightly) endeavoured to isolate the medical evidence

relating to the separate questions of limitation and (subject to limitation) causation. For present purposes, however, I propose to take both aspects of the medical evidence together.

43. The gist of the medical issues can usefully be taken from the joint statement of the two doctors dated 3 September 2018.

44. The doctors both acknowledged that there were problems for them arising from the fact that material events took place over 30 years previously

> "… and memory is often not reliable over such long periods of time. We agree that recall is an active mental process and that sometimes the content and meaning of recollections change with time".

They agreed that the Respondent's recall might have been further affected by drugs and alcohol.

45. Both experts fairly acknowledged, however, that the "interpretation" of the witness evidence was a matter for the court. They also recognised that the outcome, as regards diagnosis and causation could differ depending upon the court's assessment of the factual evidence. As will appear later, it seems to me that this mutual acknowledgement of the importance of the judge's conclusions on the primary facts is of fundamental importance on the appeal.

46. The doctors agreed that the Respondent suffers from EUPD. However, Dr O'Neill's opinion was that he also suffers from Complex Post-traumatic Stress Disorder ("CPTSD"), now appearing as a diagnostic category in ICD-11. Professor Maden noted that ICD-11 remained unpublished. His view was that

> "…CPTSD is essentially another way of describing a personality disorder, and his experience is that most experts in this field regard it as having a considerable degree of overlap with emotionally unstable or borderline personality disorder".

His view was that CPTSD does not appear in standard diagnostic texts and that it is an inapposite diagnosis in the present case because the abuse was not perceived as "traumatic" by the Respondent, either at the time or for years afterwards, in the required sense. Dr O'Neill considered that CPTSD is an available diagnosis for those who come to realise over time the nature of abuse inflicted upon them and where they have been conditioned (or "groomed") into acquiescence in the abusive acts at the time that they occurred, i.e. the traumatic effect is postponed.

47. The experts' agreement as to the Respondent's present state of mental health and their disagreement over diagnosis are succinctly expressed in two paragraphs of their joint statement as follows:

> "33. We agree that FZO's present state represents a major change from his pre-2011 state. Dr O'Neill would characterise his present state as PTSD. Professor Maden accepts that some experts would call his condition PTSD but points out that the

> diagnosis is often used loosely. Professor Maden stands by his formulation of a worsening of personality disorder exacerbated by drug and alcohol misuse, or possibly a depressive episode. Professor Maden gives weight to the documented slow evolution and emergence of post-traumatic symptoms after the 2011 breakdown. He notes that FZO says his attitude changed when he perceived that Adams was unsupportive after the 2011 breakdown. Professor Maden believes FZO's response at the time was typical of borderline personality disorder but inconsistent with PTSD relating to events that occurred more than 30 years earlier.
>
> 34. We agree that for diagnostic purposes the distinction is of relatively minor importance as these diagnoses are different ways of conceptualising a breakdown. We agree however that the distinction is important when considering causation and treatment."

48. On causation, the experts disagreed as to the extent to which the abuse by the First Defendant contributed to the Respondent's mental state in 2011 and thereafter, and to its impact upon his life. I believe that the parameters of the disagreement can be seen from three further extracts from the joint statement. At paragraph 42, the experts wrote:

> "42. We agree that the abuse by Adams is the sort of the abuse that one would expect to exacerbate an emotionally unstable or borderline personality disorder. We disagree about the extent to which it is likely that the abuse did in fact exacerbate FZO's personality disorder."

In paragraph 44 they said:

> "44. Dr O'Neill believes the abuse by Adams was the main cause of FZO's personality disorder/complex PTSD. Professor Maden believes the abuse by Adams made his personality disorder worse than it would otherwise have been but he does not believe it was the main cause of his mental health problems, particularly as FZO maintained a friendship with Adams for decades afterwards. Professor Maden believes it is impossible to be more specific in assessing the degree of the contribution to his problems because of the factual uncertainties."

Finally, in paragraph 45, there is this:

> "We agree that the 2011 breakdown was precipitated by FZO's loneliness and isolation when commuting to work in Amsterdam, exacerbated by his use of alcohol and drugs. We agree that the abuse was relevant to the extent that it contributed to his personality disorder and therefore to his vulnerability."

49. As for the impact of the Respondent's mental state upon his everyday life, the experts said this at paragraphs 55 and 56:

> "55. We agree that some of our differences arise because of different understandings of what constitutes the effects of mental health upon a career. Dr O'Neill believes his frequent changes of job result from mental health problems. Professor Maden believes that frequent changes of employment have become the norm for many people and in some fields of work will lead to more rapid progression and higher salaries. Dr O'Neill disagrees and is of the opinion that it is not typical for a skilled individual to have over thirty jobs. Nor is it typical for someone to leave employment when ostensibly they are perceived to be performing adequately.
>
> 56. We agree that since 2011 his mental health has had a major impact on his work. We agree that before 2011 he ran into difficulties at work in 1996 through the misuse of drugs. Professor Maden believes that apart from 1996, when he improved without treatment, the sole or main evidence for pre-2011 work-related problems is FZO's retrospective self-report."

50. On the issue of limitation, I should record the experts' views as given in paragraphs 70 to 72 of the joint statement as follows:

> "70. We agree that for many years he did not complain because he did not regard the relationship as an abusive one. We agree that he has never been psychologically or psychiatrically disabled from initiating a claim.
>
> 71. We agree that whatever the reasons for the delay it has greatly complicated the work of the expert because of a deterioration in the cogency of the evidence as the result of the passage of time. We agree that FZO's parents are both dead and there are uncertainties about his early years which would be relevant to establishing the causes of a personality disorder. We agree that there are important missing records relating to his childhood, his education, attendance at stage school, and details of his employment. We agree we have seen no records relating to his work in the USA. We agree that FZO says he saw a psychiatrist in 1993 and neither of us has been any records of that. …
>
> 72. We agree that it is more difficult to evaluate this claim in the absence of critical information that would usually be seen as important when establishing the causes of a personality disorder. We disagree however about the extent of those difficulties. Dr O'Neill regards them as relatively minor. Professor Maden believes they are major and that without reliable information concerning the family background and

> childhood experiences it is impossible to understand the origins of any personality disorder. ”

The Judge’s Judgment

51. This was a case in which, in accordance with usual practice in cases involving alleged sex abuse, the issues of the disapplication of the limitation period, liability and causation were tried together, in order to avoid the claimant having to give evidence twice, if the action were to be allowed to proceed outside the limitation period. Thus, the judge heard full evidence from both the Respondent and the First Defendant on all the issues of fact underlying the relationship between them before deciding whether the limitation period should be disapplied. In view of the attack by the Appellant upon various aspects of the judge’s interlinking conclusions on a number of issues, it is necessary to set out rather more fully than might normally be the case a summary of those conclusions and the reasons for them.

52. At the outset, the judge summarised the important decisions on the application of the principles affecting the exercise of the discretion to disapply a limitation period under section 33 of the 1980 Act. She referred to the speeches of Lord Hoffmann and Lord Brown of Eaton-under-Heywood in *A v Hoare* [2008] UKHL 6, as to the unfettered nature of the judicial discretion under the section and, from Lord Brown’s speech, the recognition that a substantially greater number of allegations of the present type (not all of which will be true) are likely to be made under the modern law than had previously been the case; it was, therefore, necessary to enquire carefully as to whether it will be possible for the defendant to investigate sufficiently for there to be a reasonable prospect of a fair trial. Lord Brown contrasted cases where there had been a conviction and where a claim had come “entirely out of the blue with no apparent support”.

53. The judge set out the statement from the speech of Lord Hope of Craighead in *AS v Poor Sisters of Nazereth* [2008] UKHL 32 as follows:

> “25. The burden rests on the party who seeks to obtain the benefit of the remedy. The court must, of course, give full weight to his explanation of the delay and the equitable considerations that it gives rise to. But proof that the defender will be exposed to the real possibility of significant prejudice will usually determine the issue in his favour.”

54. The judge said the following about the approach to be taken in a trial involving the section 33 issues and the substantive issues together:

> “16. I have heard evidence in this case and am thus determining the section 33 issue along with the substantive issues in it. It is clear from paragraph 74 of the judgment of Lord Justice Auld in *KR v Bryn Alyn Community (Holdings) Ltd* [2003] EWCA Civ 85, approved in *B v Nugent Care Society* [2009] EWCA Civ 827, that in such circumstances I should take care not to determine the substantive issues, including liability, causation and quantum, before determining the issue of limitation and, in particular, the effect of delay on the cogency of the evidence.

> This is because much of such evidence, by reason of the lapse of time, may have been incapable of being adequately tested or contradicted in the course of the trial. That is not to say that my overall assessment of the evidence is irrelevant to the issue of limitation. As was made clear in *JL v Bowen* [2017] EWCA Civ 82 the correct approach is for the court to adopt an overall assessment of the evidence, which includes weighing up any adverse findings made against the claimant, and the effect of such delay on the same. The reason is given in the judgment of Lord Justice Burnett, as he then was, at paragraph 26:
>
> > "The logical fallacy with which Lord Clarke MR was concerned in paragraph 21 of the *Nugent Care Society* case and Auld LJ in paragraph 74(vii) of the *Bryn Alyn* case was proceeding from a finding on the (necessarily partial) evidence heard that the claimant should proceed on the merits to the conclusion that it would be equitable to disapply the limitation period. That would be to overlook the possibility that, had the defendant been in a position to deploy evidence now lost to him, the outcome might have been different. The same logical fallacy is most unlikely to apply in the reverse situation especially when the case depends on the reliability of the claimant himself."
>
> Burnett LJ then gave the example of a claim brought arising after an alleged accident which the judge, having heard evidence, concluded did not occur. In such circumstances the claimant could not prove that it would be equitable to disapply the limitation period having regard to the balance of prejudice. He concluded that it is not realistic to shut one's eyes to findings and conclusions reached following a full trial."

55. The Appellant argues on the appeal that the judge did not sufficiently separate the factual issues relating to limitation and to the other issues respectively. It is submitted that she impermissibly factored into her decision on limitation adverse findings against the First Defendant whereas only adverse findings against a claimant are material in deciding the limitation issue. I turn, therefore, to the structure of the judgment.

56. The judge summarised the evidence of the Appellant and the evidence of his sister, FZOJ, about their early family life. She then set out the Appellant's evidence about his time at the School and about the abuse that he claimed had occurred in that period and up to 1984 when he left the School for the second time. She summarised the Appellant's unsatisfactory school reports for March 1981, involving his absences from school and his lack of effort, save in physics and drama. She dealt with the only other reports (March 1984) which she described as "mixed".

57. His sister's evidence for the period was summarised. She then dealt with the First Defendant's evidence about this period and in the period until the Respondent was 21, when their sexual relationship continued after the Respondent had left the School finally.

58. The judge then dealt with the evidence relating to the periods after the Respondent left school, first in the time before he went to Australia for the first time and then in the period 1989-2011. In paragraphs 121 to 123, the judge addressed the medical evidence concerning limitation and the disclosure to the police. She dealt next with the expert evidence bearing upon the limitation issue, summarising each doctor's evidence separately.

59. The judge then turned to the question of the application of section 33 and the submissions of each of the parties. Importantly for the appeal, she set out in paragraphs 156 to 159 the Appellant's submissions on this question. In outline, those submissions were: (1) the Appellant would be seriously prejudiced if the action proceeded; (2) the Respondent had never lacked capacity to complain, to instruct lawyers nor was he disabled from initiating a claim; (3) the cogency of the evidence had been affected: there was no evidence from the First Defendant's mother or from other teachers; there was nothing from the friend with whom the Respondent had visited Monteil; there were missing friends, former partners and work colleagues. There were missing school reports, and medical records; (4) the Respondent had been shown to be "unreliable and incapable of belief"; Professor Maden had pointed out inconsistencies in the Respondent's account; there were questions as to the Respondent's credibility "such that the claim should not succeed in any event". These matters, it was said, rendered "significant parts of the claimant's case implausible". In such circumstances it would not be just to disapply the limitation period".

60. The judge then drew her conclusions on limitation. In paragraph 161, the judge said this:

> "161. As was made clear in *JL v Bowen* [see paragraph 16 above] the correct approach is for the court, in resolving whether to disapply the limitation period, to adopt an overall assessment of the evidence, which includes weighing up any adverse findings made against the claimant, and the effect of such delay on the same."

She noted the attack on the Respondent's credibility and that this was not a case where there was a dispute as to whether abuse had occurred at all. She acknowledged that that was not an end of the matter and that causation was in issue. She noted the point for the Appellant that the diagnosis and opinions of psychiatrists were only as good as the information they received and that, since such information came entirely from the Respondent, he could not discharge the burden upon him under section 33.

61. The judge heard from both the Respondent and from the First Defendant and had had other (largely unchallenged) evidence from the Respondent's sister, partner and some work colleagues. She had, therefore, to assess the Appellant's frontal attack on the Respondent's credibility in the light of that evidence too for the purpose of deciding the issue under section 33.

62. In paragraphs 163 to 165 the judge assessed the rival credibility of the Respondent and the First Defendant. The admission of some of the alleged abuse on the part of the First Defendant was unavoidable in the light of his pleas to the criminal charges. However, as noted above and as was wholly clear to the judge, there was a significant dispute between him and the Respondent as to who was the prime mover in the sexual

activity that took place, i.e. as to who "groomed" whom and as to who was the driving force in the sexual activity. The judge found the First Defendant wholly incredible on these issues. She referred to the evidence of a teacher from the junior school and of FZOJ and said,

> "The idea that the child described by these witnesses would, at the age of 13, have sought out and groomed his 32 year old PE teacher for sex is in my judgment inconceivable… I do not accept [the First Defendant's] evidence that he was effectively pursued by the 13 year old claimant."

(The Appellant argues that the judge should not have made this assessment when addressing the section 33 question; at that stage it was only the credibility of the Respondent that was properly in issue.)

63. The judge accepted that there were four areas in which the Appellant's criticism of the Respondent in terms of inconsistency or reliability had greater force. The areas concerned were: (1) the Respondent's account that at the start of the abuse he was pre-pubescent and was fearful of being pregnant; (2) his apparent statement to Dr Read in 1996 that he had had relationships with both men and with women, which the Respondent now admitted was untrue; (3) a note made by Dr Basquille about drug use in 2011 and the Respondent's evidence that he had last used cocaine in 2009; and (4) the Respondent's evidence that his frequent job changes were because of his inability to integrate with colleagues and his feeling of isolation from them, as contrasted with the evidence from such colleagues which I have summarised above.

64. In each of these cases, while acknowledging the potential inconsistencies, the judge gave reasons for thinking that the Respondent's evidence might still be correct on these points and, in each case, she found that the possible inconsistency did not render the Respondent entirely unreliable or unworthy of belief now, as the Appellant submitted in its limitation arguments.

65. At paragraph 178, the judge concluded with this:

> "178. In conclusion I find that whilst there is some inconsistency in the evidence and that it can properly be said that at times the claimant has exaggerated or over-dramatised aspects of his evidence these are not such that the claimant is rendered so unreliable or incapable of belief that his claim must fail. They are matters to which, if the limitation period is disapplied, I would have careful regard in assessing the claimant's evidence and the extent to which I accept it."

66. The judge turned to other section 33 factors. First, she dealt with section 33(3)(a), the reasons for the delay in bringing proceedings. At paragraph 180, she said that all parties were agreed that it was not until his breakdown in 2011 that the Respondent came to view that what had occurred to him at the hands of the First Defendant was abuse, but that was where the agreement between the parties ended. At paragraph 182, the judge noted the defence argument that the likely explanation for the delay was that the Respondent,

> "… did not see his relationship with the first defendant as adverse and saw him as a friend. The claim was made because of his anger at the perceived failure of the first defendant to sufficiently support him at the time of his breakdown in 2011. They point to the fact that he was never psychiatrically or psychologically unable to make an earlier claim…".

67. The judge's conclusion was expressed in paragraph 186 as follows:

> "186. I accept the evidence of Dr O'Neill that it is impossible to look at the behaviour of the claimant and first defendant after the claimant left school separately from the grooming and abuse of him while he was at the school. I find that the delay in bringing these proceedings was because the claimant did not recognise that what happened to him at the hands of the first defendant was abuse until his breakdown in 2011. Had he done so it is inconceivable that he would have continued to be in touch with the first defendant in the way that he was. He failed to see it as abuse by reason of being groomed by the first defendant while it was happening. The way that he had been conditioned to think by the first defendant continued to operate in his mind. I agree with the submissions of Mr Seabrook that the delay in this case is a consequence of the grooming and emotional manipulation of the claimant which caused him to depend on the first defendant and to tolerate his behaviour rather than to sue."

68. The judge then addressed section 33(3)(b), the cogency of the evidence after the delay.

69. She concluded that the memory of neither the Respondent nor the First Defendant had been affected to such an extent that the matter could not be safely tried. She went on to consider whether the Defendants would have been in a better position to establish that the Respondent's claim was baseless or exaggerated as to the extent of the abuse if the trial had taken place earlier. She found that the detail of what happened would largely only be known to the two people directly involved and that it was difficult to see what further evidence there might have been on the issue.

70. The judge looked at the question about missing evidence relating to the incident with Monteil and the lead-up to it. She concluded that there was likely to have been little evidence available about this at any time and, moreover, that the defendants had not sought to find any such evidence. She did not accept that there would have been other independent evidence assisting on the point of when the Respondent reached puberty which was another factual issue in the case.

71. The judge then turned to the impact of delay upon the cogency of the psychiatric evidence. She said that there was some simplification about this for the purpose of these proceedings after the abandonment of the claim made for past lost earnings and pension. She noted the agreed position of the experts that the delay had complicated their work because of a deterioration in the cogency of evidence as a result of the passage of time. The Respondent's parents were both dead and there were

uncertainties as to the causes of the Respondent's personality disorder. There were medical documents missing: Professor Maden considered the difficulties arising from this as major; Dr O'Neill thought they were relatively minor. The judge noted that the defence had made no effort to find other witnesses, including schoolteachers. Notwithstanding delay, both psychiatrists had been able to reach firm conclusions.

72. On this the judge concluded at paragraphs 196 and 197 of the judgment as follows:

> "196. There is no doubt that there will be some difficulty in determining the reason for the claimant's mental health difficulties following a breakdown which took place some 24-31 years after the abuse occurred. Having said that there is some force in the contention made by the claimant that there would have been difficulty, perhaps even greater difficulty, in predicting when the claimant was 21 or 22 what the effects of the abuse would be on his future life. The burden of proving causation is on the claimant himself. The exercise of determining it will require a detailed scrutiny of the claimant's past life and history, together with an examination of the available evidence, particularly the medical evidence. It will also involve an assessment of the claimant's reliability as a witness. The courts are well used to carrying out such assessments. Given the delay in this case they would require particular care.
>
> 197. I have come to the conclusion that the delay has not had such an impact on the cogency of the evidence that the defendants have been exposed to the real possibility of significant prejudice."

73. On section 33(3)(d), the conduct of the defendant after the cause of action accrued, the judge took into account the incident, which she found had happened, when the School's Deputy Head had visited the First Defendant's home while the Respondent was present. She discounted (without dismissing) the Respondent's assertion that he was "half naked", but nonetheless saw force in the submission for the Respondent that his presence in the First Defendant's home should have aroused suspicion and she accepted that it had given the School a contemporaneous opportunity to make further enquiry which it did not take.

74. With regard to the duration of the Respondent's disability (section 33(3)(d)), the judge saw that it was accepted that there was no disability after he reached his majority and that there were no circumstances under this head affecting the exercise of the discretion.

75. Next, there was the extent to which the Respondent acted promptly and reasonably once he knew that he might have a claim and the steps that he took to obtain legal, medical or other advice and the nature of any advice received (section 33(3)(d) and (e)). The judge noted the period expired between the report to the police and the instigation of civil proceedings. She found that it was reasonable for him to have waited until the conclusion of the criminal proceedings given that, for whatever reason, he was psychiatrically unwell at the time. The judge found it was reasonable

for his solicitors to have refrained from taking a statement from him and to have waited to receive the statement already given to the police; even if a civil claim had been begun before the end of the criminal proceedings, it would have been stayed in any event. The judge found there was no additional prejudice to the defence caused by the additional delay.

76. The conclusion was that it was equitable to allow the action to proceed in relation to each defendant. She said (at paragraph 204):

> "204. …I take the view that, notwithstanding the delay that has occurred, through no fault on the part of the claimant, the ability of each defendant to defend the issue of the extent of liability has not materially been affected and a fair trial of the issue of causation is possible."

77. After resolving the limitation question, the judge proceeded to deal with the outstanding issues on the substance of the claim: the extent of the abuse, the question of consent on the part of the Respondent, vicarious liability of the Appellant for the actions of the First Defendant, causation (including medical diagnosis). There were then issues of treatment and prognosis and quantum which do not arise for consideration on the appeal.

78. In dealing with the extent of the abuse, there were issues of detail concerning "grooming", whether the Appellant (ignoring for this purpose issues of age) consented to any of the sexual activity, and as to whether some of the more extreme sexual activity occurred.

79. Again, in a sentence at the beginning of paragraph 206, which the Appellant criticises as reliant on a premature rejection of the First Defendant's evidence while assessing the limitation question, the judge referred to that rejection of his evidence that it was the Respondent who "groomed" him rather than the other way round. The judge accepted the Respondent's evidence on this issue.

80. On the issue of "consent", the judge addressed the Appellant's submission that all the activity that occurred after the Respondent left the School in 1984, i.e. until 1988, was consensual and happened when the Respondent had full capacity to consent.

81. At paragraph 213, the judge said,

> "A person consents to sexual activity with another if they (sic) have the freedom to consent. Submission is not the same as consent."

At paragraph 214, addressing Mr Kent QC's submission on this for the Appellant, she said:

> "214. …With respect to Mr Kent the lack of violence or aggression in the sexual activity is far from determinative of the issue of consent in this case. It is widely recognised that the grooming process obviates the need for either as the child is manipulated by such into submitting to it. That is what I find

> happened in this case. In those circumstances I consider that the claimant submitted to the sexual activity rather than giving true consent. There was no change in the sexual activity until the claimant went to Australia. I consider that the grooming of him by the first defendant continued to operate at this time such that no true consent was given. …"

82. With regard to vicarious liability, the Appellant had submitted that it was not liable in respect of any of the acts that occurred after the Respondent left the School for the first time in 1984. The Appellant argued that liability continued for all the acts up to the time of his departure for Australia in 1988. The judge referred to the test for liability set out in Lord Toulson's judgment in *Mohammed v Wm. Morrison Supermarkets PLC* [2016] AC 677. She found that the test was clearly satisfied in respect of all periods up to the Appellant's leaving the School for the second time in 1984 and that it was not broken in the period after that, prior to 1988. At paragraph 219, the judge said:

> "219. I have considered carefully whether the connection between the first defendant's employment and his wrongful conduct was broken after the claimant left Highgate Wood in 1984 such that it would no longer be right for the second defendant to be held liable for them after that time. In my view it was not. The later assaults, as I have found them to be, were simply a continuation of the behaviour that commenced while and because the first defendant was a teacher. This conduct is thus indivisible from that which occurred while the claimant was a pupil at the school. I consider it just in those circumstances for the second defendant to be held liable for it."

83. Turning to causation, the judge considered the medical evidence and the expert opinions in considerable detail. On diagnosis, she preferred the opinion of Dr O'Neill that the Respondent suffered from CPTSD. She found that what occurred fitted the wording of the descriptors in ICD-11 which in one of its forms was "designed to cover precisely the circumstances where the events evolve over time rather than a sudden dramatic trauma which is adequately and properly covered by PTSD". She rejected a submission for the Appellant that the abuse had to be violent to qualify. The judge also found that the grooming in this type of case could lead to circumstances causing dependence upon the perpetrator and difficulty or impossibility of escape.

84. The judge found it more probable than not that the Respondent was suffering from CPTSD. She repeated her rejection of Professor Maden's assessment of perceived inconsistencies in the Respondent's account. The judge referred to similar views formed by Dr Chloe Rackow and Dr Christopher Muller-Pollard. (Reliance on these additional sources is criticised by the Appellant.)

85. It had been put to the Respondent in cross-examination that the idea of trauma had come from him for the purpose of persuading the clinicians at the Capio to change their diagnosis from personality disorder to trauma in order that his health insurer would meet his claim. The Respondent denied this; he said the clinicians suggested trauma and potential benefit from trauma therapy. The judge said that she did not

accept that psychiatrists who had diagnosed trauma would do so without exercising their own professional judgment.

86. The judge said that she recognised that the Respondent had been admitted three times to the Capio before there was mention of PTSD/trauma. (It is asserted by the Appellant that there had been five such admissions before this is mentioned – but see below.) The judge found that it was when the Respondent began to speak to the police and the abuse came to the forefront of his mind that the symptoms became more obvious. She also referred to a "second letter in 2017" from Dr Muller-Pollard (which we have not seen) indicating that he had had the benefit of seeing the Respondent's presentation in the three years since he had first written in 2014. The judge considered that it could be properly assumed that this had caused him to come to "a different professional view" (i.e. presumably, that the Respondent suffered from CPTSD, as referred to in paragraph 286 of the judgment). The Appellant points out that the CPTSD diagnosis did not emerge from any source until Dr O'Neill reported in 2016 for the purposes of the litigation.

87. The judge then addressed the issue of the causation. She referred again to areas of agreement between the experts: uncertainty as to the facts relating to the Respondent's early childhood, the Respondent's temperament and the effect of the abuse by Monteil before that committed by the First Defendant, the Respondent's difficulty in coming to terms with his homosexuality. There was agreement that the abuse by the First Defendant was of the sort that one would expect to exacerbate EUPD or borderline disability. The judge noted the disagreement as to the extent to which the abuse was causative of the current condition. Professor Maden held his view as to the relatively minor effect because the Respondent had maintained a friendship with the First Defendant for decades afterwards. However, importantly, the judge noted (at paragraph 295):

> "In evidence Professor Maden said that if the court accepted the claimant's account that he was groomed in the way that he said he was his opinion on this matter would be different".

The judge noted also the agreement that the abuse suffered was relevant to the extent that it contributed to the personality disorder and to the Respondent's vulnerability.

88. The judge summarised the evidence of both experts on causation. In dealing with Professor Maden's evidence the judge recorded that the Professor agreed with Dr Shanahan's view in 2013 that the claimant's personality was "indelibly marked psychologically" by the abuse. She went on to note this (in paragraph 308):

> "308. Professor Maden expressed in his report his view that the abuse did not make more than a minor contribution to the claimant's mental health problems based on the fact that the claimant maintained what could only be called a friendship with the first defendant for decades afterwards. As I have indicated Professor Maden said that if the claimant's account of how the abuse started and what the first defendant said to him were accepted by the court he would not hold to this view."

89. At paragraph 313, concluding her summary of Professor Maden's evidence on causation, the judge said:

> "313. Professor Maden does not believe that the abuse by the claimant played any role in the 2011 breakdown. In the immediate aftermath of it he did not attribute it in any way to the abuse. It was only after their row and his rejection of the first defendant that he started to blame the first defendant for his problems. He does not believe that the abuse was of any great or lasting significance to the claimant until after he perceived the first defendant offered him inadequate support on his breakdown. His growing preoccupation with the abuse and its impact since has been encouraged by his treating clinicians who have seized on the abuse as the cause of all his problems."

Obviously that evidence was highly dependent on the findings of primary fact as to the nature of the abuse and the extent of its ongoing effect on the Respondent.

90. In paragraphs 325 onwards, the judge stated her conclusions on the causation issue. While the judge accepted on balance Dr O'Neill's view on diagnosis, she did not necessarily reject Professor Maden's evidence on the possible causes of the problems. She said (at paragraph 326):

> "This is because both psychiatrists agree that the claimant suffers from EUPD which has many similar characteristics to complex PTSD."

91. The judge said that the rape by Monteil had contributed to the Respondent's symptoms, but she found that it was not so to any great extent. She considered that it was artificial to separate out the two events in the way that Professor Maden had done. That was so because the First Defendant had used the fact of the earlier rape to create fear in the Respondent's mind; that rape and the abuse were intrinsically linked. The judge found that a large part of the bullying that had occurred at the School was linked to the abuse by the First Defendant. The judge also discounted any bullying at junior school as having had any significant contribution to the Respondent's mental state; the evidence of this was in any event slender.

92. In reaching her final conclusion that it was the First Defendant's abusive conduct which caused the Respondent's disorders, the judge said this (at paragraph 332):

> "332. …I have also taken into account that Professor Maden in his evidence said that his initial view that the first defendant's abuse of the claimant could not be said to be more than a minor cause of his EUPD would alter if the court accepted the claimant's account of the grooming and subsequent relationship with the first defendant. I have so found. Professor Maden also accepted the analysis of Dr Shanahan in 2013 that the abuse had "indelibly marked psychologically" the claimant's personality."

As noted in paragraph 335 of the judgment, the Respondent had remained unwell since the 2011 breakdown and had been unable to work since then. This was accepted by Professor Maden in his second report where he agreed that the Respondent had probably not been well enough to work since that time.

The Appeal and my Conclusions

93. I have set out above the formal grounds of appeal. On these grounds we had the benefit of very helpful written and oral arguments from counsel for both the Appellant and for the Respondent. I am grateful to them all.

Ground 1

94. Ground 1 contends that the judge misdirected herself as to the proper application of section 33 of the 1980 Act. As already mentioned, it is submitted that the judge wrongly factored into her decision on this issue findings adverse to the First Defendant. It is argued (paragraph 12 of the Appellant's skeleton) that it is *only* adverse findings against a *claimant* that are material in this respect.

95. We were referred to the judgment of Auld LJ in *KR v Bryn Alyn Community (Holdings Limited* [2003] EWCA Civ 85 where one finds this (in paragraph 74(vii)):

> "vii) Where a judge determines the section 33 issue along with the substantive issues in the case, he should take care not to determine the substantive issues, including liability, causation and quantum, before determining the issue of limitation and, in particular, the effect of delay on the cogency of the evidence. Much of such evidence, by reason of the lapse of time, may have been incapable of being adequately tested or contradicted before him. To rely on his findings on those issues to assess the cogency of the evidence for the purpose of the limitation exercise would put the cart before the horse. Put another way, it would effectively require a defendant to prove a negative, namely, that the judge could not have found against him on one or more of the substantive issues if he had tried the matter earlier and without the evidential disadvantages resulting from delay…"

96. As Burnett LJ (as he then was) said in *Bowen & another v JL* [2017] EWCA Civ 82 at [26], Auld LJ was concerned with the logical fallacy of proceeding from a finding, on necessarily partial evidence, that the claimant should succeed on the merits to the conclusion that it would be equitable to disapply the limitation period. Burnett LJ said:

> "26. …That would be to overlook the possibility that, had the defendant been in a position to deploy evidence now lost to him, the outcome might have been different. The same logical fallacy is most unlikely to apply in the reverse situation, especially when the case depends upon the reliability of the claimant himself."

At [27] Burnett LJ then said that there was clear authority for the correct approach in the judgment of Thomas LJ (as he then was) in *Raggett v Society of Jesus Trust of 1929* [2010] EWCA Civ 1002. Burnett LJ said:

> "27. …The complaint made by the appellants was that the judge had decided the abuse in question had occurred and had then disapplied the limitation period. They advanced a literal argument based upon the words of Lord Clarke MR that because she structured her judgment by dealing with her findings of fact first and only then considered limitation, she had erred. Unsurprisingly, that argument did not prosper. It is not realistic to shut one's eyes to findings and conclusions reached following a full trial. It is what is done with them in the context of the substance of the reasons for the limitation decision that matters."

97. In *Raggett's* case, the judge (Swift J), like Cutts J here, had structured the judgment by dealing with the findings of fact first. At [19], Thomas LJ found that the judge's analysis was "throughout based not on a finding that the abuse had occurred but on the cogency of the evidence of that abuse and the prejudice to the [defendants]". At [20] to [22]. Thomas LJ continued:

> "20. When this court observed that the judge must decide the issue on the exercise of the discretion under s.33 before reaching the conclusions on liability, it was enjoining a judge to decide the s.33 question on the basis, not of the finding that abuse had occurred, but on an overall assessment, including the cogency of the evidence and the potential effect of the delay on it. It was not seeking to prescribe a formulaic template for the construction of a judgment; it was leaving the judge to decide the best way to write the judgment which would expound the analysis that the law required.
>
> 21. In the circumstances of this case, it is clear from an analysis of the judgment that the judge approached the issue under s.33 entirely in accordance with principle. She reached a decision that was plainly open to her in the circumstances of the case; the evidence against Father Spencer was strong, particularly in the light of the evidence of the claimant's contemporaries at the College; it is important to note the observation of the judge at paragraph 66:
>
> > "Despite these criticisms of the claimant's evidence, [the Governors] did not seriously dispute the fact that Father Spencer had been guilty of some abuse, in the form of filming the claimant naked and fondling him sexually. However, they did not accept that the abuse was

> as long-lasting or as severe as the claimant had described."
>
> In contrast there were ample grounds for concluding that the prejudice to the Governors, particularly the death of Father Spencer, the inability of Father Edwards to give evidence and the general effects of delay, had not materially affected the ability of the Governors to defend the action.
>
> 22. There is, in short, no basis for concluding that the order in which the judge approached the issues in any way affected the substance of the way in which the discretion under s.33 was exercised or the decision reached.."

98. In the present case, as Mr Seabrook QC for the Respondent demonstrated, the judge set out the very principles upon which the Appellant relies for saying that she had erred in her approach. The judge then looked at the evidence, in the context of the full frontal attack upon the Respondent's credibility made by the Appellant for the purpose of showing that it would be inequitable to disapply the limitation period, if for no other reason, because of what the Appellant argued was the implausibility of the Respondent's account and his entire lack of credibility. The judge inevitably had to assess this attack in the light of all the evidence that she had heard. It was a case in which the fact of some abuse was incontrovertible in the light of the First Defendant's pleas of guilty in the Crown Court and the principal factual issue was as to who had been the "groomer" and the leader in the relationship. It was impossible for the judge to decide whether the Appellant's attack on the Respondent's credibility, made in pursuit of the Appellant's own argument on the section 33 issues, was a good one or not *without* regard to the credibility of the rival account given by the First Defendant. In my judgment, looking at the judgment as a whole, the judge clearly posed herself the question whether her assessment was impaired by material evidence lost in the passage of time and answered that question in the negative.

99. There was, as the judge said, nothing to suggest realistically that there was evidence missing that could have affected the outcome of this part of the case. The judge said this at paragraph 190 of the judgment:

> "190. Much of what the claimant says happened is accepted by the first defendant. The detail of sexual "relationships" is nearly always private. How they start and what goes on in the course of them is largely known only to the two people concerned. In this case the first defendant would have had every reason to keep his sexual activities, which were illegal, with the claimant private and hidden from view. It is difficult in those circumstances to see what other evidence there might have been available to the defendants which would assist them in determining the disputed extent of it."

100. In making her assessment of the Respondent's credibility for the purposes of the limitation question, at paragraph 161, the judge again referred to *Bowen's* case. She

considered the inconsistencies in the Respondent's account and the effect of the agreed diagnosis of EUPD on his reliability as a witness. She noted that neither psychiatrist was saying that a sufferer from this condition is necessarily rendered so unreliable that he is incapable of belief; that was patently not the case here.

101. I regard as being wholly unrealistic the Appellant's submission that the judge could not properly consider the respective credibility of both the Respondent and the First Defendant when dealing with the limitation issue.

102. If a defendant chooses, in a case of this type, to argue that a limitation period should not be disapplied because of the total lack of credibility of the claimant he/she/it must take the risk that a judge will have to assess that credibility, even for limitation purposes, in the light of the credibility (or lack of it) of the rival witness or witnesses. It may be that even when making an assessment of the claimant's credibility, in the face of a wholescale attack on it by the defendant for limitation reasons, a judge cannot avoid reaching a clear view as to the total lack of credibility of the other witness. The defendant takes that risk.

103. The judge was obviously entitled to consider "the other side of the coin" to the alleged incredibility of the Respondent, namely the credibility (or lack of it) of the First Defendant. In paragraphs 164 and following, the judge gives an entirely cogent and convincing statement of her reasons for finding the First Defendant's account wholly implausible. At all events, it was a conclusion to which she was well entitled to come even at that stage of the exercise, bearing in mind the effect that the delay may have had upon the cogency of the First Defendant's evidence (which she clearly did).

104. The rival credibility of the Respondent and the First Defendant was not the only issue to be resolved by the judge in deciding whether to exercise the discretion under section 33. The judge went on to consider fully and properly the other factors arising under section 33. She dealt with each of them in turn. Importantly, she went on to consider the impact of the delay on the ability of the experts to deal with the medical issues of diagnosis and causation, including difficulties arising from alleged inconsistencies in the Respondent's account. She considered the conduct of the parties and the extent to which the Respondent acted promptly and reasonably once he appreciated the potential claim.

105. In my judgment, the judge did not adopt an incorrect approach to the evidence overall on the limitation issues and the Appellant is simply wrong in its argument that findings adverse to a defendant can never be factored into the section 33 decision. Provided that the judge has considered whether the defendant has been significantly prejudiced with regard to the potential adverse finding, there can be no error in assessing rival issues of credibility in dealing with such an issue raised by the defendant itself. As I have said, if a defendant chooses to attack the credibility of a claimant in this context in order to found an argument that it would not be equitable to disapply the limitation period, he takes the risk that (to the contrary) it is the defence witness that turns out to be entirely incredible.

106. Having dealt with the section 33 issue, the judge proceeded to consider further the substance of the issues arising in the action: the extent of the abuse, consent, vicarious liability and causation.

107. As I have mentioned above in summarising the judge's judgment, she considered the medical evidence and opinion bearing upon the limitation issue. Reliance was placed by the Appellant on a number of perceived inconsistencies in the Appellant's account identified by Professor Maden. The judge considered these carefully in paragraphs 166 and following of the judgment and, while she accepted that there were some inconsistencies, she rejected others which she identified in those paragraphs. Her reasons for reaching her conclusions appear to me to be cogent and convincing. Professor Maden's expert evidence in this regard (on what were matters of fact) was being prayed in aid by the Appellant in its attack on the Respondent's credibility for the purposes of its argument on limitation. His evidence on this aspect proved to be unconvincing to the judge. Clearly, the judge was entitled to form her own view of this aspect of the credibility issue.

108. I would, therefore, reject Ground 1.

Ground 2

109. In Ground 2, it is asserted that the judge wrongly failed to find that the Appellant was exposed to the real possibility of significant prejudice by the delay.

110. The Appellant put at the forefront of its argument two statements from the earlier cases. First, there was Lewison LJ (with whom Pitchford LJ agreed) in *RE v GE* [2015] EWCA Civ 287 at [77], where he said:

> "Whether a fair trial can still take place is undoubtedly a very important question. However, it seems to me that if a fair trial cannot take place it is very unlikely to be "equitable" to expect the defendant to have to meet the claim. But if a fair trial can take place, that is by no means the end of the matter. In other words, I would regard the possibility of a fair trial as being a necessary but not a sufficient condition for the disapplication of the limitation period.' [77]"

Secondly, reference is made to Lord Hope's speech in *AS v Poor Sisters of Nazareth* (supra), quoted in paragraph 52 above (as adopted in *CD v Catholic Welfare Society* [2018] EWCA 2342)

111. It is only right to recall, however, that such remarks must be seen in the context of the cases in which they were made. For example, in *RE v GE*, Lewison LJ was merely stressing that the ability to hold a fair trial is not "the be all and end all". There are other factors to be considered. In that case, the court was dealing with a matter in which the long delay on the part of the claimant, unsatisfactorily explained, had been described by me (at [70]) as "egregious". That delay was a significant factor in the judge's decision not to disapply limitation and this court upheld that decision.

112. In this case the judge was, however, surely correct in her statement in paragraph 190 of the judgment that much of what the Respondent said had happened was accepted by the First Defendant. Such as was not so accepted, as to the nature and extent of the grooming and abuse, was necessarily private to the two of them and had to be

resolved by determining their respective credibility. As the judge said, it is difficult to see what other evidence would have assisted on those issues.

113. The Appellant's skeleton argument gives examples of areas in which better evidence of the background, the origins and effects of the First Defendant's abuse might have been available. At paragraph 24 of the document, the following examples are given:

> "24.1 What if any sexual experiences C had before sexual activity took place between him and D1?
>
> 24.2 What was the nature of that sexual activity while C was a pupil at HWS and did its nature change after he left and during the 20 years or so of C's continued relationship with D1?
>
> 24.3 How was C affected, if at all, at the time of or shortly after sexual activity with D1 while C was still a pupil at HWS?
>
> 24.4 Had C always regarded himself as 'evil, toxic and poisonous' as he now continually described himself this preventing him from forging relationships and lasting friendships as he now alleged.
>
> 24.5 What was the nature of any psychiatric diagnosis and how was such disorder or illness caused or contributed to (if at all) by the sexual activity between C and D1?
>
> 24.6 What was the cause of C's mental health breakdown in September 2011? Was it, as those treating him at the time recorded, because he had been bingeing on alcohol, cocaine and benzodiazepines due to isolation from his partner in a job in Amsterdam? Or was it the late symptomatic flowering of CPTSD stemming from the sexual assaults as contended for by C's medical expert?"

At paragraph 25, there is the following;

> "25. …There were also issues about C's previous sexual experience and what C had said to D1 about it: in particular, whether he had (and had told D1 he had) been raped by a lifeguard or simply that he had had sex with this person which was, as D1 understood it, consensual. This issue went to the very heart of C's case because it formed the basis of his account of grooming and becoming dependant on D1 upon which Dr O'Neill based her entire thesis."

At paragraph 26, the following is said:

> "26. There was also a major issue as to the extent to which C's relationships with others (including his parents) and his

> academic performance were affected by the abuse by D1 in those early years."

114. In my judgment, however, it is noteworthy that no significant concrete examples of missing witnesses have been advanced by the Appellant. It is hard to see that the Appellant could or would have called other members of the Respondent's family. They were surely unlikely to want the parents as witnesses. They had the sister FZOJ as a witness and had ample opportunity to cross-examine her but seem to have questioned her to no great extent. No other schoolteachers (the Appellant's own former employees) are identified as important missing witnesses who had been sought out but had been found to be unavailable. We are told that the Respondent's junior school teacher, Mr Bolton, was called by the Respondent, but the Appellant put no questions to him. No former pupils are identified as potential additional witnesses. Several former work colleagues of the Respondent gave witness statements which were unchallenged.

115. None of the matters now suggested to be material appear to have been investigated by the Appellant with available witnesses and there is nothing to show that other witnesses were sought but not found. The judge was right, in my judgment, to take into account that the Appellant had done little or nothing to make up the evidential deficiencies about which they then vigorously complained. The Appellant protests too much, given its inactivity in this respect.

116. The Appellant referred to the disagreement between the psychiatric experts as to whether and to what extent the Respondent's mental health problems and his breakdown in 2011 were attributable to the abuse by the First Defendant. Both psychiatrists thought that their task was rendered more difficult by the absence of medical and educational records. Reference is made to the joint statement of the experts which I have already quoted above. As noted above, Professor Maden's view was that these difficulties were major; Dr O'Neill thought they were minor.

117. The judge noted that records were missing, but she was of the view there was still "a wealth of such records in existence". She also saw that, notwithstanding the delay and these disadvantages, both doctors had been able to reach confident conclusions.

118. In the face of the disagreement of the experts as to the significance of the difficulties caused by missing records, I find myself unable to fault the judge's assessment of this factor in the decision on limitation. She saw the expert witnesses and, as with other witnesses that a trial judge has seen and the appellate court has not, it is not right to "second guess" the judge's decision on whose opinion is to be preferred, absent a clear indication that there has been an error of principle or some logical flaw in the assessment process. Looking at the later questions of diagnosis and causation, it is clear that there was a satisfactory expert debate based on the available evidence upon which conclusions could be properly drawn.

119. I cannot find that the judge's conclusion on this aspect of the section 33 considerations was wrong. I would, therefore, reject ground 2 also.

120. On the question of disapplication of the limitation period overall, I note that no criticism is raised about the judge's decision on the other factors arising under section 33(3)(a), (c), (d) or (e). It was necessary for her to weigh all the relevant factors. I do

not find that any of the arguments raised on ground 1 or ground 2 are enough to impugn the overall reasoning underlying the exercise of the judge's discretion.

121. I see no objection to the judge's approach to the order in which she had to make decisions and to make some findings of fact. In short, in view of the attack on the Respondent's credibility for the purposes of the Appellant's argument on limitation, she could not avoid assessing the relative credibility of the two main protagonists. If that led her to the conclusion that the First Defendant's rival account was "wholly implausible", then so be it. In my judgment, the way in which this judge addressed the questions in issue, the order in which she addressed them and then reached her conclusions was no more objectionable than was the approach of Swift J in *Raggett* (supra) which this court found in that case to be unimpeachable.

122. The present case is quite different from *Bowen* where the trial judge had made findings adverse to the claimant about the effect of abuse on him, but failed to apply them when considering limitation, contradicting the basis upon which he had exercised his discretion under section 33 in the claimant's favour. As Burnett LJ said in that case (at [19]),

> "An appellate court will be very slow to interfere with a decision under section 33 so long as there has been no misdirection of law or misapprehension of significant facts. Absent either of those features, an appellant would have a difficult task to persuade an appeal court that the judge's decision was wrong. The fact that the appellate court might itself have come to a different conclusion on the same material is neither here nor there."

123. Thus, I would reject the two grounds of appeal addressed to the limitation question and I now turn to the grounds addressed to the substance of the claim: (1) consent; (2) vicarious liability; and (3) causation.

Ground 3: Consent

124. I have set out above the crux of the judge's findings on this point. The nature of the abuse perpetrated upon this Respondent, and its extent, including the questions of consent/mere submission, were findings of primary fact, based on an assessment of both factual and expert witness evidence, with which this court will not interfere unless those findings were plainly wrong: see *Henderson v Foxworth* [2014] UKSC 41.

125. The Appellant's skeleton argument recites the passage in Clerk & Lindsell on Torts, 22nd Edition at 3-103 for the uncontroversial proposition that consent is a defence to a claim of trespass to the person. To this is added the passage at 15-94 of the same work as follows:

> "The victim's consent alone does not constitute a defence to a criminal charge of assault 'if actual bodily harm is intended and/or caused… Nonetheless, even though consent may not bar a prosecution, it is submitted that consent will constitute a good defence to a civil action in battery. The claimant cannot claim

> compensation for the consequences of an act which he has freely invited, or in respect of which he has consented'."

126. All this begs the question of what is "consent". This is an ordinary English word and will import the same meaning in both criminal and civil law. As our society's understanding of true consent or lack of it has developed, it seems to me to have become clear that the judge's basic proposition, stated at paragraph 213 of the judgment, succinctly and accurately expresses the law. I will quote it again:

> "A person consents to sexual activity with another if they have the freedom and capacity to consent. Submission is not the same as consent."

The judge then summarised Mr Seabrook QC's submission for the Respondent:

> "Mr Seabrook argues however that he did not have the freedom to do so, that his freedom was impaired by the grooming and manipulation process. The first defendant had engineered the claimant's dependency upon him and the claimant was required to be used sexually by the first defendant for the dependency to be met."

The judge accepted that submission, as appears from paragraph 214 of the judgment. For my part, I consider that she was entitled to do so.

127. The crux of the Appellant's argument on this point before us appears in paragraph 60 of the document as follows:

> "60. Essentially, D2 submits that freedom and capacity to consent in such a case as the present involves deciding whether:
>
> 60.1 The person is of an age and has the mental capacity to decide whether or not to engage in sexual contact;
>
> 60.2 In making such decision, he or she understands that such contact has a sexual dimension – so is aware of what he or she is doing or is allowing to happen;
>
> 60.3 The consent is genuine in the sense that the person's capacity (and ability) to decide has not been overridden by physical or psychological coercion."

128. In my judgment, the judge found on the facts that, as postulated in paragraph 60.3, the Respondent's consent was not genuine in that it had been overridden by psychological coercion, derived from the grooming and abuse during the period at the School.

129. Counsel for the Respondent referred us to the criminal case of *C v R* [2012] EWCA Crim 2034. This was a case of sexual offences committed on a step- daughter by a stepfather, when the young woman was aged between 16 and 25 years old. The character of the case appears from a short passage in the judgment of the court given by Lord Judge CJ (for himself, Mackay and Dobbs JJ) as follows:

> "The unusual feature of this case is that a substantial body of evidence was available in relation to counts 10-18 which showed apparent consent to sexual activity by the complainant after she was 16 years old, and further evidence which appeared to suggest that from time to time she initiated and welcomed sexual activity. This material included some 400 or so photographs taken by the appellant over a number of years of the complainant, posing naked and by her smile and demeanour appearing to indicate that she was willing for the appellant to take these photographs of her."

At [5], Lord Judge said:

> "The reality of this case cannot be understood without reference to the long years of the complainant's childhood during which, as the jury found, she was the victim of repeated sexual abuse by the appellant."

This was not a case in which the Crown was relying upon grooming into a state of what was described as "conditioned consent". At [15] and [16], Lord Judge said:

> "15. …This was not a case in which the Crown contended for a conviction on counts 10-18 on the basis that the complainant agreed to sexual activity because she had been groomed and corrupted by the appellant into what might be described as conditioned consent. Rather the evidence of prolonged grooming and potential corruption of the complainant when she was a child provided the context in which the evidence of her apparent consent after she had grown up should be examined and assessed. Properly analysed, so it was argued, the evidence of apparent consent did not undermine the credibility of the complainant that she never consented.
>
> 16. This approach was entirely appropriate. Once the jury were satisfied that the sexual activity of the type alleged had occurred when the complainant was a child, and that it impacted on and reflected the appellant's dominance and control over the complainant, it was open to them to conclude that the evidence of apparent consent when the complainant was no longer a child was indeed apparent, not real, and that the appellant was well aware that in reality she was not consenting."

To my mind, what Lord Judge said there clearly indicates that a truly "conditioned consent", resulting from a grooming process, is not true consent in law.

130. In my judgment, this passage supports the judge's succinct statement that, "Submission is not the same as consent", whether in the criminal law or the civil law.

131. The Appellant refers to section 74 of the Sexual Offences Act 2003 which it is submitted reflects the common law and provides that, "for the purposes of this Part, a

person consents if he agrees by choice, and has the freedom and capacity to make that choice". That too begs the question of what is "agreement" and what is "freedom" for this purpose. The question was correctly answered by the judge in the short sentence in paragraph 213 which I have already quoted twice.

132. I consider that this is also consistent with the review of the concept of consent made by the Criminal Division of this court, nearly 30 years ago, in *R v Olugboja* [1982] 1 QB 406. In that case, Dunn LJ (giving the court's judgment for himself, Milmo and May JJ) was considering the necessary directions to the jury in rape cases. He said at p. 332A-B this:

> "The jury will have been reminded of the burden and standard of proof required to establish each ingredient, including lack of consent, of the offence. They should be directed that consent, or the absence of it, is to be given its ordinary meaning and if need be, by way of example, that there is a difference between consent and submission; every consent involves a submission, but it by no means follows that a mere submission involves consent: per Coleridge J. in *Reg. v. Day*, 9 C. & P. 722, 724."

A little later, Dunn LJ said,

> "In addition to the general direction about consent which we have outlined, the jury will probably be helped in such cases by being reminded that in this context consent does comprehend the wide spectrum of states of mind to which we earlier referred, and that the dividing line in such circumstances between real consent on the one hand and mere submission on the other may not be easy to draw. Where it is to be drawn in a given case is for the jury to decide, applying their combined good sense, experience and knowledge of human nature and modern behaviour to all the relevant facts of that case."

The judge's short statement in paragraph 213 seems to me, in the context of this case, to be entirely consistent with this.

133. While Dunn LJ was focusing on what might be described as "one-off" acts of intercourse, Lord Judge was looking at cases where the acts of abuse were continuous over a lengthy period. The principle, however, is the same.

134. The Appellant objects further that, whatever the exact legal test, the judge misapplied the law to the facts. It is argued that the First Defendant was convicted of offences of buggery under section 12 of the Sexual Offences Act 1956, which at the time criminalised buggery, whether consensual or not. There are, however, two answers to this.

135. First, as was pointed out for the Respondent, on the pleadings in this case, the Appellant's arguments on this point are difficult to sustain: it was admitted (albeit qualified by the remark, "To the extent that it is inherent in the First Defendant's pleas of guilty") that up to about 1988, "The *abuse* and *assaults* included the First Defendant: … (k) *raping* the Claimant" (emphasis added): see paragraph 4 of the

Particulars of Claim and paragraph 4(5) of the Appellant's Defence. The Appellant points out, however, that the pleas of guilty related to offences in the period up to 1982, before the period when the Appellant alleged there was "consent". Nonetheless, in paragraph 9 of his Defence, the First Defendant admitted paragraph 4 (k) in unqualified fashion.

136. Secondly, as the judge said at paragraph 214, she had already found that,

> "… the first defendant groomed the claimant from the age of 13 years into believing that he was the only person who, knowing what he was following the rape by Monteil, would be his friend. He isolated him from his peers and family and created a dependency upon him…".

This is reflective of the finding at paragraph 186 (quoted above) in which the judge also accepted the expert evidence of Dr O'Neill on this point on the facts of the present case.

137. The judge found, having heard the oral evidence of both the Respondent and the First Defendant (and assisted by the expert witnesses to understand that evidence in the light of the Respondent's mental state) that the Respondent did not truly consent to what happened to him at the hands of the First Defendant in the period up to 1988. In my judgment, an appellate court cannot second-guess this judge's judgment on this point, based as it was on her assessment of both the detailed factual and expert evidence, given by witnesses whom she saw and heard.

138. I would, therefore, reject ground 3 of the Grounds of Appeal.

139. I turn to vicarious liability.

Ground 4: Vicarious Liability

140. I have set out above the crux of the judge's decision on this issue, in which she sought to apply the "two stage test" for vicarious liability emerging from the recent decisions in the Supreme Court: *Various Claimants v Catholic Child Welfare Society and others* [2012] UKSC 56 at [21], per Lord Phillips of Worth Matravers, and *Mohammed v Wm Morrison Supermarkets plc* [2016] UKSC 11 at [44] and [45] per Lord Toulson.

141. At paragraph 217 of the judgment, the judge said that she had "no hesitation in finding that the grooming and manipulation of the claimant by the first defendant was closely connected with his pastoral duties as a teacher". She proceeded to give her reasons for that conclusion.

142. The two stages of the test are correctly identified in paragraphs 70 and 71 of the Appellant's skeleton argument, together with the primary submission of the Appellant in this case, as follows:

> "70. For stage one to be satisfied there must be a relationship between the tortfeasor and the defendant capable of giving rise to vicarious liability. The paradigm example is employment and that was the case here as D1 was employed by D2 throughout the relevant period

> 71. The second stage of the test requires there to be a sufficient connection between the act or omission of the tortfeasor and the relationship between the tortfeasor and the defendant. It was this second stage of the test which D2 contends was not satisfied once C ceased to be a pupil at HWS and even in relation to the second period of uncertain duration when he returned to the school 1983/4."

143. It is perhaps as well to repeat here an important passage from the later of the two authorities referred to above. At [44] and [45] in *Mohammed* Lord Toulson said this:

> "44. In the simplest terms, the court has to consider two matters. The first question is what functions or "field of activities" have been entrusted by the employer to the employee, or, in everyday language, what was the nature of his job. As has been emphasised in several cases, this question must be addressed broadly; see in particular the passage in Diplock LJ's judgment in *Ilkiw v Samuels* [1963] 1 WLR 991, 1004 included in the citation from *Rose v Plenty* [1976] 1 WLR 141, 147-148 (at para 38 above) and cited also in *Lister v Hesley Hall Ltd* [2002] 1 AC 215 by Lord Steyn at para 20, Lord Clyde, at para 42, Lord Hobhouse, at para 58 and Lord Millett, at para 77.
>
> 45. Secondly, the court must decide whether there was sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice which goes back to Holt CJ. To try to measure the closeness of connection, as it were, on a scale of 1 to 10, would be a forlorn exercise and, what is more, it would miss the point. The cases in which the necessary connection has been found for Holt CJ's principle to be applied are cases in which the employee used or misused the position entrusted to him in a way which injured the third party. *Lloyd v Grace, Smith & Co* [1912] AC 716, *Peterson v Royal Oak Hotel Ltd* [1948] NZLR 136 and *Lister v Hesley Hall Ltd* were all cases in which the employee misused his position in a way which injured the claimant, and that is the reason why it was just that the employer who selected him and put him in that position should be held responsible. By contrast, in *Warren v Henlys Ltd* [1948] 2 All ER 935 any misbehaviour by the petrol pump attendant, qua petrol pump attendant, was past history by the time that he assaulted the claimant. The claimant had in the meantime left the scene, and the context in which the assault occurred was that he had returned with the police officer to pursue a complaint against the attendant."

I include Lord Toulson's reference to *Warren v Henlys* (vide supra) because Mr Fewtrell (who presented well the argument for the Appellant on this ground of appeal) placed some reliance upon the indication that that case was still "good law".

144. Mr Fewtrell pointed to a number of features of the present case in the second period of the Respondent's attendance at the School and thereafter which, he submitted, made the connection between the relationship of the First Defendant and the School on the one hand and the acts of the First Defendant on the other insufficiently close to attract liability on the part of the Appellant.

145. Those features were: 1) the Respondent was not a pupil at the later stage; 2) even when he was a pupil most, if not all the acts, occurred at the First Defendant's home, in his car, or at other locations – the meetings were essentially private; 3) The First Defendant was "off duty" and had "taken off the uniform"; there was no seamless episode or "unbroken chain of events" (c.f. Lord Toulson in *Mohammed* at [47]); the weekend attendance at sailing trips did not constitute part of "the course of employment" of the First Defendant by the Appellant; 4) in the second period of time at the school, the Respondent did not have PE lessons and was not taught by the First Defendant and again the assaults were away from the school.

146. For all these reasons, Mr Fewtrell submitted that the relevant relationship was not sufficiently close.

147. In support of these arguments, we were referred (for example) to some passages in the speech of Lord Clyde in *Lister v Hesley Hall Ltd.* [2001] UKHL 22 at [44]: first,

> "44. Secondly, while consideration of the time at which and the place at which the actings [sic] occurred will always be relevant, they may not be conclusive. That an act was committed outside the hours of employment may well point to it being outside the scope of the employment does not necessarily mean that it was done within the scope of the employment. So also the fact that the act in question occurred during the time of the employment and in the place of the employment is not enough by itself."

Secondly, in the same paragraph we read this:

> "… The acting may be so unconnected with the employment as to fall outside any vicarious liability. Where the employer's vehicle is used solely for a purpose unconnected with the employer's business, when, to use the language of Parke B in *Joel v Morison* (1834) 6 C & P 501,503, the driver is "going on a frolic of his own", the employer will not be liable."

148. In my judgment, one must approach these passages with care, since they were part of Lord Clyde's references to various features which might determine what was the limit of a "course of employment".

149. The law relating to vicarious liability has, however, been "on the move" even since *Lister*: see Lord Phillips in the *Catholic Child Welfare Society* case at [19]. Referring to the judgment of Ward LJ in the Court of Appeal in that case, Lord Phillips said,

> "19. …Ward LJ traces the origin of vicarious liability back to the middle ages, but rightly identifies that the law upon which

> he and I cut our teeth rendered the employer, D2, liable for the tortious act of the employee, D1, provided that the act in question was committed "in the course of the employee's employment". Thus, in a case about vicarious liability, the focus was on two stages: (1) was there a true relationship of employer/employee between D2 and D1? (2) was D1 acting in the course of his employment when he committed the tortious act?"

He then said that the courts had developed the law in four specific respects. As the later part of Lord Phillips' speech and Lord Toulson's judgment in *Mohammed* show the second stage of the test of liability is a rather different, and indeed a broader one than, the narrow concept of the "course of employment".

150. For example, the fact that the acts in issue may be committed away from the workplace or outside the hours of duty may well be regarded as less relevant today than they were even at the time of *Lister's* case. As was noted in *Wm. Morrison Supermarkets plc v Various Claimants* [2018] EWCA Civ 2339 (at [71])

> "… the time and place at which the act or acts occurred will always be relevant, though not conclusive. Nevertheless, there are numerous cases in which employers have been held vicariously liable for torts committed away from the workplace."

Reference was made there to *Bellman v Northampton recruitment Ltd* [2018] EWCA Civ 2214 where the employer was held liable for a tort committed both away from the workplace and out of office hours after a Christmas party.

151. Mr Fewtrell reminded us of the example given in paragraph 79 of the Appellant's skeleton argument as follows:

> "79. What the Court has done, in our submission, is to elide the separate concepts of vicarious and personal liability. It is suggested the point may be tested in this way. Imagine that C, then aged 21, in the course of their relationship had been travelling a passenger in D1's car. If they had had an accident driving home from visiting a mutual friend, would D2 be vicariously liable for D1's carelessness? The answer must be in the negative."

I think that this traffic accident example is rather different in character from what we are considering here. In this case, we have the pastoral relationship between teacher and pupil abused by the perpetration of regular sexual assaults on a pupil/former pupil. It could not be suggested that in the Appellant's example, that D1 would have abused the relationship in order to commit a series of acts of negligent driving. It would be necessary to enquire in respect of the individual traffic accident whether the relationship between the School and D1 was, for this purpose, sufficiently close to the negligent driving of D1 on the occasion in question: see again Lord Phillips at [2012] UKSC 56 at [21]. On the simple facts postulated by the Appellant, as suggested, the answer would be negative. If, however, C had been injured as envisaged while being

driven home by D1 during C's time as a pupil the matter might well be more complex, and I do not suggest an answer.

152. As for *Warren v Henlys* (supra), I do not see that it was any formal question of the venue of the incident or the timing of it that exonerated the employer, it was rather the change in the nature of the relevant relationship that mattered. As Hilbery J said, in deciding *Warren's* case (at [1948] 2 All ER 935 at 938E):

> "It seems to me that it was an act entirely of personal vengeance. He was personally inflicting punishment, and intentionally inflicting punishment, on the Plaintiff because the Plaintiff proposed to take a step which might affect Beaumont in his own personal affairs. It had no connection whatever with the discharge of any duty for the Defendants. The act of assault by Beaumont was done by him in relation to a personal matter affecting his personal interests and there is no evidence that it was otherwise."

153. I agree with the Appellant that each non-consensual sexual act committed by the First Defendant upon the Respondent would have been potentially a separate tort. However, the question posed by Lord Phillips still arises even in the period up to 1988. Was it the abuse of the position of trust, created in the period up to 1984 and undoubtedly within a relevantly close connection, that was still operating upon the Respondent? The judge answered this question in the affirmative at paragraphs 218 and 219 of her judgment and I would be disinclined to disturb that "evaluative judgment" of a trial judge: see Lord Dyson MR's judgment in the Supreme Court in *Mohammed* at [50], citing Lord Nicholls of Birkenhead in *Dubai Aluminium Co Ltd v Salaam and others* [2002] UKHL 48 at [26].

154. Given the judge's findings on the issue of consent, which I would uphold, I consider that her conclusion on vicarious liability must also be upheld. The finding was that the control and manipulation of the Respondent ("grooming"), begun during the First Defendant's employment by the Appellant, continued to be operative upon the Respondent, rendering his participation in subsequent sexual activity merely submissive rather than consensual. That situation was caused by what happened when the relevant relationship undoubtedly satisfied the second criterion for vicarious liability. Accordingly, in my judgment, it remained satisfied throughout for the reasons given by the judge.

155. I would, therefore, reject Ground 4.

Ground 5: Causation

156. The analysis at trial divided between diagnosis and causation. The issue between the doctors is neatly summarised by the judge at paragraph 238 of the judgment as follows:

> "238. They agree that the claimant's present state represents a major change from his pre-2011 state. Dr O'Neill would characterise his present state as complex PTSD. Professor Maden accepts that some experts would call his condition

> PTSD but points out that the diagnosis is often used loosely. He stands by his formulation of a worsening of personality disorder exacerbated by drug and alcohol misuse or possibly a depressive episode. They agree that for diagnostic purposes the distinction is of relatively minor importance as these diagnoses are different ways of conceptualising a breakdown but they agree that the distinction is important when considering causation and treatment."

157. Dr O'Neill's diagnosis was founded on the description of CPTSD in ICD-11, read with ICD-10 on PTSD. These are set out in paragraphs 239-240 of the judgment and I will not repeat all of them. The main descriptor of relevance in ICD-11 is the reference to:

> "…an event or series of events from which escape is difficult or impossible (e.g. … prolonged domestic violence, repeated childhood sexual or physical abuse) …".

158. The Appellant's challenge to this diagnosis was, and is, that it failed to have proper regard to the underlying concept of "simple" PTSD (to which CPTSD is a "bolt-on") which in ICD-10 is described at the outset as:

> "A. Exposure to a stressful event or situation (either short or long lasting) of exceptionally threatening or catastrophic in nature, which is likely to cause pervasive distress in almost anyone …
>
> B. Persistent remembering or "reliving" the stressor by intrusive flashbacks…
>
> C. Actual or preferred avoidance of circumstances resembling or associated with the stressor…"

The Appellant submits that the evidence of the Respondent was that the sexual activity perpetrated was not violent in nature, but rather non-forceful and sympathetic in character, which would negate any form of PTSD, complex or otherwise.

159. This objection to her diagnosis was explored with Dr O'Neill in cross-examination in a series of questions, some snapshots of which we shown to us by Mr Kent QC. In the course of those questions, Mr Kent put to Dr O'Neill that her diagnosis did not fit the wording of CPTSD as described as in ICD-11; it was suggested that she was, in effect, re-writing the criteria. Dr O'Neill was not deflected from her view, however.

160. I have re-read (more than once) those questions and answers (and a good deal more of the cross-examination besides). In her evidence, Dr O'Neill was at pains to say that the diagnostic "boxes" describing CPTSD, PTSD and various personality disorders were not discrete and that there was overlap. As mentioned earlier, the doctors were agreed about overlap with EUPD. Dr O'Neill said that one could not take a legalistic view of the descriptions given in the documents. Throughout her answers she stressed that the traumatic nature of abuse may only be appreciated by the victim over time. It was suggested to her that the sexual acts were consensual and could not, therefore, be

traumatic. She responded that there was not true consent and that the perception of trauma can be delayed. (This is a summary only of the evidence to be found in Transcript Bundle 2, pp. 311-366.)

161. The judge heard cross-examination of Professor Maden on the diagnostic criteria for CPTSD, and on the wording of ICD-11, in which he adhered to his view that such a diagnosis required recognition of trauma by the victim at the time of the acts in question. (Transcript Bundle 2 pp. 460 et seq.)

162. It is, of course, extremely difficult for an appellate court to judge the impact of conflicting answers of this character by simply reading the words of the questioner and of the witness. Having heard this evidence, the judge preferred that of Dr O'Neill. At paragraph 278, the judge noted again that both doctors agreed that the Respondent suffers from EUPD "…" and that there can be a considerable overlap in psychiatric conditions …". She said the question was whether there was, as Dr O'Neill argued, an overlap with PTSD.

163. The judge looked at the wording of ICD-11 and said that there was nothing in the wording of the document to indicate that an individual must have appreciated at the time of the relevant events that they were traumatic; she said it was recognised in the definition that repeated childhood sex abuse may amount to "a series of events of an extremely distressing nature" and the condition might "develop following exposure to an event or series of events". She found it was designed to cover circumstances where events evolve over time rather than a sudden dramatic trauma. The judge rejected Mr Kent's submission that the abusive acts had to be violent at the time to qualify and considered that persistent abuse following grooming can be defined as extremely threatening or horrific in nature. She also found, as is not infrequently the case in domestic violence, the behaviour of the perpetrator towards the victim leads to a dependence from which it is either difficult or impossible to escape. She concluded that CPTSD was therefore a possible diagnosis in the case.

164. The judge noted her previous rejection of Professor Maden's finding of inconsistency on the Respondent's part. She said that having heard the evidence of the experts over several days she found it more probable than not that the Respondent was suffering from CPTSD. She found support in this in the views of other psychiatrists, including Dr Rackow and Dr Muller-Pollard.

165. So far as Dr Rackow is concerned her views are summarised in paragraph 229 of the judgment (not paragraph 222, as the judge said in paragraph 289). By September 2017, on referring the Respondent again for admission to the Capio she described the Respondent as "continuing to suffer from PTSD symptoms and (as already mentioned) in a letter of 28 November 2017 (which we have not seen), Dr Muller-Pollard apparently stated that the Respondent had a "well-established history of complex PTSD": see paragraph 230 of the judgment.

166. During the hearing, working from the summary of notes from the Capio given in Dr O'Neill's first report of 21 March 2016 (which I have used above), it was argued at the hearing before us from this that Dr Muller-Pollard did not appear initially to share this view of the diagnosis. The reference in those notes is to the doctor's discharge summary of January 2014 in which he made the diagnosis of "Recurrent Depressive Disorder, generalised anxiety disorder and panic disorder" – i.e. not CPTSD. It was

suggested, therefore, that the judge was wrong to say that Dr Muller-Pollard's diagnosis supported Dr O'Neill. Further, it was argued that any CPTSD opinion/diagnosis reached later by Dr Muller-Pollard in 2016/2017 should be discounted as it was reached after the commencement of litigation or the prospect of it.

167. For my part, like the judge, I would not be prepared to discount the opinions of these doctors as being in some way conditioned to achieve particular ends. It is not surprising, I think, that as the nature of the past sexual abuse gradually emerged, up to June 2012, the treating psychiatrists' views developed. A change of opinion, if such it was, was not necessarily wrong. It is to be recalled that the Respondent's partner, FZOR, said that it was only after the breakdown in September 2011 that the Respondent disclosed even to him the abuse that he had experienced, and then only in general terms.

168. In the circumstances, I consider that the judge was entitled to prefer the evidence of Dr O'Neill (supported by some of the other clinicians) to that of Professor Maden on diagnosis. In doing so, she recognised (in paragraph 326) the agreement between the doctors that the Respondent suffers from EUPD and that this shares many similar characteristics to CPTSD. The judge's decision was necessarily a balanced one, but it was undoubtedly one to which she was entitled to come, and we would not be justified in interfering with it.

169. Because of this "balance" the judge considered again the merits of Professor Maden's opinion when she came to a view on the ultimate question not on diagnosis, but on causation of the Respondent's problems. This she did in paragraphs 327 and following of her judgment.

170. In my judgment, it is extremely important in this case to note that each of the experts recognised very fairly that their opinions might change in the light of the court's decisions on the primary facts as to the nature and extent of the abuse and as to the question of who was the instigator of the sexual activity: i.e. who was the "groomer" and who was the "groomed". Professor Maden was inclined to disbelieve the Respondent's reporting of past events and noted what he perceived to be a number of inconsistencies, although, as noted, he agreed with Dr Shanahan's 2013 view that the Respondent's personality had been "indelibly marked psychologically" by the abuse, even on his own assessment of the primary facts. In the end, the judge, who heard all the witnesses, clearly preferred (and strongly) preferred the evidence of the Respondent to that of the First Defendant on these issues. At three points in her judgment, the judge referred to Professor Maden's concession that his professional opinion would be different if the court accepted the Respondent's account that he was groomed in the way that he said he was.

171. At paragraph 295 of the judgment, the judge said:

> "295. …In the joint report it was made clear that Dr O'Neill believed the abuse by the first defendant was the main cause of the claimant's EUPD/Complex PTSD while Professor Maden believed that, although the abuse made his personality disorder worse than it would otherwise have been, it was not the main cause of his mental health problems. This was particularly

> because the claimant maintained a friendship with the first defendant for decades afterwards. In evidence Professor Maden said that if the court accepted the claimant's account that he was groomed in the way that he said he was his opinion on this matter would be different."

At paragraph 308, she said:

> "308. Professor Maden expressed in his report his view that the abuse did not make more than a minor contribution to the claimant's mental health problems based on the fact that the claimant maintained what could only be called a friendship with the first defendant for decades afterwards. As I have indicated Professor Maden said that if the claimant's account of how the abuse started and what the first defendant said to him were accepted by the court he would not hold to this view."

Finally, at paragraph 332, she said:

> "332. …I have also taken into account that Professor Maden in his evidence said that his initial view that the first defendant's abuse of the claimant could not be said to be more than a minor cause of his EUPD would alter if the court accepted the claimant's account of the grooming and subsequent relationship with the first defendant. I have so found. Professor Maden also accepted the analysis of Dr Shanahan in 2013 that the abuse had "indelibly marked psychologically" the claimant's personality."

172. I have quoted above (paragraph 92) the judge's summary (at paragraph 313 of the judgment) of Professor Maden's evidence on causation. His opinion, said the judge, was that:

> "it was only after their row and his [the Respondent's] rejection of the first defendant that he started to blame the first defendant for his problems. He does not believe that the abuse was of any great or lasting significance to the claimant until after he perceived the first defendant offered him inadequate support on his breakdown".

That assessment was highly dependent upon the findings of primary fact as to the true nature of the relationship between the Respondent and the First Defendant. If Professor Maden was wrong about that, as it was found that he was, his opinion on causation was also flawed. Whatever the diagnosis, CPTSD or enhanced EUPD, on the primary facts as found, the abuse caused the breakdown and the Respondent's continued disability.

173. The First Defendant's case (and with it the Appellant's case) on the facts collapsed. The opinion of Professor Maden, on many of the important medical issues, depended upon the defence's factual case succeeding; it did not. Thereafter, a judgment for the Respondent followed inexorably.

174. I would, therefore, reject ground 5 also.

Proposed result

175. In the result, I would dismiss this appeal.

Lord Justice Simon:

176. I agree. At a number of points in his judgment, McCombe LJ has identified the judge's findings of fact and expert evidence with which the appellant has taken issue. During the course of the argument, I was left with some disquiet about some of these findings; but it is important to bear in mind that we did not hear the evidence, and that it is not for this court to attempt to substitute its own evaluation of evidence without any of the advantages of a trial judge.

Lady Justice Nicola Davies:

177. I share the disquiet of Simon LJ as to some of the judge's findings of fact. My particular concern relates to the judge's acceptance of the evidence of Dr O'Neill and her finding that it is more probable than not that the Respondent is suffering from Complex PTSD. In so doing the judge preferred the evidence of Dr O'Neill to that of Professor Maden who concluded that the Respondent is suffering from an emotionally unstable personality disorder. In arriving at her conclusion, the judge took account of the fact that Dr O'Neill was not alone in this diagnosis, she identified other psychiatrists "who have had greater involvement with the Respondent, including Dr Rackow and Dr Muller-Pollard" as having come to the same opinion. The judge noted that before either of the doctors became involved "… at the claimant's 4th admission to the Capio in 2014, the professionals were noting concerns that he may have symptoms of PTSD. There was later talk of trauma focused therapy."

178. As to the relevance of the previous Capio hospital admissions the judge stated:

> "I recognise that the claimant had been an inpatient at the Capio on three occasions before there is any mention of PTSD but this does not in my view negate the subsequent diagnosis. Nor does the failure of Dr Read in 1996 or Dr Muller-Pollard to make the diagnosis in 2014 do so. … The claimant's first three admissions to hospital were short. As Dr O'Neill said the clinicians would not always get a proper understanding of the patient's difficulties or the chance to carry out any intense psychological work. When Dr Muller-Pollard wrote his second letter in 2017 he had the benefit of the claimant's presentation in the three years since his first in 2014. It can be properly assumed this caused him to come to a different professional view." (paragraph 288)

179. Nowhere in this part of the judgment ("Discussion and findings on diagnosis") does the judge expressly refer to or appear to take into account the fact that the Respondent was admitted on seven separate occasions to the Capio Nightingale hospital between November 2011 and January 2014. On each occasion the Respondent was an inpatient for a period of weeks. He was assessed and treated by a number of

consultant psychiatrists. No psychiatrist diagnosed PTSD. The prevalent diagnosis was that of a form of personality disorder and ADHD. It is of note that by the third admission in June 2012 the Respondent had recently been interviewed by the police regarding his allegations of child sexual abuse. It is clear from the medical records that from the third admission onwards the Respondent was speaking of the abuse which he suffered from the age of 11 to 17 and that was being noted and considered by the treating clinicians. As the Respondent was an inpatient, the treating clinicians and other healthcare professionals were given the opportunity to record his complaints and monitor his presentation and condition. It was in that context that in April 2014 Dr Muller-Pollard made the diagnosis of recurrent depressive disorder, generalised anxiety disorder and panic disorder.

180. The diagnosis of Complex PTSD was first made by Dr O'Neill in the context of this litigation. It has since been made by Dr Rackow and Dr Muller-Pollard.

181. At the time of the trial, Complex PTSD was not included within the international classification of diseases published by the World Health Organisation. Dr O'Neill stated that Complex PTSD is to be accepted as a diagnostic category within the publication in 2020. In giving evidence Dr O'Neill did not rely upon any articles in the medical literature which reference Complex PTSD, its symptoms nor the proposed classification. Professor Maden did rely upon literature to support his contention that the Respondent was suffering from a form of personality disorder rather than PTSD. The judge recorded that Professor Maden stated that he and other experts had reservations about the appropriateness of a diagnosis of PTSD or Complex PTSD. The judge accepted this evidence and described it as "a respected view" (paragraph 279).

182. In my judgment, in assessing the evidence of the two experts and their respective diagnoses, the medical history of the Respondent, in particular since his breakdown in 2011, was of relevance. Between 2011 and 2014, when the Respondent was an inpatient at the Capio hospital, he was assessed by five different consultant psychiatrists, none of whom diagnosed PTSD or Complex PTSD. These diagnoses were material. Account was taken of them by Professor Maden in reaching his diagnostic conclusion. It is of note that from 2012 onwards those treating the Respondent in the Capio hospital were aware of the fact that he had spoken to the police and was alleging sexual child abuse. The judge records that it was as the Respondent started to speak with the police and the abuse came to the forefront of his mind that the symptoms became more obvious. It would appear to follow from this finding of the judge that the symptoms would have been increasingly obvious during the period 2012 to 2014 when the Respondent was being seen and treated at the Capio, not least in 2013/14 by Dr Muller-Pollard who did not diagnose Complex PTSD.

183. The approach of the judge to the opinions of the treating clinicians at the Capio hospital is set out in paragraph 288 of her judgment (paragraph 178 above). In my judgment, the judge's approach fails to give any or any adequate weight to the diagnoses of the treating clinicians who were assessing and treating the Respondent as an inpatient on no less than seven separate occasions.

184. Further, in preferring the evidence of Dr O'Neill, the judge was accepting a diagnosis which has yet to be formally included within the World Health Organisation

international classification. If that is a course which the court is minded to take, then real rigour is required in assessing the relevant evidence in respect of such a diagnosis. I regard the failure by the judge to give any or adequate weight to the diagnoses of the treating clinicians between 2011 and 2014 as representing an error of law.

185. The issue which I have to address is whether that error of law is of sufficient materiality so as to undermine a determination that the appeal should be dismissed. I have concluded that it does not. Whatever the diagnosis, it is undisputed that in 2011 the Respondent suffered a breakdown, since which time he has been unable to work. Further, in his evidence, Professor Maden conceded that if the court accepted the Respondent's account that he was groomed in the manner alleged, his opinion as to the contribution of the abuse to the Respondent's personality disorder would be different. Professor Maden's evidence on causation was dependent on the findings of primary fact relating to the abuse with which I do not take issue. It follows that Professor Maden's opinion upon causation is undermined by the court's findings on those facts.

186. I agree with the conclusion of McCombe LJ at paragraph 172 above that whatever the diagnosis, Complex PTSD or emotionally unstable personality disorder, on the primary facts as found, the abuse caused the Respondent's breakdown in 2011 and his continuing disability. This conclusion is not dependent upon the diagnosis of Complex PTSD being preferred to that of emotionally unstable personality disorder. That being so, I agree with McCombe LJ that this appeal should be dismissed.

Appendix

11.—(1) This section applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.

…

33.—(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which--

(a) the provisions of section 11 …

(b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents;

the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates. …

(3) In acting under this section the court shall have regard to all the circumstances of the case and in particular to—

(a) the length of, and the reasons for, the delay on the part of the plaintiff;

(b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11, by section 11A or (as the case may be) by section 12;

(c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;

(d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;

(e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;

(f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received. …

(8) References in this section to section 11 or 11A include references to that section as extended by any of the provisions of this Part of this Act other than this section or by any provision of Part III of this Act.