Neutral Citation Number: [2020] EWHC 1914 (QB)

Case No: QB-2018-005376

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/07/2020

Before :

MR JUSTICE CHAMBERLAIN

- -

Between :

JXJ	**Claimant**
- and -	
The Province of Great Britain of the Institute of Brothers of the Christian Schools ("the de la Salle Brothers")	**Defendant**

- -
- -

Laura Collignon (instructed by **Summit Law LLP**) for the **Claimant**
Steven Ford QC (instructed by **BLM Law**) for the **Defendant**

Hearing dates: 17-23 June 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE CHAMBERLAIN

Mr Justice Chamberlain :

Introduction

1. There is an order preventing the disclosure of the Claimant's identity. He is therefore referred to as "JXJ".

2. Between September 1972 (when he was 10) and September 1974 (when he was 12), JXJ attended St Ninian's School in Gartmore, Stirlingshire, Scotland ("the School"). This was an "approved" or "List D" boarding school to which juvenile offenders and others who were considered to be in need of care and protection could be sent by order of a juvenile court or the Secretary of State.

3. Legal responsibility for the management of the School lay with a board of managers appointed by the Catholic Archbishop of Glasgow. The headmaster, depute headmaster and many of the teaching staff were members of the Institute of the Brothers of the Christian Schools ("the Institute"), a monastic order founded by St Jean-Baptiste de la Salle in Rheims in 1680 and dedicated to the provision of Christian education. Its members are known as the de la Salle brothers ("the DLS brothers" or "the brothers"). The Institute operates all over the world. Organisationally, it is split into provinces. The Defendant is its Province of Great Britain or, more accurately, of Ireland, Great Britain and Malta.

4. During his time at the School, JXJ was repeatedly subjected to sexual assaults, some involving considerable violence, by James McKinstry, a lay member of staff who worked at the School as a gardener and night watchman. McKinstry was convicted of those assaults, and of assaults against other boys at the School, at the High Court in Edinburgh in 2003. There is no dispute that these sexual assaults took place. JXJ says that he was also physically assaulted by DLS brothers who taught at the School. These alleged assaults are not admitted.

5. JXJ's claim has three elements. He claims that the Defendant is vicariously liable for:

    (a) the sexual assaults perpetrated by McKinstry;

    (b) the acts and omissions of Brother Alphonsus, the headmaster of the School, in exposing JXJ to the risk of abuse and/or in failing to protect him from that abuse; and

    (c) further assaults committed by Brothers Pius and Patrick and jointly by a group including Brothers Alphonsus, Patrick, Cuthbert, Pius and Benedict, together with McKinstry.

6. The Defendant accepts that the assaults of which McKinstry was convicted took place, but pleads a limitation defence and, in addition:

    (a) denies that it is vicariously liable for McKinstry's assaults;

    (b) accepts that it is vicariously liable for any breach of duty on the part of Brother Alphonsus but does not admit any such breach of duty; and

(c) accepts that it is vicariously liable for any physical assault committed by any of the DLS brothers, but does not admit that any of the assaults alleged took place.

The history of the proceedings and the applicable law

7. JXJ's intention to bring this claim was first notified to the Defendant on 2 July 2014. Psychiatric reports were sought from Dr Roger Kennedy (for the Claimant) and Prof. Anthony Maden (for the Defendant). A joint report by Dr Kennedy and Prof. Maden was finalised on 21 September 2017.

8. The claim was issued in June 2018. In the Particulars of Claim, reliance was placed on the general rule that parties are to be sued in the place where the Defendant is domiciled: Civil Jurisdiction and Judgments Act 1982, Sch. 4, para. 1. Although the claim could have been brought in Scotland, the place where the harmful events occurred (Sch. 4, para. 3(c)), both JXJ and the Defendant were now domiciled in England, so England was the appropriate forum. Because the events giving rise to this claim pre-date the coming into force of Regulation (EC) 864/2007 ("the Rome II Regulation") and the Private Law (Miscellaneous Provisions) Act 1995, it was said that the applicable law is determined by the common law choice of law rules. Under those rules, substantive matters are governed by Scots law, the *lex loci delicti*, subject to the rule of double actionability derived from *Phillips v Eyre* (1870-1) LR 6 QB 1; but procedural matters are governed by the law of England and Wales, the *lex fori*. The measure of damages is for these purposes a procedural matter: *Harding v Wealands* [2007] 2 AC 1. It was said that, because of s. 1(1) of the Foreign Limitation Periods Act 1984 ("the 1984 Act"), limitation is governed by Scots law and, in particular, ss. 17A, 17B and 17D of the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act"), as inserted by a recent Act of the Scottish Parliament, the Limitation (Childhood Abuse) (Scotland) Act 2017 ("the 2017 Act").

9. In the Defence, the Defendant admitted that England is the appropriate forum; that the substantive law applicable to the claim is Scots law, subject to the rule of double actionability; that the measure of damages is governed by the law of England & Wales; and that, under the 1984 Act, limitation is governed by Scots law.

10. On 6 May 2019, Master Kay gave directions for the parties to rely on their respective experts' reports and on the joint report of Dr Kennedy and Prof. Maden. Permission was also given to the parties to rely on the report of an expert to be jointly instructed on the Scots law of limitation, David Sheldon QC. He produced his report on 9 May 2019. It deals in considerable detail with the genesis of the new Scottish limitation provisions, on which there was then no decided authority from the Scottish courts.

11. The trial was set down for hearing in a window from 15-24 June 2020. On 22 April 2020, Stewart J ordered a pre-trial review to determine the arrangements for the hearing. That took place remotely before HHJ Coe QC, sitting as a Judge of the High Court, on 6 May 2020. She ordered that the trial should proceed in the existing window, to deal with liability (including limitation) only, with issues of causation and quantum to be dealt with at a later date. She gave directions for the hearing, which was to be in court, with arrangements for certain of the witnesses who were not able to travel to court to participate remotely. At a pre-trial review in the week before the hearing, I gave further directions that the trial should proceed in open court, save that:

(a) when taking the evidence of witnesses who were not able to attend court, the hearing would take place wholly remotely, using Skype for Business; and

(b) during the other parts of the hearing certain of the Defendant's witnesses who were not able to attend could observe proceedings in court remotely, again using Skype for Business.

(Express provision is made for hearing evidence by video link (CPR r. 32.3) and for conducting hearings by video-conferencing (CPR 32PD Annex III).)

12. During the parts of the hearing held in court, the court was open to the public and press, although no member of the public (other than the Claimant, lawyers and court staff) in fact attended. For the wholly remote parts of the hearing, members of the public and press were able to apply for access, though no one did. The remote part of the hearing was, therefore, "public" within the meaning of CPR 51Y PD para. 3.

13. At the pre-trial review, I invited counsel to produce a joint note summarising the agreed position on applicable law. On the day before the trial, I drew counsels' attention to s. 1(1)(b) and (2) of the 1984 Act and to the decision of Barling J in *Deutsche Bahn v MasterCard* [2018] EWHC 412 (Ch), at [155]-[158]. In order to make sense of the submissions made, it is necessary to set out the material provisions of the 1984 Act.

14. Section 1 provides insofar as material as follows:

> "(1) Subject to the following provisions of this Act, where in any action or proceedings in a court in England and Wales the law of any other country falls (in accordance with rules of private international law applicable by any such court) to be taken into account in the determination of any matter—
>
> (a) the law of that other country relating to limitation shall apply in respect of that matter for the purposes of the action or proceedings… and
>
> (b) except where that matter falls within subsection (2) below, the law of England and Wales relating to limitation shall not so apply.
>
> (2) A matter falls within this subsection if it is a matter in the determination of which both the law of England and Wales and the law of some other country fall to be taken into account."

15. Section 4(1)(a) provides that reference in the Act to the law of any country (including England and Wales) relating to limitation are to be construed as including the law relating to the extension of any limitation period.

16. Section 7(3) provides as follows:

> "Nothing in this Act shall—
>
> (a) affect any action, proceedings or arbitration commenced in England and Wales before the day appointed under subsection (2) above [1 October 1985]; or

> (b) apply in relation to any matter if the limitation period which, apart from this Act, would have been applied in respect of that matter in England and Wales expired before that day."

17. Having considered these provisions, Mr Steven Ford QC, for the Defendant, filed a note on the morning of the first day of the trial indicating a "position" contrary to that which had been agreed since the Defence was filed. The Defendant's new position was that:

    (a) The limitation period which, apart from the 1984 Act, would have been applied in England and Wales expired in January 1983, 3 years after JXJ turned 18. Therefore, by operation of s. 7(3), the 1984 Act did not apply and the law applicable to limitation is determined by the common law. That being so, procedural matters are for the *lex fori*; and since limitation in both Scots and English law is procedural, the law governing limitation is that of England and Wales.

    (b) In any event, if the 1984 Act was applicable, the limitation law of both Scotland and England and Wales applied. In the *Deutsche Bahn* case, Barling J held that a matter where the double actionability rule applies is one "in the determination of which both the law of England and Wales and the law of some other country fall to be taken account" for the purposes of s. 1(2) of the 1984 Act, with the result that both limitation laws apply. The practical effect of this is that it is only necessary to consider the limitation law more advantageous to the Defendant, namely the law of England and Wales.

18. For the Claimant, Ms Laura Collignon produced a note arguing that it was far too late for the Defendant to change its position. Although the pleadings had been settled before she was instructed, she submitted that it was open to the parties to agree that s. 7(3) of the 1984 Act did not apply. This could be because (i) the primary limitation period applicable in England had not expired on 1 October 1985 in the light of s. 14 of the Limitation Act 1980 (which provides that the limitation period does not begin to run until the claimant has knowledge of certain matters) and/or (ii) s. 7(3) of the 1984 Act (when read with s. 4(1)) was to be construed as inapplicable to a case where, under the law of England & Wales, the claim was not conclusively statute-barred because there was discretion to disapply the primary limitation period. As to the operation of s. 1(2), it was for the Defendant to decide what limitation points (if any) to take. Even if on a true construction of the 1984 Act the laws of both Scotland and England and Wales applied, the court was not obliged to consider the latter if a defendant chose not to rely on it.

19. I invited Mr Ford on the morning of the first day of the trial to indicate if he was applying to amend the Defence. Initially, he said that any such application could be left for closing submissions. Having heard Ms Collignon's opening, I indicated that this was not satisfactory. The purpose of pleadings is to define the issues so that it is clear to each side what is to be addressed in evidence and submissions. On the pleadings it was agreed that the only law applicable to the issue of limitation was Scots law. I asked Mr Ford to consider over the short adjournment whether he wished to apply to amend his pleadings. If such an application were to be made, it should be made before any evidence was called. I would then consider whether to grant the

application and, if so, on what terms. After the short adjournment, Mr Ford told me that there would be no application to amend the Defence.

20. The trial therefore proceeded on the agreed, pleaded footing that the only law governing limitation is Scots law. It was appropriate to proceed on this basis for three reasons. First, in the law of England and Wales (as in Scots law), limitation is a procedural defence. In general, a limitation defence must be pleaded. If pleaded, it bars the claimant's remedy. If it is not pleaded, the fact that it could have been has no effect on the existence of the cause of action or on the court's jurisdiction to entertain the claim. Second, the parties have proceeded from the outset on the basis that the 1984 Act applies. This was the basis on which the joint expert report of Mr Sheldon was obtained and the factual evidence prepared. It is also the basis on which the split trial was ordered. Third, although it appears that there was a failure on both sides fully to consider the legal position at the outset, it is not clear that the 1984 Act does not apply. In previous cases involving historic assaults committed in another country it has been assumed (albeit without argument) that the 1984 Act applies: see e.g. *Sophocleous v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWCA Civ 2167, [2019] QB 949. Determining the applicability of the 1984 Act would certainly involve deciding a novel question of statutory construction and might also require the determination of questions of fact about JXJ's knowledge in the early 1980s. It is common for questions such as these to go by agreement. The fact that the agreement may have been made on a wrong legal basis does not generally supply a reason for the court to go behind it of its own motion, unless the matter to which it relates is jurisdictional, which in this case it is not. It may be that, if the 1984 Act applies, the Defendant could have pleaded a limitation defence in English law as well as Scots law. If so, the position is not conceptually different from that of a defendant who has not pleaded limitation at all: the case proceeds on the basis pleaded even though an additional defence might have been available.

Previous litigation against the Institute

21. A large number of claims have been brought by former pupils of schools at which DLS brothers taught. Factual findings made in civil litigation to which JXJ was not a party are not admissible: *Rogers v Hoyle* [2014] EWCA Civ 257, [2015] QB 265, [32]-[40] (Christopher Clarke LJ). However, the decision of the Extra Division of the Inner House of the Court of Session in *McE v de la Salle Brothers* [2007] CSIH 27, [2007] SC 556 concerned abuse perpetrated by a brother at this very school between 1963 and 1966; and the parties agree that the decision correctly describes the statutory framework governing its management and operation at that time.

22. As to that, Lord Osborne noted at [106] that pupils might be sent to "approved schools", such as the School, for several different reasons. Section 61 of the Children and Young Persons (Scotland) Act 1937 as amended ("the 1937 Act") permitted a court which found a child or young person guilty of certain offences to make an approved school order. Section 62 conferred power on the Secretary of State to send "certain juvenile offenders and others" to approved schools. But s. 66 made clear that the commission of an offence was not a prerequisite for the making of an approved school order; such an order could be made by a juvenile court if satisfied that the child or young person was in need of care or protection. Likewise, under s. 68, where a juvenile court was satisfied that the parent or guardian of a child or young person was

unable to control him, it could make an approved school order. Section 74 provided that such an order had to specify, among other things, the age and religious persuasion of the child or young person.

23. At [107], Lord Osborne noted that ss. 83-85 of the 1937 Act contained provisions concerning the establishment of approved schools. By s. 83(1), the managers of any school intended for the education and training of persons to be sent there under the Act could apply to the Scottish Education Department to approve the school for that purpose. By s. 83(2), the approval was revocable. Under s. 85, the Scottish Education Department was empowered to classify approved schools according to, among other things, the age of the persons for whom they are intended and the religious persuasion of such persons. Under s.106, the Secretary of State was empowered to appoint inspectors. Under s. 107, The Secretary of State was empowered to fund the expenses of the managers of an approved school. Section 110 was a definition section. It included this:

> "'Managers', in relation to an approved school established or taken over by an education authority or by a joint committee representing two or more education authorities, means the education authority or the joint committee as the case may be, and in relation to any other approved school, means the persons for the time being having the management or control thereof."

24. Paragraph 1 of Sch. 2 to the 1937 Act authorised the making by the Scottish Education Department of rules for the management and discipline of approved schools. The managers could make supplementary rules, but they had to be approved by the Scottish Education Department. Paragraph 12 of Sch. 2 provided:

> "(1) Subject as hereinafter provided, all rights and powers exercisable by law by a parent shall as respects any person under the care of the managers of an approved school be vested in them . . .
>
> (2) The managers of an approved school shall be under an obligation to provide for the clothing, maintenance and education of the persons under their care."

25. Rules made under this provision in 1961 required the managers to meet and to visit the school "to ensure that the conditions of the school and the welfare, development and rehabilitation of the pupils under their care are satisfactory" (r. 2); to "manage the school in the interests of the welfare, development and rehabilitation of the pupils" (r. 4); and to determine, in consultation with the headmaster, "the number, type and qualifications of staff to be employed by them" (r. 10). The headmaster was to be a person appointed by the managers (r. 10(5)). No person could, however, be appointed to that post without the prior approval of the Secretary of State. The headmaster was "responsible to the managers for the efficient conduct of the school in the interests of the welfare, development and rehabilitation of the pupils" (r. 11).

26. Lord Osborne summarised the legal position as follows at [111]:

> "In my view, the legal characteristics and structure of the approved school system clearly emerge from the foregoing statutory provisions, which I

> consider require to be borne in mind in reaching conclusions in regard to the particular responsibilities of those involved in the system. First, the management and control of an approved school were the responsibility of the managers of that school. Pupils at such a school were under the care of the managers. There were vested in the managers all the rights and powers exercisable by law by a parent in relation to any person in the care of the managers in an approved school. The managers had a responsibility to ensure that the conditions of the school and the welfare, development and rehabilitation of the pupils under their care were satisfactory. They had a duty to manage the school in the interests of the welfare, development and rehabilitation of the pupils. The managers were responsible also for decisions relating to the staff at the school, who were to be employed by them. They were responsible for suspension and dismissal of staff, once appointed. The headmaster of the school, who was a member of its staff and employed by the managers, was responsible to them for the efficient conduct of the school in the interests of the welfare, development and rehabilitation of the pupils. In certain respects, reflected in my summary of the relevant legislation, the managers required the approval of the Secretary of State in relation to certain decisions. Furthermore, the Secretary of State was authorised to inspect approved schools through an inspectorate. As regards the funding of approved schools the necessary resources were derived from the Secretary of State and local education authorities. That funding was then used by the managers to meet the various disbursements which they had to make."

27. The claim against the Institute failed before the Extra Division of the Inner House. It is not necessary to consider in detail the reasons for this, because it is common ground that the reasoning cannot survive the decision of the Supreme Court in *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56, [2013] 2 AC 1 ("the *Christian Brothers* case"), which arose out of claims brought by individuals who alleged they had been abused by DLS brothers in an English school. The parties have helpfully agreed the findings of fact recorded in the judgment of Lord Phillips (with which the other members of the Court agreed) about the structure and organisation of the Institute and the operation of the English schools with which it was associated. It is also agreed that these findings are equally applicable to schools in Scotland, including the School.

28. The relevant findings are as follows:

    (a) The Institute was founded in 1680. Its members are lay brothers of the Catholic Church. The Institute's rules, approved by a Papal Bull of 1724, provided that "they should make it their chief care to teach children, especially poor children, those things which pertain to a good and Christian life": [1].

    (b) The Institute is an unincorporated association, but has certain corporate features, including a hierarchy of authority. The Institute has created legal bodies capable of owning property and entering into legal relations in pursuance of its mission: [2].

    (c) The head of the Institute is the "superior general" in Rome, elected by the general chapter of brothers, which itself is made up of elected representatives of

all brothers. For the purposes of administration, it is split into provinces, each headed by a "provincial". Within a province, brothers live in communities, each headed by a director: [7].

(d) The brothers are bound together by lifelong vows of chastity, poverty and obedience and by detailed and very strict norms of conduct, known as "the rule". The vow of obedience carries the obligation to obey the superiors of the Institute, including the provincial and the director of the community. Each brother undertakes to "go wherever I may be sent and to do whatever I may be assigned by the [Institute] or its superior": [8].

(e) The rule is highly particular and governs all aspects of the life and conduct of a brother, including such matters as the taking of communal meals and other required communal activities. It contains provisions on how children taught are to be treated, including a chapter on correction or punishment, which forbids touching a child or corporal punishment. One chapter deals with chastity and includes a provision that "[t]hey shall not touch their pupils through playfulness or familiarity, and they shall never touch them on the face". There is a requirement to advertise to each other any thoughts of which they are conscious and extreme reserve is required, for example in speaking to women. Any brother employed to teach by an outside body has to hand over all his earnings to the Institute. The Institute provides the brothers with the "wherewithal to live" and looks after them in their retirement: [9].

(f) Some of the schools in which brothers taught were owned by the Institute. Others were not. In relation to these, the Institute could not control whether the school chose to engage brothers as teachers, but it could control whether a brother worked in a school that was prepared to engage him: [10], [17].

(g) If a brother was sent to a school managed by third party, the Institute's control over his life remained complete. He remained bound by his vows and every year the provincial made an annual visit and inspection of the community and the brothers living in it, which embraced their role within the school: [18].

29. In the *Christian Brothers* case, claims were brought by 170 men in respect of abuse which they alleged they had suffered at the hands of brothers between 1958 and 1992 at a residential school in Market Weighton in what is now the East Riding of Yorkshire. They claimed against two groups of defendants. The first were the "Middlesbrough defendants", which were entities associated with the Catholic Diocese of Middlesbrough, to whom the liabilities of the managers of the school had been transferred by statute. The second group of defendants were DLS brothers representing the Institute. At first instance, the first group was held vicariously liable for assaults perpetrated by brothers employed by the managers. The second group was held not liable. The claimants were content to look to the Middlesbrough defendants for their relief. Those defendants, however, challenged the finding that the Institute was not also vicariously liable: see [4].

30. It will be necessary to return to the Supreme Court's reasoning in more detail in due course. At this stage, it is sufficient to note that the Institute was held vicariously liable, jointly with the Middlesbrough defendants, for assaults committed by brothers.

The case did not address the question whether the Institute was vicariously liable for staff who were employed by the managers but were not brothers.

31. Since then, a large number of claims have been intimated against the Institute, both in Scotland and in England. There are, however, no determined claims concerning the School. On 8 June 2020, shortly before the trial, JXJ served a Part 18 request asking for details of other claims against the Defendant which were mentioned in its publicly available 2018 report and accounts. The response was produced after the trial. It indicates that 15 of the claims mentioned in the 2018 report and accounts relate to the School and that there have been a further 26 claims in Scotland since then. Of all of these, six relate to the period September 1972 to September 1974, when JXJ attended. Two claimants have made claims against Brother Alphonsus, one against Brother Pius, three against Brother Patrick and nine against Brother Benedict. There are no allegations against Brother Cuthbert.

32. Ms Collignon submitted that this information is relevant. She relied on *O'Brien v Chief Constable of South Wales Police* [2005] 2 AC 534, where Lord Bingham said at [4] that if those involved in a disputed incident had in the past been involved in events of an apparently similar character, "attention would be paid to those earlier events as perhaps throwing light on and helping to explain the event which is the subject of the current inquiry". That is no doubt correct. But the fact that other complaints have been made against particular individuals is not evidence that those complaints are well-founded. The fact that these claims have been made is not, in my view, probative. I shall consider the relevance of these complaints to the question of limitation in due course.

The proper approach to the evidence

33. The allegations in this case relate to a period between 45 and 47 years ago. In *BXB v Watch Tower Bible and Tract Society of Pennsylvania* [2020] EWHC 156 (QB), [2020] 4 WLR 42, I had to consider the proper approach to historic allegations of sexual assault, insofar as they were disputed. At [13]-[14] of my judgment, I referred to the observations of Leggatt J in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), [15]-[18] and [22] about the fallibility of memory and the tendency of the human mind, however honest, to construct a narrative after the event. One passage in particular, from [18] of Leggatt J's judgment, is of particular relevance:

> "Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time."

34. At [15] of my judgment in *BXB*, I referred to the observations of Floyd LJ (giving a judgment of the court to which Henderson and Peter Jackson LJJ contributed) in *Kogan v Martin* [2019] EWCA Civ 1645, [2020] EMLR 4, [88]-[89]. Floyd LJ emphasised that, subject to questions of limitation, a proper awareness of the fallibility of memory does not relieve judges of the responsibility to make findings of fact based on all the evidence. This too is pertinent here.

The scope of the dispute in fact and law

35. Where a person has been convicted of an offence before a court in the United Kingdom, the fact of the conviction is admissible as proof that he committed that offence and creates a rebuttable presumption that he did so: s. 11(1) & (2) of the Civil Evidence Act 1968. In this case, the Defendant admits the assaults of which McKinstry was convicted. These were recorded by the High Court in Edinburgh as follows:

> "On various occasions between 19 January 1973 and 16 September 1974, both dates inclusive, at Gartmore House, (then known as Saint Ninian's List 'D' School), Gartmore Estate, Stirlingshire, James Andrew McKinstry did assault [JXJ]… then a boy under your charge and under the age of 14 years, handle his private member and masturbate him, repeatedly punched him on the body and seize him by the hair, utter threats and repeatedly insert your finger or fingers into his hinder parts, all to his injury."

36. The Defendant does not, however, admit that McKinstry penetrated JXJ's anus with his penis; nor that Brother Alphonsus was present while McKinstry was sexually assaulting JXJ; nor that he was aroused or masturbating when JXJ reported the assaults by McKinstry to him; nor that he breached his duty of care to take reasonable steps to protect JXJ from McKinstry and/or other DLS brothers. The Defendant also does not admit the physical assaults that JXJ says were committed against him by DLS brothers.

37. The Defendant's case is that the inconsistencies in the accounts given by JXJ to the Scottish police and the High Court in Edinburgh, the various psychiatrists who have assessed him, his pleadings and written and oral evidence in these proceedings mean that what he says cannot be relied upon as a basis for making findings of fact on the balance of probabilities.

The proper approach to findings of fact when limitation is in issue

38. In *B v Nugent Care Society* [2009] EWCA Civ 827, [2010] 1 WLR 516, Lord Clarke MR noted at [22] that a judge determining questions of limitation along with the substantive issues in the case 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". However, in *JL v Bowen* [2017] EWCA Civ 82, [2017] PIQR P11, Burnett LJ (with whom Sir Ernest Ryder and Lewison LJ agreed) noted that there was no difficulty in reaching preliminary adverse conclusions as to the reliability of the claimant. He gave an example at [26]:

> "A claimant sues for personal injury ten years after an alleged accident and seeks an order to disapply the limitation period of three years. The defendant has lost its witnesses and records, but advances a defence that the accident did not occur. The judge concludes, without the lost evidence, that indeed the accident did not occur. The burden is on the claimant to prove that it would be equitable to disapply the limitation period having regard to the balance of prejudice. In those circumstances he would not be able to do so. There would be no purpose in extending the limitation

> period and it would not be equitable to do so. Similarly, a full exploration at trial of, for example, the claimant's reasons for delay may enable the judge to reach firm conclusions which could have been no more than provisional had limitation been resolved as a preliminary issue."

39. In the light of this guidance, I have proceeded at this stage to set out the Claimant's evidence and make some preliminary findings on its reliability and cogency. On the central contested issues, however, it is necessary to consider limitation issues first, so as to decide whether it is, or is not, possible to reach findings of fact.

The Claimant's evidence

JXJ

40. JXJ was born in Glasgow in 1962. His father worked; his mother had mental health problems. He was taken into local authority care shortly after he was born, though he returned home at weekends and in the holidays. In September 1972, when he was 10, he was sent to the School because he had been involved in petty crime and fighting. He was there until September 1974. He describes it as an "awful, brutal place".

41. When JXJ arrived at the School, McKinstry was the gardener. JXJ remembers seeing him with shears and clippers. At first, one of the brothers performed the role of night watchman, visiting each house at night to check the lights were off and the boys were in bed, but this role was later assigned to McKinstry by the brothers. It was suggested to JXJ in cross-examination that this detail had been included to bolster his argument on vicarious liability, but JXJ maintained that it was the brothers who assigned the night watchman role to McKinstry.

42. JXJ initially slept in a small dormitory at the back of the school building. He was then moved to a larger dormitory at the front of the building. After a week or so, JXJ was required by the headmaster, Brother Alphonsus, to take his mattress out of the dormitory and sleep outside an office used by McKinstry. JXJ could not recall why, but assumed he had got into trouble and was being punished. On his first night sleeping outside the dormitory, JXJ recalled waking to find McKinstry next to him. JXJ's nightgown had been pulled up and his body was wet with what he now believes to have been McKinstry's semen. JXJ was aware of a brother in a cassock by the stairs. He explained in cross-examination that the light was low and he could not see who it was, but he believes from the shape of the silhouette that it was Brother Alphonsus. JXJ had to sleep on the mattress outside the dormitory for about 7 to 10 nights and during that time he was abused by McKinstry on most nights. The abuse increased in intensity, with McKinstry touching JXJ, masturbating him and performing oral sex on him.

43. When JXJ was allowed to return to the dormitory, the abuse continued. JXJ would be woken up by McKinstry kneeling by the side of his bed and touching him. McKinstry would perform oral sex on JXJ. This became "a regular thing".

44. On a Friday afternoon when he had home leave for the weekend, JXJ was dropped by the school bus near a roundabout at Bearsden. He was walking home when McKinstry pulled up in his orange Volkswagen. McKinstry offered JXJ a lift and JXJ got into the car. McKinstry said they should go to a hotel and go to bed together. JXJ refused,

saying he would rather go to bed with a woman, and McKinstry tried to hit him. JXJ jumped out of the car. JXJ told his mother after he got home that McKinstry had attacked him. His mother telephoned the School. Brother Cuthbert, the depute headmaster, came to JXJ's house and took him back to the School.

45. On the Sunday night, JXJ was called to see Brother Alphonsus. He sat on Brother Alphonsus's knee (as he usually did for confession) and recounted what McKinstry had done, not just in the car but outside and inside the dormitory. JXJ remembers thinking it odd that Brother Alphonsus's hand was moving under his cassock. He now believes Brother Alphonsus was aroused by JXJ's account of being abused by McKinstry and was masturbating himself. JXJ says that Brother Alphonsus told him he must have imagined the abuse by McKinstry and it was a sin to tell lies.

46. On the Monday after he reported the abuse to Brother Alphonsus, at morning assembly, Brother Alphonsus made an announcement to the whole school that JXJ had made a serious allegation about a popular member of staff and other pupils were not to speak to him. (Prof. Maden, in his report, records JXJ as saying that Brother Alphonsus had warned the boys not to speak to him "while it was being investigated".) JXJ says that, from that day on, he was ostracised by other pupils and by the teaching staff. In his oral evidence, he said that his life became hell.

47. The sexual abuse continued after the announcement at the assembly. JXJ would wake up with McKinstry touching him and performing oral sex on him. He was worried the other boys might see. If that happened, he felt he would be in even more trouble. The abuse escalated and became more violent. McKinstry would try to force his penis into JXJ's mouth, put his hands around JXJ's throat, pull JXJ's hair, hold JXJ's nose and put his fingers into JXJ's mouth. On occasion he would get into JXJ's bed, put his penis between JXJ's legs and insert his finger or thumb into JXJ's anus. Sometimes he would try to force his penis into JXJ's anus, hurting him. In retrospect, JXJ believes McKinstry's penis penetrated his anus. McKinstry told JXJ that if anyone found out there would be trouble. JXJ struggled but sometimes it was easier just to give in. When he did that, McKinstry would be happy and would tell JXJ how nice he was. The abuse continued on a regular basis until JXJ left the School.

48. In addition to the sexual abuse he suffered at the hands of McKinstry, JXJ complains of physical abuse by brothers. There are three principal allegations.

49. First, on occasions JXJ tried to run away from the School and was found and returned by the police. Upon his return, he was taken to Brother Alphonsus' office, where his trousers would be pulled off, he would be forcibly pinned down over a desk, his arms twisted up his back and up to six members of staff would take in turns to whip him with a leather teacher's belt across his bare buttocks. The whipping caused welts on his buttocks which would bleed and he could not sit for a week. Such was the force with which he was pinned down that on several occasions one or both of his shoulders were dislocated. When this happened, he was not taken to a doctor outside the School, but rather to the nurse's office in the School (the nurse was called Beatrice or Beatrix), where Brother Cuthbert would stand over him and pull his shoulder back into place.

50. Second, Brother Patrick had a horse whip and a riding crop, which he would use to hit JXJ on the backs of his legs.

51. Third, Brother Pius punched JXJ on several occasions. He used to play a trick where he would pull out his hand from under his cassock. Sometimes, he would produce an apple or a sweet, but on other occasions a clenched fist with which he would punch JXJ in the face. JXJ says that on one occasion Brother Pius punched him so hard that he broke JXJ's teeth. On another occasion, he broke JXJ's nose.

Preliminary conclusions about JXJ's evidence

52. In some respects, JXJ frankly admitted that his memory about what had happened was hazy. Both at his trial in Edinburgh in 2003 and in his evidence for these proceedings, he made clear that he could not be sure that there was someone else present when he awoke to find McKinstry touching him sexually; nor that, if there was someone there, it was Brother Alphonsus. JXJ's recollection was in my judgment not clear enough to justify a finding of fact on the balance of probabilities that Brother Alphonsus was present while JXJ was being abused by McKinstry.

53. JXJ was cross-examined robustly on inconsistencies in the accounts he had given at different times to the police, to various psychiatric experts and in his evidence for these proceedings. In my view, some of the inconsistencies were more significant than others.

54. Mr Ford pointed out that neither what JXJ said to the Scottish police, nor his evidence at trial in 2003, includes any allegation that McKinstry penetrated JXJ's anus with his penis; and that if abuse of that kind had taken place, one would expect it to have been mentioned. JXJ responded that the statements in the bundle were not the only ones he had given to the Scottish police; he thought that there were others. To my mind, it is unlikely that the Scottish police would have retained some but not all of the statements given by JXJ during the investigation which led to the criminal proceedings in 2003; despite some oddities in the page numbering and presentation, the statements in the bundle read as complete documents; and JXJ's recollection of what he said to the Scottish police was hazy. On the balance of probabilities, I find that the statements in the bundle were the only ones that JXJ gave to the Scottish police in the course of the investigation leading to the criminal proceedings in 2003.

55. There were some inconsistencies between the description there of what McKinstry did and the description he gave in his evidence in this case, but I did not find these inconsistencies to be significant. It is inevitable when recounting events of this kind that the description given on one occasion will be slightly different from that given on a subsequent occasion. The account JXJ gave at trial in 2003 (which the jury must have accepted) included clear evidence that McKinstry had inserted his fingers into JXJ's anus. JXJ's evidence to me on this point was, to my mind, credible and I accept it as true: at the time of the assaults, JXJ had been 11 years old; McKinstry had placed his penis between JXJ's legs; he could not be sure whether McKinstry had succeeded in penetrating him with his penis; in retrospect JXJ thinks McKinstry did succeed. It is neither possible nor necessary to make a finding about whether McKinstry did in fact penetrate JXJ's anus with his penis. In any event, the difference between what McKinstry was convicted of doing (and the Defendant now accepts he did) and what JXJ says in his evidence McKinstry did is insignificant. Either way, JXJ suffered repeated and exceptionally serious sexual abuse. Latterly, the abuse was accompanied by considerable violence. Not surprisingly, this line of questioning caused JXJ some distress. It would have been better if it had not been pursued.

56. Some of the other inconsistencies in JXJ's allegations, on the other hand, were more concerning – and these cause me to be cautious about the weight that can properly be placed on JXJ's evidence on matters which are not admitted and on which there is no independent corroboration. In particular:

(a) In his accounts to Dr Kennedy and Prof. Maden, in his Particulars of Claim and in his witness statement, JXJ says that, when he sat on Brother Alphonsus' knee and reported being abused by McKinstry, Brother Alphonsus was aroused or masturbating. Yet when asked about this incident by the Scottish police in 2000, JXJ said this about an occasion when he sat on Alphonsus' knee: "It was a normal occurrence that boys would sit on his knee and tell him problems they may have had. I never felt anything sexual by having to sit on his knee was being implied". JXJ gave no convincing explanation of this discrepancy. I do not conclude that JXJ was being dishonest when he said that he recalled Brother Alphonsus' arousal. But the fact that he had no such recollection in 2003 suggests that this was part of a narrative which developed in the way described by Leggatt J in *Gestmin* as he returned to the events in his own mind. The fact that JXJ's current recollection is the later of the two does not necessarily make it less reliable. But the unexplained discrepancy means that it is not possible to make a finding, on the balance of probabilities, that Brother Alphonsus was aroused, or masturbating, when he was being told by JXJ of the abuse by McKinstry.

(b) In his statement to the Scottish police, JXJ mentioned being whipped by Brother Patrick with a horsewhip. He also mentioned Brother Pius and Brother Cuthbert but did not say that he had been hit by Brother Pius or held down and assaulted by a group including Brother Cuthbert. Given my finding that the statements in the bundle were the only statements JXJ gave to the Scottish police, it is likely that JXJ's recollection of being assaulted by Pius and Cuthbert developed, as his recollection of the incident with Alphonsus did, after he gave his police statements in 2000. This does not mean that what JXJ now says is untrue, but it significantly affects the weight I can attach to JXJ's recollection of these matters.

(c) In the Particulars of Claim, endorsed by JXJ with a statement of truth on 5 June 2018, JXJ pleaded that the monks who had held him down for beatings in the headmaster's study included Brother Benedict (who by then had recently been convicted for the second time of assaults committed while teaching as a DLS brother). JXJ's witness statement contains no mention of Brother Benedict. But on 19 January 2020, JXJ wrote to Brother Benedict (who was in prison in Scotland) saying that he thought Brother Benedict had been "scapegoated" and asking Brother Benedict to give evidence on his behalf. This letter is referred to in an email to Mr Latham on 20 January 2020 at 00:51, in which JXJ asked: "Do you remember Brother Benedict? Can't say I do, I think he may have taught how to play the recorder [sic]". If this was the state of his recollection earlier this year, it is troubling that JXJ signed a statement of truth two years ago attesting to truth of the pleaded allegation that Brother Benedict was among those who had assaulted him. This too affects the weight I can attach to JXJ's account as to the identity of those who were involved in assaults on him.

(d) Finally, at the criminal trial in 2003, JXJ mentioned that, in addition to the abuse suffered at the School, he had also suffered sexual abuse at a different school; and according to a letter dated 12 July 2011, he told a psychiatrist, Dr Faisal Goni, that he had been sexually abused by his paternal uncle. Yet in his accounts to the psychiatrists instructed for the purposes of this claim, he appears not to have mentioned either of these instances of abuse. In his evidence before me, JXJ did not accept that he had been abused by his paternal uncle. He thought Dr Goni might have mixed him up with his brother, who had also been one of his patients. To my mind, that is unlikely. The letter contains a substantial amount of detail about JXJ. Given that the letter was written more than a month after the clinic appointment, the details must have been transcribed from notes of what JXJ said to Dr Goni. There is no suggestion that anything else in the letter is inaccurate. On the balance of probabilities, I find that JXJ did tell Dr Goni that he had been abused by a paternal uncle. That fact would have been material to causation and quantum in these proceedings. JXJ, an intelligent man who has studied for a law degree, would have known that. This also affects the extent to which I can place weight on JXJ's evidence.

Desmond Latham

57. Desmond Latham attended the School between September 1970 and September 1973. Though they were not friends, he remembers JXJ because they were in the same house and a few places apart in the roll call. He remembers that no one liked JXJ and he was always picked on, though he "gave as good as he got".

58. Mr Latham was not at the assembly when Brother Alphonsus made the announcement, because he was in the sick bay having made his own allegations of abuse to Brother Alphonsus about another teacher a few days earlier. Mr Latham was told by a friend that Brother Alphonsus had made an announcement that JXJ had made allegations against a member of staff and that the boys were not to associate with him. Although Brother Alphonsus did not say so, the boys knew that the member of staff concerned was McKinstry and that the allegations were of a sexual nature.

59. Mr Latham said that JXJ was singled out by the staff for bad treatment. Brother Patrick "really hated" JXJ and "made no attempt to hide it". Mr Latham saw him hit JXJ on his bare legs with a riding crop on two or three occasions.

60. Mr Latham described a brother who held his hand in his smock and, as a trick, would bring it out in a fist. Mr Latham said he saw this brother hit JXJ on a weekly basis. In his first witness statement, Mr Latham identified the brother as Brother Ignatius but in his second witness statement he said he realised he had made a mistake. It was in fact Brother Pius.

The inferences to be drawn from the emails between JXJ and Desmond Latham

61. In cross-examination, JXJ was asked about the circumstances in which Mr Latham had become involved in the litigation. JXJ said that he did not know Mr Latham when he was at the School, but had been doing some research about child abuse victims online and had come across him on a web forum. He contacted Mr Latham through the administrator of the forum. They spoke on the telephone, while JXJ was sitting

outside Birkbeck College in London. JXJ said they did not communicate and he had passed Mr Latham on to his lawyer.

62. Mr Latham was asked about his contact with JXJ. He said that he had not had contact with JXJ and had not discussed the case with him. Although JXJ had put him in touch with a solicitor with a view to bringing proceedings of his own, he had not contacted JXJ in that context either.

63. After the Claimant and Mr Latham had completed their oral evidence, Ms Collignon informed the court that JXJ had indicated that there were emails between JXJ and Mr Latham and that these would have to be disclosed. The emails were disclosed on Friday 19 June and when the trial resumed on Monday 22 June I was informed that the parties had agreed that they should be inserted into the trial bundle, but neither party wished to apply to have any witness recalled. The emails indicated that JXJ and Mr Latham had corresponded at some length, both when they first became acquainted in 2015 and then again in 2018.

64. In his closing submissions, Mr Ford said that the emails showed that both JXJ and Mr Latham had lied when they said they had not been in contact. I asked whether that submission was open to Mr Ford, given that the emails had not been put to JXJ or Mr Latham in cross-examination. Mr Ford responded that it was for Ms Collignon to decide whether she wished to adduce evidence explaining the emails by recalling JXJ and/or Mr Latham: both were her witnesses. If she chose not to do so, Mr Ford had no duty, and indeed no right, to apply to recall them for cross-examination.

65. Ms Collignon said that Mr Ford could have applied to have JXJ and/or Mr Latham recalled and that, having decided not to, it was improper for him to submit that the emails showed them to have lied. In case she was wrong about that, she herself applied to recall JXJ, making clear that she had no questions to put to him, but was happy to tender him for cross-examination. Mr Ford, for his part, said that if JXJ gave no additional evidence in chief, he would have no questions in cross-examination. Given that both parties had made clear they had no questions to put to him, I formed the view that there was no point in permitting JXJ to be recalled and refused the application to recall him on that basis.

66. At my invitation, the parties filed written submissions as to what could be drawn from the emails in these circumstances. In my judgment, the position is as follows:

    (a) In general, a witness must be cross-examined on those parts of his evidence said to be untrue: see *Browne v Dunn* (1894) 6 R 67, HL, relevant extracts from which are set out in *Markem Corp. v Zipher Ltd* [2005] EWCA Civ 267, [2005] RPC 31, [59]-[61] (Jacobs LJ).

    (b) In this case, through no fault of the Defendant's, the emails were not disclosed until after JXJ had finished giving evidence, so there was initially no opportunity for Mr Ford to put them to JXJ.

    (c) However, if Mr Ford had wished to cross-examine on the emails, he could have done so, possibly by applying for JXJ and/or Mr Latham to be recalled and certainly by indicating that he had questions to put to JXJ when Ms Collignon applied to recall him. Having decided not to do that, Mr Ford cannot fairly and

properly submit, on the basis of the emails, that the evidence given by JXJ or Mr Latham was deliberately untrue.

(d) However, the parties agreed that the emails should be inserted into the hearing bundle. This means that they are admissible: see CPR 32 PD para. 27.2 and my decision in *BXB*, [62]-[64].

(e) Mr Ford is entitled to say that the emails raise unanswered questions about the reliability of JXJ's and Mr Latham's evidence and that this can be borne in mind when considering whether JXJ has discharged his burden of proof: see e.g. *Johnson v Medical Defence Union Ltd* [2006] EWHC 321 (Ch), [226]-[228] (Rimer J).

67. I have considered the emails with the help of a colour-coded document submitted by Ms Collignon. They establish that JXJ was mindful of the need to avoid specific discussion of the allegations which figured in his claim, so as to avoid the suggestion that Mr Latham's evidence on those matters was not independent. However, JXJ did in fact engage in discussion about some of the specific allegations, both before and after Mr Latham produced his witness statement. In particular:

(a) In an email from JXJ to Mr Latham at 16:30 on 5 March 2015, JXJ said: "Die [sic] to Alphonses [sic] announcement, I was the most hated boy in the school". On 6 March 2015 at 3:38pm, JXJ said: "I was never popular at St Ninians". On 7 March 2015 at 2:10am, he said: "I was an ostracized loner at St Ninians". There are some other references to Brother Alphonsus, but no direct reference to when the announcement was made or what it was about.

(b) There are references to JXJ's allegations about Brother Patrick. On 7 March 2015 at 2:10am, JXJ said: "Once when we were marching in our shorts outside, brother Patrick whipped me with his training whip, it wasn't the first time, but that time I charged at him and brought him to the ground in front of the whole house room". Much later, on 25 January 2019 at 6:09pm, after he had produced his statement, Mr Latham said: "Keep your chin up bud, I remember Brother Patrick was always picking on you more than the rest of us. He was very quick with his riding crop".

(c) On 7 March 2015 at 2:10am, JXJ said: "Bra Pius did punch my teeth out, you never knew when that hand came out of his cassock whether he held an apple or a clenched fist. Once during his RK class about the Crucifiction, I asked when TV was invented, and explained that on TV people appear to die, but don't. Bra Pius went mad".

68. Reading the exchanges as a whole, both JXJ and Mr Latham were keen to avoid, and indeed seem to have thought they had avoided, a situation in which they contaminated each other's evidence. It is, however, a familiar feature of human interaction that one can honestly try to avoid discussing a particular topic, and honestly believe one has succeeded, whilst in fact having discussed the topic more or less extensively. The discussions do not in themselves cast doubt on the reliability of JXJ's evidence: the "specifics" almost always came from him. They do, however, make it impossible to regard Mr Latham's evidence as providing much by way of independent corroboration of JXJ's evidence. This is because, when recalling events between 45 and 47 years

ago that happened to someone else whom he did not know well, there is a substantial risk that what he now recalls is affected by JXJ's recollections as recounted to him in emails in 2015 and subsequently: see the extract from [18] of Leggatt J's judgment in *Gestmin*, set out at [33] above.

The Defendant's evidence

Brother Livinus

69. Brother Livinus taught at the School from 1956 to 1967. He is now 93 years old. He had a good recollection of the way the School was run during his time there and of certain of the individuals involved. He did not hesitate to give answers that, in some cases, were not helpful to the Defendant's case.

70. Brother Livinus was depute headmaster from 1961. Though he was not at the School when JXJ was there, the Defendant relied on his evidence to establish how the School was run. It was not suggested that there had been any material changes in the period between 1967 (when he left) and 1972-1974 (when JXJ attended), save that the frequency of visits by the board of managers seems to have declined somewhat.

71. The School was run by a board of managers, who employed both the brothers and other members of staff. In cross-examination, however, he accepted that it was the headmaster and depute headmaster who had day to day responsibility for running the School. They were in charge of all the staff, without whom the School could not have operated. Brother Livinus accepted that he or the headmaster would have intervened quickly if they discovered that a member of staff had been exposing them to harm.

72. Brother Livinus said when he was at the School the managers would come once a month for meetings. He or the depute headmaster would also attend. In his time, most of the managers came from Glasgow, about 25 miles away. The provincial also attended once a year, sometimes more, and made suggestions about how the School should be run. Brother Livinus remembered the School as a positive, nurturing place. He did not remember any violence or abuse. Corporal punishment, which was then lawful in Scotland, did take place, but it was subject to strict controls.

73. It was pointed out to Brother Livinus that Brother Benedict had been convicted of committing a series of cruel, sadistic and depraved acts of abuse against boys at the School during the period when Brother Livinus was depute headmaster; and that, separately, Brother Benedict had in 2016 been convicted of committing further abuse at another school, St Joseph's in Tranent, East Lothian, also while Brother Livinus was there. That makes it impossible to regard his positive impression of School as a matter of any evidential significance.

Brother Laurence

74. Brother Laurence is the current provincial (i.e. head) of the Institute's Province of Ireland, Great Britain and Malta. Like Brother Livinus, he too did not shrink from answering questions even where the answers were unhelpful to the Defendant.

75. He accepted in cross-examination that, in terms of its day-to-day operations, the School would have been led by the headmaster and depute headmaster. He accepted

that the Defendant could have investigated the allegations made by JXJ and others when they were first made in the late 1990s and early 2000s. He did not accept that the School had a responsibility to investigate at that time. He pointed out that the School's records had been handed to the local authority when the School closed in 1982, so any investigation would have been difficult.

76. Brother Laurence accepted that there had been a failure on the part of the Institute to protect the children from members of staff. In his experience as an educator, if something was going on in a school, other members of staff must have known about it. These things filter down from the students. This was particularly true of physical abuse, which was more likely than sexual abuse to be overt.

John Biggins

77. Mr John Biggins is the Safeguarding Administrative Assistant for the Defendant. His role, which he took up recently, involves handling communications and records about safeguarding. He gave evidence as to the whereabouts of the brothers whom JXJ accuses of assaulting him. Brother Benedict (Michael Murphy) is alive, but serving a prison sentence for offences committed at St Joseph's in Tranent, East Lothian. All the other brothers implicated by JXJ had died: Brother Cuthbert (Joseph Nolan) on 20 May 1983, Brother Alphonsus (Vincent Henry Mitchell) on 1 April 1990, Brother Pius (Michael Hyland) on 3 May 1993, Brother Patrick (Timothy Mullins) on 7 October 2004.

78. Mr Biggins said that the Institute does not have any records of the staff who were not brothers, because it did not employ them, but he had instructed a tracing agent to find McKinstry and discovered that he died on 18 January 2019.

79. Mr Biggins explained that he had searched the archive, which consists of five or six rooms containing boxes of documents. The only relevant document was a photocopy of a register of brothers. This, Mr Biggins suggested, may have been the only document retrieved from Police Scotland after a box of documents was sent to them during the criminal investigations.

Limitation

The Scots law of limitation prior to the 2017 Act

80. In general, s. 17 of the 1973 Act governs limitation in personal injury actions not resulting in death. It provides materially as follows:

> "(2) Subject to subsection (3) below and section 19A of this Act, no action to which this section applies shall be brought unless it is commenced within a period of 3 years after—
>
> > (a) the date on which the injuries were sustained or, where the act or omission to which the injuries were attributable was a continuing one, that date or the date on which the act or omission ceased, whichever is the later; or

> (b) the date (if later than any date mentioned in paragraph (a) above) on which the pursuer in the action became, or on which, in the opinion of the court, it would have been reasonably practicable for him in all the circumstances to become, aware of all the following facts—
>
> > (i) that the injuries in question were sufficiently serious to justify his bringing an action of damages on the assumption that the person against whom the action was brought did not dispute liability and was able to satisfy a decree;
> >
> > (ii) that the injuries were attributable in whole or in part to an act or omission; and
> >
> > (iii) that the defender was a person to whose act or omission the injuries were attributable in whole or in part or the employer or principal of such a person.
>
> (3) In the computation of the period specified in subsection (2) above there shall be disregarded any time during which the person who sustained the injuries was under legal disability by reason of nonage or unsoundness of mind."

81. This is broadly similar to the equivalent English and Welsh provision, s. 11 (read with s. 14) of the 1980 Act. The three-year primary limitation period is referred to in Scotland as the "triennium".

82. Section 19A of the 1973 Act is headed "Power of court to override time-limits etc." Sub-section (1) provides:

> "Where a person would be entitled, but for any of the provisions of section 17… of this Act, to bring an action, the court may, if it seems to it equitable to do so, allow him to bring the action notwithstanding that provision."

83. In s. 19A of the 1973 Act, unlike in s. 33 of the 1980 Act, the factors relevant to the exercise of power are not statutorily prescribed. As Mr Sheldon confirms in his impressively comprehensive report, however, "each jurisdiction has referred to the other's case law in the developing law of limitation". So far as the approach of the Scottish courts is concerned, that is demonstrated by Lord Drummond Young's opinion in *B v Murray (No. 2)* 2005 SLT 982, at [29], which was upheld on appeal to the House of Lords: *AS v Poor Sisters of Nazareth* [2008] UKHL 32, 2008 SC (HL) 146. For their part, the courts of England and Wales have also regarded decisions on s. 19A of the 1973 Act as relevant when applying s. 33 of the 1980 Act: see e.g. *Catholic Child Welfare Society (Diocese of Middlesbrough) v CD* [2018] EWCA Civ 2342, [35] (Lewison LJ).

84. In *B v Murray (No. 2)* Lord Drummond Young identified three key principles at [27]:

> "First, in considering prejudice to a defender, it is important to keep in mind that an extension period reimposes the liability that the defender

> would otherwise have escaped. Secondly, because of that, it is not material that the prejudice suffered by the defender is no worse than would have been the case had the action been raised towards the end of the limitation period. Thirdly, if a defender can show actual prejudice in defending the action, or the real possibility of significant prejudice, it will normally not be appropriate to grant an extension. This is because fundamental legislative policy underlying limitation statute is to avoid the possibility of such prejudice, and if the prejudice can be shown to be real, rather than merely a possibility, that legislative policy applies with its full force and must be given effect. Consequently, existence of actual prejudice to the defendant must always be of the greatest importance in considering whether an extension should be granted."

85. At [29], Lord Drummond Young noted that the "crucial question" when considering whether to exercise the power conferred by s. 19A was "where do the equities lie?". At [30], he noted that one relevant issue was the pursuer's ignorance of the legal right to claim damages. Prejudice to the defendant was also important, but what mattered was "whether the loss of evidence is material, not whether it is total."

86. The House of Lords saw no error in this approach. Lord Hope (with whom the other members of the Appellate Committee agreed) said that "proof that the defender will be exposed to the real possibility of significant prejudice will usually determine the issue in his favour": *AS v Poor Sisters of Nazareth*, [25].

87. Mr Sheldon explains that Lord Drummond Young's opinion has been regularly cited and followed by Scottish courts. By way of example, he drew attention to *M v O'Neill* 2006 SLT 823, where Lord Glennie held at [96] that it would not be possible to have a fair trial in relation to disputed events said to have taken place 35 years previously; and *W v Trustees of the Roman Catholic Archdiocese of St Andrews and Edinburgh* [2013] CSOH 185, where Mr P.A. Arthurson QC (sitting as a temporary judge of the Outer House of the Court of Session) held that prejudice to the defenders was inevitable in a case where there was a 20 year gap between the cessation of the alleged abuse and the service of the summons. At [29], he said:

> "What must matter in weighing the equities and prejudice is whether the loss of evidence and impact on the quality of justice is material..."

88. In *SF v Quarriers* [2015] CSOH 82, 2016 SCLR 111, the Lord Ordinary (Lord Bannatyne) declined to exercise the power under s. 19A to allow an action to proceed in respect of abuse said to have been committed by someone who had died almost 25 years before the action was raised. At [149], the judge said this:

> "It appears to me that where the allegations of abuse are made against a single person and that person's evidence has been lost to the defenders then it is really impossible for the defenders to have a fair trial. The defenders are denied the evidence of what would have been their most important witness. They are not able to properly defend themselves."

89. *K v Marist Brothers* [2016] CSOH 54 concerned allegations of sexual and physical abuse said to have been committed by Brother Germanus, a member of the defendant order, in the early 1960s. The Lord Ordinary (Lady Wolffe) held as follows at [91]:

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

The 2017 Act

90. The reasons why legislative change was thought necessary appear from the Policy Memorandum accompanying the draft Bill which became the 2017 Act. At §10, the existing law was described in this way:

> "Under section 19A of the 1973 act, the court may – if it seems to it equitable to do so – allow an action for damages to proceed even if it would otherwise be time barred. The starting point in relation to an application to the court to exercise this power is that the limitation period, which is the general rule, has expired. The onus is accordingly on the pursuer to show that justice requires the action to proceed even though the limitation period has expired. It is of critical importance that the pursuer provides a reasonable explanation for not raising the action earlier, and if the pursuer does not provide what the court considers a reasonable explanation then the application is likely to be refused. Against the background of the three-year period, the courts have typically not accepted explanations for failing to raise actions within that period where the pursuer has been aware of the abuse, and indeed may have disclosed abuse well before raising the action. Explanations for the delay which have referred to such matters of shame, fear and psychological difficulties as a result of childhood abuse have been unsuccessful. A case in which the court allowed an action against the alleged abuser to proceed well after the expiry of the three-year period, on the basis of evidence of systematic abuse from childhood well into adulthood which has rendered the pursuer emotionally dependent on the defender, was described by the judge as 'somewhat exceptional'. Further, given that the ordinary limitation period will have expired, if the defendant can show actual prejudice or the real possibility of prejudice in defending the action, that will usually determine the section 19A issue in favour of the defender. In approaching these cases in the way that they have, the courts have been applying the policy of the 1973 Act – given, in particular, that these cases are, in principle, subject to the three year limitation period and that the pursuer requires to persuade the court to allow the action to proceed out of time. That is why legislation is necessary."

91. At §25, the following was said:

> "The Scottish Government is persuaded that cases of childhood abuse have unique characteristics which warrant a specific limitation regime. These characteristics derive from the abhorrent nature of the act, the vulnerability of the victim (who was a child at the time), and the effect of abuse on children. In particular, it is now recognised that the effects of childhood abuse often themselves inhibit disclosure to third parties until many years after the event."

92. At §32, the Scottish Government continued as follows:

> "The Australian Royal Commission concluded that limitation periods are inappropriate for this class of civil actions. The Scottish government agrees with this conclusion. It considers that whatever factors might cover in the exercise of the court's discretion, the application of a limitation period to cases of childhood abuse creates an inbuilt resistance to allowing historical claims to proceed which is not appropriate in the context of this class of case. It has the practical effect of protecting abuses (and their employers) from being held to account in the civil courts, while preventing abused survivors from obtaining access to justice and, if they can establish their claims, obtaining reparation for the wrong."

93. Accordingly, the 2017 Act inserted new provisions into the 1973 Act: ss. 17A-17D. They provide materially as follows:

> "**17A. Actions in respect of personal injuries resulting from childhood abuse**
>
> (1) The time limit in section 17 does not apply to an action of damages if—
>
> (a) the damages claimed consist of damages in respect of personal injuries,
>
> (b) the person who sustained the injuries was a child on the date the act or omission to which the injuries were attributable occurred or, where the act or omission was a continuing one, the date the act or omission began,
>
> (c) the act or omission to which the injuries were attributable constitutes abuse of the person who sustained the injuries, and
>
> (d) the action is brought by the person who sustained the injuries.
>
> (2) In this section—
>
> "abuse" includes sexual abuse, physical abuse, emotional abuse and abuse which takes the form of neglect,

> "child" means an individual under the age of 18.
>
> **17B. Childhood abuse actions: previously accrued rights of action**
>
> Section 17A has effect as regards a right of action accruing before the commencement of section 17A.
>
> …
>
> **17D Childhood abuse actions: circumstances in which an action may not proceed**
>
> (1) The court may not allow an action which is brought by virtue of section 17A(1) to proceed if either of subsections (2) or (3) apply.
>
> (2) This subsection applies where the defender satisfies the court that it is not possible for a fair hearing to take place.
>
> (3) This subsection applies where—
>
> > (a) the defender satisfies the court that, as a result of the operation of section 17B or (as the case may be) 17C, the defender would be substantially prejudiced were the action to proceed, and
> >
> > (b) having had regard to the pursuer's interest in the action proceeding, the court is satisfied that the prejudice is such that the action should not proceed…

Mr Sheldon's conclusions

94. At the date of Mr Sheldon's report, 9 May 2019, there was no decided authority on the interpretation of these provisions. Mr Sheldon drew attention to legislation in Victoria, Australia, designed to achieve similar aims. The Limitation of Actions Amendment (Child Abuse) Act 2015 amended the Limitation of Actions Act 1958 to abolish the limitation period for historic abuse cases in Victoria. The amended provisions contained a saving provision (s. 27R), which preserved the court's common law powers, including the power summarily to dismiss or permanently to stay proceedings. A marginal note to the amending Act provides an example of a case in which the power might be used, namely, "where the lapse of time has a burdensome effect on the defendant that is so serious that a fair trial is not possible".

95. In *Connellan v Murphy* [2017] VSCA 116, the Victoria Court of Appeal stayed proceedings for abuse which was said to have taken place in 1967 or 1968. The court identified the applicable principles at [54]:

> "1. In order to justify the grant of a stay, a defendant bears a heavy onus. A stay is ordinarily only granted in exceptional circumstances, because it effectively brings to an end litigation without adjudication.
>
> 2. The categories of abuse of process are not closed.

> 3. In particular, the concept of an abuse of process is not confined to cases in which, if the action were to proceed, the defendant would not receive a fair trial.
>
> 4. The fundamental test is whether, in the circumstances, the proceeding would be manifestly unfair to the defendant or would otherwise bring the administration of justice into disrepute among right-thinking people."

The court considered that this test was satisfied. Although the defendant was alive, he was "being asked to defend himself at the age of 62 for actions he is alleged to have committed as a 13-year-old in respect of a person he can only have known (on the plaintiff's case) for little more than a week. The burdensome and oppressive nature of that task is manifest": [57].

96. In the light of all of this, Mr Sheldon concluded as follows:

> "First, it is plain that the [2017] Act was intended to invert the legal or persuasive onus in relation to limitation – it is now for the defender to show that the action should not proceed rather than for the pursuer to show why it should… The starting point in the courts analysis now requires to be that there is no limitation period, and that the pursuer in case is covered by s. 17A he is entitled to bring an action at any time. If the defendant maintains under s.17D(2) that a fair trial is 'not possible', s/he requires to 'satisfy' the court of that proposition. In cases of retrospective application of s. 17A, such as the present case, the defender requires to 'satisfy' the Court under s. 17D(3) there would be substantial prejudice to the defender if the action were to proceed – and the court requires to be 'satisfied' that the action should not proceed notwithstanding the pursuer's interest in that matter.
>
> Arguably, the position under s. 17D(2) is relatively straightforward. A fair trial is either possible, or it is not. The position in relation to s. 17D(3) he is potentially more difficult since it involves in essence a prediction about the course of a future trial or proof…
>
> Assuming that those authorities are transferable to the court's deliberations under s.17D(3), the court will presumably be on firm ground if it can conclude that substantial prejudice would be "inevitable" at any proof – as for example in *W v Trustees of the Roman Catholic Archdiocese of St Andrews and Edinburgh*. Under s. 19A, 'the real possibility of significant prejudice' – i.e. something short of inevitability – would normally also have determined the issue in favour of the defender. It will be a matter for the court to determine whether that formulation, approved by the House of Lords in relation to s. 19A, will now suffice in relation to s. 17D."

97. Mr Sheldon noted that the second significant issue under s. 17D(3) relates to the interest of the pursuer. As to that, he concluded as follows:

> "Even if a defender can satisfy the court that substantial prejudice would occur, the court can still decline to dismiss the case if the pursuer's 'interest in the action proceeding' outweighs any prejudice. The policy

> framework suggests that the legislature was keen to alter the balance of justice in favour of pursuers in abuse cases. Moreover, it is clear that the Scottish government was concerned to emphasise that abused individuals often delayed to bring actions for damages due to fear, shame, guilt, or trauma. The policy aim of the 2017 Act seems to have been to exclude from the court's consideration delay resulting from these *sequelae* of abuse. In the event of course, the provisions enacted (in spite of the misgivings of the Justice Committee) appear to envisage circumstances in which delay *may* result in dismissal. Arguably therefore, the new provisions set up a rebuttable presumption that there is a good explanation for any delay in bringing a claim, removing or restricting the emphasis laid in many of the cases on the conduct of the pursuer."
>
> Put another way, the claim may be raised at any time, and the pursuer does not require to provide any explanation for the delay. However, there clearly may be cases in which delay and/or the conduct of the pursuer is directly relevant to the issue of prejudice to the defender. If it can be shown – and of course the onus rests on the defender – that substantial prejudice has in fact resulted from the claimant's conduct, whether deliberate or otherwise, it is hard to see how the court could properly leave that out of account in considering s. 17D. That would apply *a fortiori* to a case where the claimant's conduct has made a fair trial impossible. An example of this might be the destruction of relevant evidence, deliberate or otherwise. Again, if it could be shown that the pursuer had to leave without justification in bringing a claim, it would in my view be arguable that that delay could be weighed in any consideration of the pursuer's 'interest' in terms of s. 17D(3)(b)."

LM v DG's Executors

98. Since the date of Mr Sheldon's report, there has been one decision from Scotland on the new limitation provisions: that of Sheriff Lorna Drummond QC in *LM v DG's Executor* 2020 SLT (Sh Ct) 11. In it, the pursuer sought damages from the executor of the estate of her late stepfather for sexual abuse said to have been perpetrated by him between 1981 and 1985, when she was between the ages of 11 and 15. The defender relied on s. 17D(2), but not s. 17D(3), in applying for the action to be dismissed before evidence had been heard: see [25]. The Sheriff said this at [26]:

> "The test is different from that which applies under s.19A of the 1973 Act where the court has a discretion to override the time limit and allow a case to proceed if it seems to it equitable to do so. Section 17D(2) turns solely on whether it is possible for a fair hearing to take place."

99. As to that, the Sheriff noted at [27] that it was normally impracticable for the court to predict the fairness of the trial at this stage of the proceedings, because it "cannot know the extent of the available evidential material, or its relevance and weight, in advance of the trial itself". At the interlocutory stage, the court would have to be satisfied that the trial would "inevitably" be unfair: [30]. On the facts, the Sheriff noted that in some of the Australian cases, notably *Judd v McKnight* [2018] NSWSC 1489, the court had allowed proceedings to continue notwithstanding the death of the

alleged perpetrator and his inability to give evidence or instructions throughout the trial. She continued as follows at [31]:

> "In this case, the deceased denied the allegations put to him by police at interview. He put forward the position that the events did not happen and that the sisters had got together to make it up. The situation is similar to the facts before the court in *Judd*. It contrasts with a scenario where the allegations have never been put to the alleged perpetrator with there being no possibility of them ever being put to him and his position ever being known, because he has died or become *incapax*. In the present case there is a basis on which to cross examine the pursuer and her sister. At the very least their accounts can be tested against their police statements and possibly against each other's accounts too. The situation is different in *Moubarak by his Tutor Cooney v Holt* [[2019] NSWCA 102] relied on by the defender, where at no time prior to becoming *incapax*, due to the onset of dementia, was the defender ever confronted with the allegations, nor was any police statement ever taken from him."

100. Neither party made submissions on the Australian cases referred to by Sheriff Drummond. Both were brought as a result of s. 6A of the New South Wales Limitation Act 1969, which, like the Victoria statute, abolished the limitation period in cases of child abuse, but expressly preserved the court's common law power to dismiss or stay proceedings. The New South Wales Parliament inserted a note indicating that this power could be used, "for example… when a lapse of time has a burdensome effect on the defendant that is so serious that a fair trial is not possible". In *Judd*, Garling J, sitting in the Supreme Court of New South Wales, applied a test of whether any hearing would be "manifestly unfair to the Estate or would otherwise bring the administration of justice into disrepute among right-thinking people". He held that this test was not met on the facts of that case. In *Moubarak*, the Court of Appeal of New South Wales distinguished *Judd* as follows at [136]:

> "Mr Judd largely accepted that he had in fact engaged in the conduct alleged. His claim was that it was consensual or, alternatively, he reasonably believed it to be lawful. That critical fact marks a material point of distinction between *Judd* and the facts of the present case, as do the different time frames involved since the alleged assaults in Judd and those in the present case."

Conclusions on Scots limitation law

101. In my judgment, the new Scottish limitation provisions should be applied in the following way:

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

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

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

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

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

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

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

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

(i) The Australian case law applies a test that differs from those required by s. 17D(2) and (3): whether the proceeding would be manifestly unfair to the defendant or would otherwise bring the administration of justice into disrepute among right-thinking people. That must be firmly borne in mind when comparing facts to those in the Australian cases.

Application of Scots limitation law to the facts of this case

102. Under the law of England and Wales, it is clear that the question whether to extend time under s. 33 of the 1980 Act can be considered in respect of each cause of action separately: *Murray v Devenish* [2018] EWHC 1895 (QB), [73(iv)] (Nicol J); see also my judgment in *BXB v Watch Tower and Tract Society of Pennsylvania* [2020] 4 WLR 42, [117]. Although the language of s. 17D of the 1973 Act is not as clear as that of s. 33 of the 1980 Act on this point (and the issue was not addressed in Mr Sheldon's report), it was common ground between the parties that the application of the tests in s. 17D(2) and (3) might yield different results insofar as the claim relates to:

    (a) the sexual assaults perpetrated by McKinstry;

    (b) the acts and omissions of Brother Alphonsus in exposing JXJ to the risk of abuse and/or in failing to protect him from that abuse; and

    (c) the further assaults said to have been committed by Brothers Pius and Patrick and jointly by a group including Brothers Alphonsus, Patrick, Cuthbert, Pius and Benedict, together with McKinstry.

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

104. As to the first element of the claim, the Defendant admits that McKinstry committed the sexual assaults of which he was convicted. Although JXJ's evidence about the extent of those assaults goes beyond the Defendant's admissions to some extent, the difference is insignificant: see [55] above. Whether the Defendant is vicariously liable for McKinstry's assaults is, of course, a different question. But the answer turns largely on an application of the principles derived from the authorities to the facts about how the School was run in practice. As to those facts, I do not doubt that documents are less readily available than they would have been had the claim been brought within 3 years of the date when JXJ turned 18, but many of the relevant documents have nonetheless been preserved and are available. (I have considered some of them below.) More importantly, the Defendant has been able to adduce evidence from Brother Livinus, whose recollection as to the extent of influence exercised by the board of managers and the Institute was clear, despite the time that has elapsed since he worked at the School.

105. I bear in mind that, for JXJ's claim to succeed in respect of the assaults committed by McKinstry, it will not be enough for him to show that the Defendant is vicariously liable for those assaults. Causation and quantum are also in issue, but the principal medical records relevant to these issues are available. JXJ has been cross-examined about them. If necessary, he could be cross-examined again in the second part of the split trial.

106. In my judgment, insofar as the claim relates to McKinstry's assaults, the Defendant has not shown that it is not possible for a fair hearing to take place. I accept that the passage of time gives rise to some prejudice to the Defendant, but I would not

describe the prejudice as "substantial". It follows that neither s. 17D(2) nor s. 17D(3) of the 1973 Act applies. Insofar as JXJ seeks damages in respect of McKinstry's assaults, the claim can proceed.

107. The second element of the claim is, however, of a very different character. It involves an allegation of negligence on the part of a named individual, Brother Alphonsus, in respect of his handling of an individual complaint. I have already indicated that JXJ's own recollection was not sufficiently clear to justify a finding that Brother Alphonsus was present when McKinstry was abusing JXJ and not sufficiently consistent with his evidence at the trial in 2003 to justify a finding that Brother Alphonsus was masturbating or aroused when JXJ told him of McKinstry's abuse. Ms Collignon submitted that, even without findings on these points, the fact that the abuse continued after JXJ had reported it to Brother Alphonsus was enough to establish negligence. Although she did not put it like this, Ms Collignon was in effect suggesting that this was a case of *res ipsa loquitur*.

108. It may be that, in circumstances where a pupil in a residential school tells the headmaster that he is being abused by a particular individual, and the abuse continues after the complaint, the maxim *res ipsa loquitur* does apply. But this is just another way of saying that the circumstances are such as to justify an inference of negligence on the part of the headmaster so as to shift the evidential burden to the defendant: see e.g. *Phipson on Evidence* (19th ed.), §6-33; *David T. Morrison & Co Ltd v ICL Plastics Ltd* [2014] UKSC 48, 2014 SC (UKSC) 222, [4] (Lord Reed). On any view, it would in principle be open to the defendant to call evidence to displace the inference. In the present case, the question whether Brother Alphonsus was negligent would require an answer to most, if not all, of the following questions: (a) When did JXJ report to Brother Alphonsus that McKinstry had been abusing him? (b) What steps, if any, did Brother Alphonsus take to investigate the allegations and over what period? (c) What steps, if any, did he take to safeguard JXJ while the investigation was ongoing? (d) Did he speak to other pupils or members of staff and, if so, what did they say? (e) Did he put JXJ's allegations to McKinstry and, if so, what did he say? (f) If not, why not? (g) What conclusions did he reach as to the reliability of JXJ's allegations and why? In light of the answers to these questions, it would then be necessary to measure Brother Alphonsus' actions against the standard of care reasonably to be expected of a headmaster in a Scottish residential approved school in the early 1970s.

109. Such of the School's written records as are now available to the court contain no mention of any investigation into JXJ's or any other complaint. The Defendant's evidence is that, when the School closed in 1982, it passed such records as it had to the local authority. The documents available at trial were obtained pursuant to a Freedom of Information Act request from the Scottish Government. But they plainly did not include all of the School's records; and in any event there is no evidence that it would have been standard practice in the early 1970s to produce or retain written records of investigations into complaints of abuse. It would not be safe to infer that there was no investigation simply from the absence of any mention of one in the documents before the court.

110. The individual most likely to have relevant evidence on the steps, if any, taken to investigate JXJ's complaint and safeguard him is, of course, Brother Alphonsus himself. He died in 1990, long before the first allegation of abuse at the School was

made public. Brother Cuthbert, the depute headmaster, died in 1983. It is true that the Defendant could have sought a statement from McKinstry, who died in 2019. He might have been able to say whether Brother Alphonsus had asked him about JXJ's complaint, but he is very unlikely to have been in a position to address the other factual questions relevant to the issue of Brother Alphonsus' alleged negligence. In any event, what McKinstry said would have been of limited assistance, given that his evidence at the criminal trial had been disbelieved by the jury.

111. This second element of the claim focuses on the personal conduct of Brother Alphonsus just as surely as the first focuses on the personal conduct of McKinstry. But whereas McKinstry's conduct is the subject of a conviction and admissions, almost nothing is known about Brother Alphonsus' reaction to JXJ's complaint. Just as the death of the alleged abuser deprived the defendant of the evidence necessary for a fair trial in *SF v Quarriers* and *K v Marist Brothers*, so the death of the allegedly negligent headmaster, and the lack of other relevant evidence, deprives the Defendant of the opportunity for a fair trial here. In relation to the claim that the Defendant is vicariously liable for the negligence of Brother Alphonsus, I would hold that it is not possible for a fair trial to take place. Accordingly, s. 17D(2) of the 1973 Act applies; and this part of the claim cannot proceed.

112. If I had concluded that a fair hearing was possible, I would have had to conduct the balancing exercise required by s. 17D(3) of the 1973 Act. I accept that JXJ's interest in the action proceeding is weighty, given the exceptionally serious nature of the sexual abuse he admittedly suffered, the fact that it was accompanied by considerable violence and the serious and long-lasting psychological and psychiatric consequences which, on his case, it caused. But the prejudice to the Defendant in this case is more than just "substantial". It is close to total, because, as I have said, nothing at all is known about what steps, if any, were taken by Brother Alphonsus in response to JXJ's complaint. If I were to make findings about the lack of an effective investigation or the lack of effective safeguarding measures, it could only be on the basis of an inference from the absence of positive evidence on these matters. Accordingly, even giving full weight to JXJ's interest in the action proceeding, I would have concluded that – on this part of the claim – the prejudice to the Defendant was such that the action should not proceed. Had I not found that s. 17D(2) applies to this part of the claim, I would have concluded that s. 17D(3) applies.

113. The third element of the claim relates to physical assaults said to have been committed by Brothers Pius and Patrick and jointly by a group including Brothers Alphonsus, Patrick, Cuthbert, Pius and Benedict, together with McKinstry. As I have noted, Brother Cuthbert died in 1983, Brother Alphonsus in 1990, Brother Pius in 1993 and Brother Patrick in 2004. It is true that the Defendant could have taken statements from Brother Patrick once it became clear that there were multiple complaints against brothers who had taught at the school. But any such statement is unlikely to have addressed JXJ's particular complaints of physical violence, because there is no evidence that he had made those complaints publicly at the time. In general, the date when a potential defendant ought to begin to take steps to gather evidence is the date on which formal notice is given of the intention to bring proceedings. That was not until 2014, by which time all but two of the individuals against whom allegations of physical assault were made were long dead. The exceptions are Brother Benedict and McKinstry. Brother Benedict was then and is now alive, though he is now serving a

prison sentence in respect of assaults committed at St Joseph's, Tranent. But given JXJ's frank admission in his email to Mr Latham that he could not remember Brother Benedict (see [56(c)] above), it seems unlikely that the latter's evidence would have been material. As to McKinstry, it is possible that he might have had evidence relevant to the allegation of physical assaults in Brother Alphonsus' office, but he was not – on JXJ's case – the principal protagonist. In any event, as I have noted, it is not likely to have carried much weight given that his evidence about events at the School had already been disbelieved by a jury.

114. It is now clear that, contrary to the impression formed by Brother Livinus when he was there, the School was not then, and was not when JXJ attended, a "nurturing" place for all of its pupils. Specific incidents of sexual violence by members of staff towards pupils are now established. The evidence before me does not enable me to find that violence was endemic, though it may have been. In any event, however, this aspect of JXJ's claim does not depend on a generic allegation about the culture of the school or the attitude of its staff. It depends on specific allegations that JXJ was assaulted, and in some cases seriously injured, by named individual members of staff. JXJ was cross-examined about these incidents. Cross-examination of JXJ highlighted inconsistencies between the accounts he had given over the years as to the identities of those who had assaulted him. However, because the claim was brought so late, the Defendant was deprived of the ability to put the allegations to the principal individuals said to have been involved. Accordingly, as Lady Wolffe put it in *K v Marist Brothers*, Mr Ford "could do no more than put the pursuer to his proof"; he could not properly lead a positive case because he had no basis to so do. In my judgment, this means that, in relation to the allegations of physical abuse, it is not possible for a fair hearing to take place. Section 17D(2) therefore applies; and this part of the claim cannot proceed.

115. The fact that, as the Defendant's response to the Part 18 request shows, other claims have been brought in the courts of both Scotland and England and Wales in respect of alleged abuse at the School – in some cases against the same named individuals – does not affect this conclusion. The Part 18 response did not prompt an application by JXJ to adjourn or re-open the evidence. I do not know whether the allegations made in the other cases would support those made by JXJ or not. But in any event the point remains that, because of the passage of time, the individuals against whom the allegations are made cannot respond to them.

116. If I had concluded that a fair hearing was possible in relation to this part of the claim, I would have concluded that s. 17D(3) applied. As before, I acknowledge the weight of JXJ's interest in pursuing the claim: what is alleged includes violence against him by those in a position of trust when he was between 10 and 12 years old; in some instances, serious injuries were caused; and on JXJ's case the injuries had long-term and substantial effects on his physical and mental health. But the prejudice to the Defendant of allowing this part of the claim to succeed between 45 and 47 years after the assaults complained of took place, and in circumstances where the individuals whose evidence is likely to be most relevant are deceased, is in my judgment so substantial that it outweighs JXJ's interest in the action proceeding. Even if I had concluded that a fair trial of this part of the claim was possible, I would still have concluded that it cannot proceed, applying s. 17D(3).

The claim in respect of sexual abuse by McKinstry

The facts relevant to the issue of vicarious liability

117. Some of the key facts relevant to vicarious liability are uncontentious:

(a) Under the statutory provisions applicable in Scotland at the time when McKinstry abused JXJ (see [22]-[25] above), the management and control of the School were the responsibility of the managers. They were also responsible for the care of pupils *in loco parentis*.

(b) The managers were also legally responsible for the appointment, suspension and dismissal of staff (including the headmaster), who were employed by them. The headmaster was responsible to the managers for the efficient conduct of the school: see Lord Osborne's summary of the legal position, set out at [26] above.

(c) The headmaster and depute headmaster, who were DLS brothers, were in operational charge of all staff, including those who were not brothers. They were in a position to control the tasks allocated to staff members and the way they performed them.

(d) McKinstry was not a brother. He was employed by the managers, not the Institute.

(e) McKinstry was initially employed as a gardener. It appears from JXJ's evidence, and not in dispute, that he later took up employment as a night watchman. It is unclear whether it was the managers or the headmaster who appointed him to that role. It is clear, however, that his position gave him access at night to the dormitories where the pupils slept.

118. For reasons that will become clear when I consider the authorities, it is necessary to look beyond the legal relationships and consider the degree of control exercised in practice by the Institute over the School and its staff. The documents obtained from the Scottish Government are material to this issue:

(a) A memorandum about a visit by the then provincial (Brother Wilfrid) to the School in January 1967 recorded that the provincial was concerned about "serious weaknesses in the organisation of the school". The provincial continued:

> "There was only one conclusion I could reach. I instructed Brother Amedy [the headmaster] for the number of classes to be reduced from 5 to 4 to release Brother Livinus [the depute headmaster] to get down to the essential work of organisation…
>
> …It seems to me that the situation calls for the appointment of another teacher (today – possibly a woman). It would be possible as a temporary measure to offer her (if single) accommodation in the new domestic bungalow. The family accommodation is required the same bungalow could be made available as a temporary measure. The resident domestic could be accommodated in the house in the

> room intended for the brothers (Brother Anthony's room) if the proposed adaptations to meet the needs of the brothers are undertaken shortly. However it is evident that another house would need to be built ultimately to house extra staff."

This memorandum was sent to HM Inspector of Schools, who acknowledged it on 3 February 1967.

(b) A report of an inspection in January/February 1968 included this, under the heading "Discussion with Bro. Provincial":

> "Bro. Wilfrid said that he had not had the time or opportunity to do a full visitation but thought that with the changes in personnel things were now shaping a bit better.
>
> Without being quite a challenging or demanding as he has been on occasion in the past he said that it now behoved the department to provide the further necessary facilities to give the school a chance i.e. the play barn, at least two further staff houses and an office for S.W.Os if it were firm policy to keep St Ninian's at Gartmore.
>
> …
>
> We also discussed possible future staff movements. It was agreed that Bro. Adolphus, who was not a strong member of the team should be replaced, and it was recognised that Bro. Philip is now pretty worn out after 35 years very active working Scottish schools."

(c) A report of an inspection by HM Inspector of Schools in October 1976 included this, under the heading "Background":

> "St Ninian's, a school for RC boys, is owned and administered by the De La Salle Order… The head, depute head and several members of staff are members of the De La Salle Order. In recent years, however, there has been an increase in the number of staff employed in the school and two of these now hold senior posts. Another fairly recent development has been the appointment of women as teachers and housemothers."

It is common ground that the School was not in fact owned by the Institute, but the perception of HM Inspector of Schools that it was "administered" by the Institute is of some relevance.

(d) A report of a further inspection visit in October 1978, apparently at the request of managers to discuss plans to develop and extend the accommodation, included this under the heading "Staffing":

> "The school is well staffed by mixture of religious and lay personnel. The brothers are very much in charge, providing the headmaster and his depute, the administrator and senior assistant (education). One other brother is a teacher and 1 a social worker.

> There are 2 thirds in charge, both laymen. Altogether there are 5 teachers and an instructor, 6 social workers and 4 housemothers; a domestic and an assistant domestic; two typists and four male ancillaries – handyman, groundsman, painter and janitor."

119. In the light of this evidence, I find as follows:

    (a) Although legal responsibility for the operation of the School lay with the managers, the provincial (who must be taken to have been acting on behalf of the Institute) also exercised considerable *de facto* control over the operation and organisation of the school.

    (b) In particular, the provincial understood himself to be able to give instructions to the headmaster about the exercise of his functions as headmaster and in fact gave such instructions.

    (c) The instructions covered all aspects of the organisation of the School, including the employment and deployment of staff.

    (d) The provincial also corresponded directly in relation to the School with HM Inspector of Schools, who regarded the School as "administered" by the Institute and saw the DLS brothers as "very much in charge".

The scope of the dispute

120. It is agreed that, in order to succeed, JXJ must show that his claim in respect of the sexual abuse by McKinstry is actionable under both Scots law and the law of England and Wales. It is also agreed, however, that there are no relevant differences between the principles governing liability under these two systems of law. The Scots law of delict and the English and Welsh law of tort are – in this respect, as in many others – identical.

121. The law on vicarious liability was restated by the Supreme Court in two decisions handed down on 1 April 2020: *Various Claimants v Barclays Bank* [2020] UKSC 13, [2020] 2 WLR 960 and *William Morrison Supermarkets plc v Various Claimants* [2020] UKSC 12, [2020] ICR 874. In the *Barclays* case, at [1], Lady Hale (with whom the other members of the Court agreed) said this:

> "Two elements have to be shown before one person can be made vicariously liable for the torts committed by another. The first is a relationship between the two persons which makes it proper for the law to make the one pay for the fault of the other. Historically, and leaving aside relationships such as agency and partnership, that was limited to the relationship between employer and employee, but that has now been somewhat broadened. That is the subject matter of this case. The second is the connection between that relationship and the tortfeasor's wrongdoing. Historically, the tort had to be committed in the course or within the scope of the tortfeasor's employment, but that too has now been somewhat broadened. That is the subject matter of the *Wm Morrison* case."

122. The dispute in this case concerns the first element. Ms Collignon submitted that, although McKinstry was not employed by the Defendant, the relationship between them was such as to make it proper that the Defendant, as well as the board of managers, should be liable for the damage caused by McKinstry's wrongdoing. Mr Ford, for his part, submitted that there was no relevant relationship between the Defendant and McKinstry, so that only the board of managers as employer was vicariously liable for his wrongs. Mr Ford accepted, however, that if there was a relationship akin to employment, the necessary connection between that relationship and McKinstry's wrongdoing was established. It was therefore common ground that the second element of the test for vicarious liability is met.

The first element of the test for vicarious liability

123. In the *Barclays* case, Lady Hale summarised at [10]-[27] the recent case law relevant to the first element of the test for vicarious liability. Much of it is concerned with the question whether the status of the primary wrongdoer is more akin to that of an employee or that of an independent contractor. In *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2006] QB 510, the Court of Appeal held a defendant which had employed an air conditioning fitter vicariously liable for the negligence of the fitter's mate even though he was employed by another company supplied by that company to the defendant on a labour-only basis. May LJ relied on the fact that both employers were in a position to control the work of the fitter's mate. But the Supreme Court later favoured the approach of Rix LJ, who thought the key question was whether the employee was "so much a part of the work, business or organisation of both employers that it is just to make both employers answer for his negligence": see *Viasystems* at [79], endorsed in *Christian Brothers* at [45] (Lord Phillips).

124. In *E v Province of Our Lady of Charity* [2012] EWCA Civ 938, [2013] QB 722, the Court of Appeal held a trust which had inherited the liabilities of the bishop liable for sexual abuse suffered by the claimant at the hands of a priest. Although the priest was not employed by the bishop, the relationship was sufficiently akin to employment to make it fair and just that the bishop be held liable. Ward LJ thought the key question was whether the relationship between the priest and bishop was closer to that of an employee ("one who is paid a wage or salary to work under some, if only slight, control of his employer in his employer's business for his own business") or that of an independent contractor (who "works in and for his own business at his risk of profit or loss"): [70].

125. Next was the *Christian Brothers* case, which (as noted above) concerned a school in England at which DLS brothers taught. In that case, Lord Phillips identified at [35] a number of policy reasons (or "incidents") which in general make it fair, just and reasonable to impose vicarious liability on an employer:

> "(i) the employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability; (ii) the tort will have been committed as a result of activity being taken by the employee on behalf of the employer; (iii) the employee's activity is likely to be part of the business activity of the employer; (iv) the employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee; (v) the

> employee will, to a greater or lesser degree, have been under the control of the employer."

126. In the *Barclays* case at [16], Lady Hale noted that there "appears to have been a tendency to elide the policy reasons for the doctrine of the employer's liability for the act of his employee… with the principles which should guide the development of that liability into relationships which are not employment but which are sufficient take into employment to make it fair and just to impose such liability". What was important when considering whether a particular defendant was vicariously liable, Lady Hale said at [18], is the detail of the relationship, and its closeness to employment, rather than the policy reasons for the imposition of vicarious liability in general.

127. In the light of that, it is important to examine closely what was said in the *Christian Brothers* case about the detail of the relationship between the DLS brothers and the Institute. At [32], Lord Phillips noted that the Institute was "not a contemplative order". On the contrary, it had been established "to carry on an activity, namely giving a Christian education to boys". This meant, Lord Phillips said at [33], that "it is appropriate to approach this case as if the Institute were a corporate body existing to perform the function of providing a Christian education to boys". At [58]-[60], he continued as follows:

> "56. In the context of vicarious liability the relationship between the teaching brothers and the institute had many of the elements, and all the essential elements, of the relationship between employer and employees. (i) The institute was subdivided into a hierarchical structure and conducted its activities as if it were a corporate body. (ii) The teaching activity of the brothers was undertaken because the provincial directed the brothers to undertake it. True it is that the brothers entered into contracts of employment with the Middlesbrough defendants, but they did so because the provincial required them to do so. (iii) The teaching activity undertaken by the brothers was in furtherance of the objective, or mission, of the institute. (iv) The manner in which the brother teachers were obliged to conduct themselves as teachers was dictated by the institute's rules.
>
> 57. The relationship between the teacher brothers and the institute differed from that of the relationship between employer and employee in that: (i) The brothers were bound to the institute not by contract, but by their vows. (ii) Far from the institute paying the brothers, the brothers entered into deeds under which they were obliged to transfer all their earnings to the institute. The institute catered for their needs from these funds.
>
> 58. Neither of these differences is material. Indeed they rendered the relationship between the brothers and the institute closer than that of an employer and its employees."

128. At [59], Lord Phillips rejected the analysis of Hughes LJ in the Court of Appeal that the brothers did not act on behalf of the Institute more than "any member of a professional organisation who accepts employment with that status is acting on behalf of the organisation when he does his job". This was wrong because:

> "The business of the institute was not to train teachers or to confer status on them. It was to provide Christian teaching for boys. All members of the institute were united in that objective. The relationship between individual teacher brothers and the institute was directed to achieving that objective."

129. Lord Phillips said at [61] that it was also possible to conclude that the first element of the test for the vicarious liability was satisfied on the basis of a simpler analysis:

> "Provided that a brother was acting for the common purpose of the brothers as an unincorporated association, the relationship between them would be sufficient to satisfy stage 1, just as in the case of the action of a member of a partnership. Had one of the brothers injured a pedestrian when negligently driving a vehicle owned by the institute in order to collect groceries for the community few would question that the institute was vicariously liable for his tort."

130. In *Cox v Ministry of Justice* [2016] AC 660, the Supreme Court held the Ministry of Justice vicariously liable for injuries caused to a prison catering manager by the negligence of a prisoner working under her direction on prison service pay. Of the five incidents identified by Lord Phillips, not all were equally significant. Lord Reed said that the fact that the defendant is more likely than the tortfeasor to be able to compensate the victim, and can be expected to have insured against liability, was "unlikely to be of independent significance" because "[t]he mere possession of wealth is not in itself any ground for imposing liability": [20]. The fifth incident – that the tortfeasor will, to a greater or lesser degree, have been under the control of the defendant – was also a factor which was unlikely to be of independent significance in most cases, though the absence of even a vestigial degree of control would be liable to negative the imposition of vicarious liability: [21]. Three remaining incidents – that the tort would have been committed as a result of activity being undertaken by the tortfeasor on behalf of the defendant; that the tortfeasor's activity is likely to be part of the business activity of the defendant; and that the defendant, by employing the tortfeasor to carry on the activity, will have created the risk of the tort committed by the tortfeasor – were related: [22]-[23]. Taken together, they generated the principle identified at [24] that:

> "a relationship other than one of employment is in principle capable of giving rise to vicarious liability where harm is wrongfully done by an individual who carries on activities as an integral part of the business activities carried on by defendant and for its benefit (rather than his activities being entirely attributable to the conduct of a recognisably independent business of his own or other third-party), and where the commission of the wrongful act as a risk created by the defendant by assigning those activities to the individual in question."

131. At [29], Lord Reed said that the approach identified in the *Christian Brothers* case was not confined to cases of sexual abuse:

> "By focussing upon the business activities carried on by the defendant and its attendant risks, it directs attention to the issues which are likely to be relevant in the context of modern workplaces, where workers may in reality be part of the workforce of an organisation without having a

> contract of employment with it, and also reflects prevailing ideals about the responsibility of businesses for the risks which are created by their activities."

At [30], he emphasised that a "business" for these purposes did not have to be carrying on activities of a commercial nature. At [31], he said this:

> "The other lesson to be drawn from *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd*, *E v English Province of Our Lady of Charity* and the *Christian Brothers* case is that defendants cannot avoid vicarious liability on the basis of technical arguments about the employment status of the individual who committed the tort. As Professor John Bell noted in his article, 'The Basis of Vicarious Liability' [2013] CLJ 17, what weighed with the courts in *E v English Province of Our Lady of Charity* and the 'Christian Brothers' case was that the abusers were placed by the organisations in question, as part of their mission, in a position in which they committed a tort whose commission was a risk inherent in the activities assigned to them."

132. In *Armes v Nottinghamshire County Council* [2018] AC 355, the Supreme Court held a local authority vicariously liable for abuse allegedly carried out by foster carers in whose care the authority had placed the claimant. The relevant activity of the local authority was the care of looked after children: [62]. The foster parents were an integral part of the local authority's organisation of its childcare services, carried on for the benefit of the local authority, and could not be regarded as independent contractors: [59].

133. Having reviewed these and other authorities, Lady Hale said this in the *Barclays* case at [27]:

> "The question therefore is, as it has always been, whether the tortfeasor is carrying on business on his own account or whether he is in a relationship akin to employment with the defendant. In doubtful cases, the five 'incidents' identified by Lord Phillips may be helpful in identifying a relationship which is sufficiently analogous to employment to make it fair, just and reasonable to impose vicarious liability. Although they were enunciated in the context of non-commercial enterprises, they may be relevant in deciding whether workers who may be technically self-employed or agency workers are effectively part and parcel of the employer's business. But the key, as it was in *Christian Brothers* [2013] 2 AC 1, *Cox* [2016] AC 660 and *Armes* [2018] AC 355, will usually lie in understanding the details of the relationship. Where it is clear that the tortfeasor is carrying on his own independent business it is not necessary to consider the five incidents."

Counsels' submissions

134. Ms Collignon emphasised three features of the School's operation as showing that the relationship between McKinstry and the Defendant was sufficiently akin to employment to justify the imposition of vicarious liability. First, the day to day running of the School was in practice the responsibility of the headmaster and the

depute headmaster, who were DLS brothers. Although McKinstry was formally employed by the managers, they were volunteers whose involvement was confined to attendance (with the headmaster and depute headmaster) at board meetings. Second, the School required staff who were not brothers, such as McKinstry, in order to function; and such staff members were in practice under the direction and control of the headmaster and depute headmaster. Ms Collignon relied on Brother Livinus' evidence that, as headmaster, he would not hesitate to intervene if, for example, a staff member who was not a brother left a knife out on a table or if such a staff member was found to be hitting the boys. Third, the control of the Institute over the School was not limited to the headmaster and depute headmaster. Documents dating from between 1964 and 1968 showed that the provincial also played an active role in the operations of the School. Ms Collignon submitted that, given that the Institute existed to perform the function or "business" of providing a Christian education to boys, and that staff who were not brothers were necessary to the performance of that role, they should be regarded as integrated into the business of the Institute.

135. Mr Ford, for his part, submitted that staff members such as McKinstry had no relationship at all with the Institute, save that they were employed by a third party (the managers) at a school in which some DLS brothers were also employed by the same third party. Insofar as the headmaster and depute headmaster gave day to day instructions to lay staff members, they did so *qua* headmaster and depute headmaster (appointed as such by the managers), not *qua* DLS brothers. Although staff such as McKinstry were integrated into the business of the School, they were not integrated into the business of the Institute and had no obligations to it, nor to its provincial or superior.

Discussion

136. The present case involves a pattern of relationships with legal and factual elements which differ from those found in any of the authorities to which I was referred. Mr Ford did not suggest that McKinstry was carrying on business on his own account. He was plainly not an independent contractor: he was employed by the managers, who were undoubtedly vicariously liable for his wrongs. As the *Christian Brothers* case shows, that fact does not preclude the possibility that a party other than his employer may also be vicariously liable. But, as the *Barclays* decision makes clear, such liability will be found only where the relationship between the defendant and the primary wrongdoer is "akin to employment": see at [27] (Lady Hale).

137. In the *Christian Brothers* case, the relationship between the Institute and the brothers satisfied this test, because of the web of reciprocal obligations between them. The brothers had committed themselves by their vows to live by the Institute's rules and to obey its hierarchy. In return, the Institute had undertaken the obligation to provide for them throughout their working lives and in retirement. Although the brothers entered into contracts of employment, they did so as directed by the Institute's hierarchy and were required to surrender their earnings to the Institute. The brothers were the conduit through which the Institute furthered its objective of providing Christian education for boys. This structure, into which the brothers had freely entered, also made it appropriate to regard them as akin to partners in the "business" of the Institute: *Christian Brothers*, [61] (Lord Phillips).

138. Staff members such as McKinstry, by contrast, took no vows and made no commitments to the Institute. They did not have to abide by its rules. The Institute could not, for example, require them to go to a different school, even contingently on their being offered employment there. It was for them to choose whether to enter into a contract of employment at a particular school. If they did so, they had no obligation to surrender their earnings to the Institute. By the same token, the Institute owed no obligation to look after them, whether during the course of their employment or afterwards. On no view could they be regarded as akin to partners in the "business" of the Institute. If the Defendant is to be held liable for the wrongs committed by McKinstry, it must be on a very different basis from that on which the Institute was held liable for the wrongs committed by its brothers.

139. Ms Collignon understandably placed weight on Lord Reed's statement at [31] of his judgment in *Cox* that "defendants cannot avoid vicarious liability on the basis of technical arguments about the employment status of the individual who committed the tort". This, said Lord Reed, was a lesson to be drawn from three cases: *Viasystems*, *E v Province of Our Lady of Charity* and the *Christian Brothers* case. The latter two authorities are concerned with the vicarious liability of religious organisations for their members. They establish that the reciprocal obligations that exist between a religious organisation and its members can supply a basis for imposing vicarious liability even when there is no contractual relationship. That does not assist here, because, as noted above, there were no reciprocal obligations between the Institute and McKinstry.

140. In *Viasystems*, the fitter's employer was held liable for the negligence of the fitter's mate, even though the latter was employed by someone else. But, on Rix LJ's approach (endorsed in the *Christian Brothers* case), that was because the mate was "so much a part of the work, business or organisation of both employers that it is just to make both employers answer for his negligence". There was no question that the defendant was vicariously liable for the fitter: it was his employer. It was a short step to find the defendant liable also for the negligence of the mate whose task it was to assist the fitter. The mate was, in reality, an integral part of the defendant's business. Here, however, the Institute did not employ *any* of the School's staff. It had a relationship akin to employment with *some* of those staff (those who were brothers) because of the reciprocal obligations I have described and because the Institute and its brothers were engaged in the common enterprise of providing a Christian education to boys. But it had no relevant relationship with McKinstry or any of the other staff of the School who were not brothers. They were an integral part of the work, business and organisation of the School, but not of the Institute.

141. To put the point another way, the Institute pursued its objective (or carried on the "business") of providing a Christian education to boys by requiring its members – the brothers – to enter into employment contracts with other businesses – the schools – which shared the same objective. The brothers were an integral part of the work, business and organisation of both the Institute and the schools in which they were employed. The other staff were integrated into the work, business and organisation of the schools in which they were employed, but they were not integrated into the work, business or organisation of the Institute.

142. I have not lost sight of Ms Collignon's point that, as the Defendant's witnesses accepted, it would be impossible for the Institute to perform its function of providing a Christian education without the assistance of staff who were not brothers. There is,

however, no principle of law that a business or organisation is vicariously liable for to all those without whom it would be unable to operate. A business may choose to have some of the work essential to its mission carried out by independent contractors. If it does, it will not be vicariously liable for their wrongs. By the same token, a business which chooses to operate by supplying staff to other organisations does not by doing so assume liability for wrongs committed by the other staff employed by those organisations.

143. I have considered whether it makes any difference that the Institute exercised a considerable degree of control over the day to day operation of the School, including as regards the employment and deployment of staff. Whilst certainly relevant, I do not consider that this feature tips the balance in favour of vicarious liability in this case. The contemporaneous (or roughly contemporaneous) documents establish that the headmaster in practice took instructions not only from the managers but also from the provincial; and that the latter, acting on behalf of the Institute, exercised a degree of influence over the organisation of the School, including decisions on the employment and deployment of staff. This reflects the fact that the headmaster and the other teachers who were also brothers owed obligations both to the managers and to the Institute; and this was recognised by external actors such as HM Inspector of Schools, who accordingly dealt directly with the provincial on occasion. But none of this establishes a direct relationship akin to employment between the Institute and members of staff who were not brothers. The evidence does not go so far as to establish that the managers were mere ciphers. Under the statutory scheme, it was they who were responsible for the employment of staff; and it was to them alone that the lay members of staff owed obligations. The law has not developed to the stage where a person who exercises *de facto* influence over the operation of a business is, by virtue of that influence, to be held vicariously liable for an employee of the business with whom he has no direct relationship.

144. Finally, I turn to the "five incidents" identified by Lord Phillips at [35] of his judgment in the *Christian Brothers* case, which Lady Hale said in *Barclays* would be relevant in "doubtful cases". The first (the fact that the defendant is more likely than the tortfeasor to have the means to compensate the victim), as Lord Reed said in *Cox*, in general supplies no principled justification for the imposition of vicarious liability. That is especially so where (as here) there were employers (the managers) who were, on any view, vicariously liable. The fact that their liabilities were not transferred to another entity (as was the case in the English school the subject of the *Christian Brothers* case) does not justify the imposition of liability on another party. The fifth factor (control) is, as Lord Reed noted, also unlikely to supply a positive reason for imposing vicarious liability; and does not do so here: see [143] above. The other three factors are conveniently rolled into the compendious test identified by Lord Reed at [24] of his judgment in *Cox*, which I have already sought to apply in the preceding paragraphs of this judgment.

145. It follows that, in my judgment, the Defendant is not vicariously liable for the serious sexual assaults committed by McKinstry against JXJ.

Conclusion

146. For these reasons, I conclude that:

(a) insofar as it relates to the sexual assaults committed by McKinstry against JXJ, the claim is not barred by s. 17D(2) or (3) of the 1973 Act, but must be dismissed because the Defendant is not vicariously liable for those assaults;

(b) in all other respects, the claim is barred by s. 17D(2), alternatively s. 17D(3), of the 1973 Act and therefore it cannot proceed.

Postscript

147. I recognise that JXJ will be bitterly disappointed by this result. Nothing in this judgment should be taken as diminishing in any way the gravity of the wrongs done to him by McKinstry or the long-term effects they have had on his mental health. Similarly, nothing I have said should be taken to imply that JXJ's allegations about the conduct of the DLS brothers are untrue. My conclusion on those allegations is simply that, at this stage, between 45 and 47 years after the events complained of took place, when the key relevant witnesses are dead, it would not be fair to try them.