Neutral Citation Number: [2018] EWCA Civ 2342

Case No: A2/2017/0562

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION,
LEEDS DISTRICT REGISTRY
His Honour Judge Gosnell
5DW01675

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 October 2018

Before :

LADY JUSTICE RAFFERTY
and
LORD JUSTICE LEWISON

- -

Between :

(1) THE CATHOLIC CHILD WELFARE SOCIETY (DIOCESE OF MIDDLESBROUGH) **(2) THE TRUSTEES OF THE MIDDLESBROUGH DIOCESAN RESCUE SOCIETY** **(3) TRUSTEES OF THE DE LA SALLE PROVINCIALATE**	**Appellant**
- and -	
CD	**Respondent**

- -
- -

Mr Michael Kent QC & Mr Nicholas Fewtrell (instructed by **Keoghs LLP**) for the **Appellant**
Mr Hugh Preston QC & Ms Susannah Johnson (instructed by **Switalskis LLP**) for the **Respondent**

Hearing date : 16 October 2018

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Approved Judgment

Lord Justice Lewison:

1. In a reserved judgment given on 21 December 2016 HHJ Gosnell exercised his discretion under section 33 of the Limitation Act 1980 to disapply the limitation period laid down by section 11 of that Act; and found that CD had been anally raped in July 1990 by Brother James, a member of staff of St William's Community Home, the school that he was then attending. At the time of the incident CD was 12 years old. CD began his action in January 2006 but did not explicitly say that he had been raped until February 2014; some 24 years after the alleged rape and 8 years after the start of his litigation. The defendants appeal on the basis that the judge was wrong to exercise his discretion to disapply the limitation period.

2. It is now settled that an action for deliberately inflicted personal injury is subject to the limitation period laid down by section 11 of the Limitation Act 1980. That section provides:

> "(3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) or (5) below.
>
> (4) Except where subsection (5) below applies, the period applicable is three years from—
>
> (a) the date on which the cause of action accrued; or
>
> (b) the date of knowledge (if later) of the person injured."

3. Section 1 (5) applies only where the injured person dies, which is not the case here. Thus the limitation period is three years from one of the two dates in section 11 (4). The date of knowledge is defined by section 14 (2). It is an objective standard of the seriousness of the injury and nothing more: *A v Hoare* [2008] UKHL 6, [2008] 1 AC 844 at [35]. In so far as the action alleges rape, it is common ground that the date of knowledge is no later than the date on which the cause of action accrued; that is to say July 1990 (see *A v Hoare* at [43] approving *Stubbings v Webb* [1993] AC 498, 506; *Albonetti v Wirral MBC* [2008] EWCA Civ 783 at [24]). It follows that under section 11 any action ought to have been brought by July 1993.

4. However, in July 1993 CD was still a minor. Section 28 (1) of the 1980 Act, as it applies to section 11 by virtue of section 28 (6), provides:

> "Subject to the following provisions of this section, if on the date when any right of action accrued for which a period of limitation is prescribed by this Act, the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of [three] years from the date when he ceased to be under a disability or died (whichever first occurred) notwithstanding that the period of limitation has expired."

5. Section 38 (2) provides that a person is under a disability if he is a minor.

6. Section 33 of the 1980 Act gives the court power to disapply the limitation period. It provides, so far as relevant:

> "(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which—
>
> (a) the provisions of section 11 … of this Act prejudice the plaintiff or any person whom he represents; and
>
> (b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents;
>
> the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates.
>
> …
>
> (3) In acting under this section the court shall have regard to all the circumstances of the case and in particular to—
>
> (a) the length of, and the reasons for, the delay on the part of the plaintiff;
>
> (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11…;
>
> (c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
>
> (d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
>
> (e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
>
> (f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received."

7. Before coming to the judge's exercise of discretion it is necessary to go into the history of the allegation. The rape is said to have taken place on a trip to Scotland in July 1990. A number of boys went on that trip, which was led by Brother James. At

that time one of the key workers concerned with CD at St William's was Trish Monkman, a residential social worker. She had a good relationship with CD, as shown by an affectionate letter that she wrote to him shortly after her departure from St William's in October 1990. In a note compiled in the summer of 1990 for the benefit of her successor, Cathy Burke, she recorded:

> "[CD] fills his leisure time well and fairly rarely complaining of being bored or sitting around. He enjoys all outdoor activities and was fortunate enough to spend a week in the Highlands of Scotland with Brother James."

8. At about the same time, Mr Allen, one of CD's teachers, also made a note in which he said:

> "During the week 16th to 20th July, [CD] spent a week in Scotland with Brother James. He had a great time and returned to class with work completed, seemingly benefitting from his week away."

9. In March 1991 CD was assessed by an educational psychologist who reported:

> "[CD] now seems to see St William's in a very positive light. He was unable to recall anything he disliked about the establishment and envisages remaining there until his 18th birthday."

10. The file maintained by South Tyneside MBC (which had statutory responsibility for CD) recorded in August 1991:

> "His Key Worker is Cathy Burke who offers [CD] a consistent and thoughtful approach to him personally. He has a trusting relationship with her and often if there are areas of anxiety on [CD's] behalf, he can express these to Cathy."

11. By 1993 suspicions about Brother James' behaviour had begun to surface. CD was interviewed by the police, but did not mention any sexual misconduct. His key worker (whose name has been redacted) recorded that he was quite upset about "criminal charges brought against adults he knew and cared for."

12. CD attained his majority in January 1996. In 2003 he was once again interviewed by police about his time at St William's. The statement is a short one in which he said:

> "I do not have any complaints in respect of any form of abuse whilst I was resident, against any member of staff or other resident."

13. In 2005 CD was contacted by a solicitor. Group litigation against the defendants was begun by claim form issued on 18 January 2006. The claim form alleged in very general terms that the claimants claimed:

> "Damages for injuries sustained as a result of abusive behaviour whilst the claimants were in the care of the

> Defendants at the St William's residential Children's home as minors."

14. On 5 September 2006 HH Judge Hawkesworth QC made a case management order in the litigation providing for a Group Litigation Order. Paragraph 16 of that order required the lead solicitors to serve a master Particulars of Claim with 28 days of receipt of the approved GLO. Those were to contain general allegations relating to all claims, and a schedule containing entries for each individual claimant stating which of the general allegations they relied on and "(if appropriate) any specific facts relevant to the claim." We have not seen any evidence that that direction was obeyed.

15. The vicarious liability of the defendants was hotly contested; and was dealt with as a preliminary issue. It was not until the Supreme Court gave judgment on 21 November 2010 (*Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56, [2013] AC 1) that that issue was finally resolved in the claimants' favour.

16. While the preliminary issue was proceeding, on 21 July 2006 CD was interviewed by Mrs Richardson, a psychotherapist instructed by his solicitors. She recorded the "Facts relating to the alleged abuse suffered". She recorded a number of allegations of slapping and hitting. She also recorded that:

> "3.3.4 [CD] told me that when allegations of sexual abuse at St William's by Brother James … came to light, he did not feel surprised since it made sense of things he had seen and experienced e.g. Brother James coming to the bedroom at a holiday location and removing one of the boys.
>
> 3.3.5 [CD] told me that he now feels bad about being covertly exploited in the above ways, although he was not aware of it at the time. As far as he can recall, he was never the subject of any overt sexual behaviour at St William's and considers that he may have had a "lucky escape"."

17. In that interview CD did not say that he himself had been the victim of sexual abuse. On the contrary, he denied it.

18. CD made a witness statement on 18 May 2007. That statement is a longer one. In that statement he said that he had been physically abused by Brother James and other staff members. But the abuse alleged was not sexual abuse. It again consisted of slapping and other physical violence. CD did, however, mention what might well have been sexual abuse. He said that he went on holiday to Scotland with Brother James and five other boys, although he did not give a date for that holiday. What he said was:

> "One night … I was lying awake in bed. Brother James came into the bedroom where all six of us boys were sharing. He went to the bed of either [RP] or [DS] and I saw Brother James lead the boy out of the bedroom. I then fell asleep. The following morning the boy who had been led away by Brother James was back in his bed. We never spoke about this. Since that time I now believe that Brother James had led that boy away to abuse him."

19. It is noticeable that in this account also CD did not say that he himself had been sexually abused.

20. In July 2007 Mrs Richardson gave her opinion about why CD had taken so long to make his complaint which, at that stage, did not include any claim about sexual abuse. She said:

> "Although physical abuse is not surrounded by as many taboos as sexual abuse, it can be equally difficult for a child or young person to complain of."

21. She went on to say that CD's behaviour in not complaining of the alleged maltreatment was typical of a similar victim. Among the reasons for her opinion were that he did not realise it was wrong at the time; and that violence was endemic in the system. The whole report is predicated on physical rather than sexual abuse. However, she did give the opinion that CD knew at the age of 16 (i.e. in 1994) that he had been psychologically harmed. In a subsequent report she amended that date to 2005.

22. As noted, the Supreme Court gave judgment on 21 November 2012.

23. On 14 February 2014 CD served his individual statement of particulars. In that document it was asserted that:

> "Brother James also took the Claimant from his room when he had been taken on holiday in Scotland. Brother James took [CD] to his room and raped him."

24. No further details of the rape were given. In his statement dated 3 February 2014 CD said:

> "In my previous statement I mention that on one occasion I was lying awake in bed one night when Brother James came into the bedroom and took either [RP] or [DS] out of the bedroom. I said that I thought that Brother James had abused this person. The boy that was led out of the bedroom by Brother James was in fact me. Brother James took me into his bedroom and raped me. This is the first time that I have ever disclosed this and at this point I am unable to speak further about it."

25. That was the totality of CD's evidence before trial about the alleged rape. He was interviewed again by Mrs Richardson, but she did not offer any professional opinion on why this allegation had not been made before. Now that the allegation of rape had been made, CD was also interviewed by Prof Maden, retained by the defendants. In his report dated 19 February 2015 he recorded:

> "He repeated that Brother James sexually assaulted him. I asked for more details. He says Brother James took him out of the room where they were all staying. Brother James came into the room and took him to another bedroom. There "he sexually assaulted us". I pressed for details of how the assault had begun

> or anything that Brother James had said. He said: "It's all a blank really". He says Brother James just sent him back to bed afterwards. He says he sexually assaulted him on only that one occasion. [Comment: the allegation was presented in general terms. He did not allege rape when speaking to me…]."

26. When Prof Maden began the section of his report expressing his opinion he said:

> "There are serious problems for the expert arising from the fact that the material events took place over [20] years ago. Memory is not reliable over such long periods of time. Recall is an active mental process in which memories tend to become distorted with time to fit the individual's beliefs, needs and values. Both the content and the meaning of recollections often change with time. Events can and do acquire a significance years later that they did not have at the time."

27. He went on to say:

> "These problems with recall affect all cases but they are particularly acute in the present case because the Claimant is a highly unreliable informant with numerous convictions for dishonesty including one for perverting the course of justice."

28. Prof Maden expressed the view that it was surprising that he first denied that anything untoward had happened and that he did not reveal the alleged sexual abuse until 2014. He did not exhibit any symptoms of post-traumatic stress disorder or other psychological symptoms such as usually accompany delayed disclosures of actual assaults. That, he said, "makes no sense in psychiatric terms". He went on to say:

> "I found him evasive and vague when speaking about the alleged sexual abuse. His account lacked the circumstantial detail that usually accompanies such accounts. … Even allowing for shame and embarrassment the vagueness of the allegation is extreme, to the extent that he did not actually tell me he was raped and nor does he say that anywhere except in his addendum statement. I have reported on hundreds of cases of this nature but this account stands out for the vagueness of the allegation."

29. Mrs Richardson and Prof Maden made a joint statement on 19 March 2015. They both agreed that CD's allegation of rape was "vague in the extreme". However, they disagreed on a number of matters. Whereas Prof Maden considered that because of CD's delayed disclosure and lack of circumstantial detail there was a high probability that the alleged sexual assault was a false memory or simply a false allegation, Mrs Richardson considered that those matters were consistent with the reaction of a typical victim abused as CD had alleged. She did not agree that the passage of time should be regarded as making CD's memory of events unreliable per se. Whereas Prof Maden believed that the passage of time had complicated the expert's task, Mrs Richardson considered that the passage of time per se did not make the abuse more difficult to evaluate.

30. During the progress of the case Brother James had been tried between October and November 2015; and had been convicted of a number of serious sexual offences against pupils at St William's. CD was not among them. That was the state of the evidence when the case came on for trial. We do not have a full procedural picture, but what happened was that the judge decided to hear the evidence before deciding whether to disapply section 11.

31. In opposition to the application to disapply section 11, Ms Hansen, the defendants' solicitor, made a witness statement. She described the efforts that had been made, unsuccessfully, to trace a number of potential witnesses. They included, in particular, Trish Monkman and Cathy Burke.

32. CPR Part 32.5 (2) provides that a witness's witness statement stands as his evidence in chief unless the court orders otherwise. CPR Part 32.5 (3) enables a witness, with the permission of the court, to amplify his witness statement. However, Part 32.5 (4) states that the court will give permission under paragraph (3) "only if it considers that there is good reason not to confine the evidence of the witness to the contents of his witness statement." Despite these provisions, CD was asked in his examination in chief, apparently without objection from the defendants, questions about the circumstances of the alleged rape. This was the first time that the defendants had heard his account, apart from the single sentence in his witness statement.

33. In my judgment the starting point in a decision whether or not to disapply the limitation period must be the purpose of statutes of limitation. In *Robinson v St Helens Metropolitan Borough Council* [2002] EWCA Civ 1099, [2003] PIQR P128 Sir Murray Stuart-Smith said at [32]:

> "The Limitation Acts are designed to protect defendants from the injustice of having to fight stale claims especially when any witnesses the defendants might have been able to rely on are not available or have no recollection and there are no documents to assist the court in deciding what was done or not done and why."

34. This statement of the purpose of limitation acts is plainly right, and in any event Sir Murray's observation was approved by the House of Lords: *Adams v Bracknell Forest BC* [2004] UKHL 29, [2005] 1 AC 76. In addition to giving protection to defendants against facing stale claims there is also a more general social benefit. As McHugh J said in the Australian case of *Brisbane South Regional Health Authority v Taylor* [1996] HCA 25, (1996) 186 CLR 541 a limitation period "represents the legislature's judgment that the welfare of society is best served by causes of action being litigated within the limitation period, notwithstanding that the enactment of that period may often result in a good cause of action being defeated." I made observations to similar effect in *RE v GE* [2015] EWCA Civ 287 at [74] to [75].

35. It follows that the disapplication of the limitation period is an exception to the general rule. For that reason the burden of persuasion lies on the claimant. Delay of itself may not preclude disapplication of the limitation period. What is of importance is what prejudice the defendant has suffered by the delay: see *Cain v Francis* [2008] EWCA Civ 1451, [2009] QB 754 at [73]. Indeed, in *AS v Poor Sisters of Nazareth* [2008]

UKHL 32, 2008 SC (HL) 146, a case about the Scottish equivalent of section 33, Lord Hope (with whom the other law lords agreed) said at [25]:

> "The issue on which the court must concentrate is whether the defender can show that, in defending the action, there will be the real possibility of significant prejudice. As McHugh J pointed out in *Brisbane South Regional Health Authority v Taylor* (p 255) it seems more in accord with the legislative policy that the pursuer's lost right should not be revived than that the defender should have a spent liability reimposed on him. The burden rests on the party who seeks to obtain the benefit of the remedy. The court must, of course, give full weight to his explanation for the delay and the equitable considerations that it gives rise to. But proof that the defender will be exposed to the real possibility of significant prejudice will usually determine the issue in his favour."

36. Although delay between the accrual of a cause of action and the issue of proceedings will often prejudice a defendant, the delay permitted by the Limitation Act is not a delay of which he can complain. But once the limitation period has expired, that disability is removed. It then becomes relevant to consider the whole of the period that has elapsed since the cause of action accrued. In *Donovan v Gwentoys Ltd* [1990] 1 WLR 472, 479 Lord Oliver put it thus:

> "A defendant is always likely to be prejudiced by the dilatoriness of a plaintiff in pursuing his claim. Witnesses' memories may fade, records may be lost or destroyed, opportunities for inspection and report may be lost. The fact that the law permits a plaintiff within prescribed limits to disadvantage a defendant in this way does not mean that the defendant is not prejudiced. It merely means that he is not in a position to complain of whatever prejudice he suffers. Once a plaintiff allows the permitted time to elapse, the defendant is no longer subject to that disability, and in a situation in which the court is directed to consider all the circumstances of the case and to balance the prejudice to the parties, the fact that the claim has, as a result of the plaintiff's failure to use the time allowed to him, become a thoroughly stale claim, cannot, in my judgment, be irrelevant."

37. There was some debate about when a relevant period of delay ended. Mr Preston QC, for CD, submitted that the cut-off date was the date when the claim form was issued. The whole system of limitation period depends on the date when proceedings are issued, and an examination of the case law shows that when judges speak of delay, they are speaking of delay up to the date of issue of the writ or claim form. Thus when section 33 (3) (a) and (b) refer to delay, the delay in question ends when the claim form is issued. However, Mr Preston also accepted that a failure to notify the defendant of the real nature of the claim after issue of a claim form in very general terms was also relevant. It was one of "all the circumstances of the case" although it should not carry as much weight as delay before the issue of the claim form. In addition, the disappearance of evidence and the loss of cogency of evidence even

before the limitation clock begins to tick is also relevant: *Chief Constable of Greater Manchester Police v Carroll* [2017] EWCA Civ 1992 at [42] (8).

38. The focus in connection with the effect of delay is on its consequences for a defendant's ability to investigate and defend a claim. For that purpose a defendant needs to know what is the claim that the claimant wishes to advance. The importance of the date on which a defendant was notified of the claimant's claim in sufficient detail to investigate it has been stressed in the case law. In *Donovan* itself Lord Griffiths at 478 approved the following passage from the judgment of Stuart-Smith LJ in the court below:

> "The time of the notification of the claim is not one of the particular matters to which the court is required to have regard under section 33(3); although it may come in under paragraph (e). But to my mind it is an extremely important consideration, and is always so regarded by judges who have to consider these questions."

39. This point is brought into sharper focus by the illustration that Stuart-Smith LJ gave:

> "Plaintiff A is a boy of eleven at the time of an accident in the school playground. The law allows him ten years within which to bring his claim — that is, until he is 21. *If there has been no notification of the claim, it is likely that the defendants are seriously prejudiced by the delay.* There can be little hope of investigating it, and memories of such witnesses that might be traced will be hopelessly unreliable. If the Writ is issued before the plaintiff is 21, the defendant has to accept this prejudice because the law, out of its concern for infants, so allows. If the Writ is issued a week after the plaintiff's 21st birthday, the prejudice to the defendant is no greater than it was if it had been issued in time. The lapse of the week has made no difference. But the law says that enough is enough; the plaintiff has had long enough; he should only be allowed to pursue his action if he can persuade the court on balance that the prejudice to him in being deprived of his right to sue is greater than that to the defendant." (Emphasis added)

40. Mr Preston said that the issue of the claim form in the very general terms that I have quoted was good enough; and that once proceedings had been issued, if the defendants wanted to know more about the nature of the case they could and should have asked for more information as the rules permitted them to do. I disagree. Mr Preston accepted that the defendants could have had no idea that CD intended to make an allegation of rape until 2014, some eight years after the action had begun. Where, as here, a claimant asks the court to exercise a discretion in his favour which disapplies a limitation period passed for the benefit of defendants, it seems to me that it is incumbent upon him to put all his cards on the table at the earliest opportunity. In my judgment, therefore the whole of the period from the accrual of the cause of action in July 1990 to the date on which the defendants first learned the real nature of CD's case is to be taken into account, if nowhere else then in considering "all the circumstances of the case".

41. Where a judge hears the evidence with a view to both (a) deciding whether to disapply the limitation period and (b) deciding whether the claimant's allegations are true, there are obvious dangers. In *KR v Bryn Alyn Community (Holdings) Ltd* [2003] EWCA Civ 85, [2003] Q.B. 1441 Auld LJ put it this way:

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

42. I do not, myself, find the metaphor particularly helpful, but in *JL v Bowen* [2017] EWCA Civ 82, [2017] PIQR P11 at [26] Burnett LJ lucidly explained the thinking behind it:

> "The logical fallacy which Lord Clarke MR was concerned with at [21] of the *Nugent Care Society* case and Auld LJ at [74(vii)] of the *Bryn Alyn* case was proceeding from a finding on the (necessarily partial) evidence heard that the claimant should succeed on the merits to the conclusion that it would be equitable to disapply the limitation period. That would be to overlook the possibility that, had the defendant been in a position to deploy evidence now lost to him, the outcome might have been different."

43. As the court also held in that case, when assessing the cogency of evidence in considering whether to disapply the limitation period, the judge must take into account findings adverse to the claimant which he makes in the course of his fact-finding.

44. There is one other point to be made at this stage. In *A v Hoare* Lord Brown gave guidance on the approach to the disapplication of the limitation period. He said at [86]:

> "Secondly, … a substantially greater number of allegations (not all of which will be true) are now likely to be made many years after the abuse complained of. Whether or not it will be possible for defendants to investigate these sufficiently for there to be a reasonable prospect of a fair trial will depend upon a number of factors, not least when the complaint was first made and with what effect. *If a complaint has been made and*

> *recorded, and more obviously still if the accused has been convicted of the abuse complained of, that will be one thing; if, however, a complaint comes out of the blue with no apparent support for it (other perhaps than that the alleged abuser has been accused or even convicted of similar abuse in the past), that would be quite another thing.* By no means everyone who brings a late claim for damages for sexual abuse, however genuine his complaint may in fact be, can reasonably expect the court to exercise the section 33 discretion in his favour. On the contrary, a fair trial (which must surely include a fair opportunity for the defendant to investigate the allegations—see section 33(3)(b)) is in many cases likely to be found quite simply impossible after a long delay." (Emphasis added)

45. *JL v Bowen* was indeed a case in which the perpetrator had been convicted of offences against JL, yet this court held that the judge had been wrong to disapply the limitation period. In this case there was no conviction of Brother James of any offence involving CD. CD's case is in fact weaker than Lord Brown's second example. It is not merely a case of an uncorroborated complaint coming out of the blue. It is a case of an uncorroborated complaint being made out of the blue; in the face of previous inconsistent statements, and at variance with contemporaneous documents.

46. The judge set out some general guidance on the approach to section 33 and then turned to consider the specific factors listed in section 33 (3). The first was the length of, and the reasons for, the delay on the part of the plaintiff. As to that he said that the limitation period started on 30 January 1996 and expired on 30 January 1999. Proceedings were issued on 18 January 2006 "which means that the delay in issuing proceedings after the limitation period is just short of seven years." The reason for the delay was that CD "was too embarrassed and ashamed to report the abuse, for reasons which are common to many victims of child sexual abuse." The judge recognised at this point that he ought not to assess the truth of those assertions without descending into fact finding. He resolved the tension "by making the assumption that the abuse in fact occurred or at least that it may have occurred for the purpose only of this assessment."

47. The judge then considered the next matter specified in section 33 (3). That is:

> "the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11."

48. The question that the judge posed himself was the effect of "the seven year delay in issuing proceedings". The seven year period takes as its starting point the expiry of the limitation period permitted under section 28: that is three years after CD attained his majority. I have serious reservations whether that is the correct period. Section 28 does not, at least on its face, purport to amend section 11. On the contrary section 28 (1) recognises that the limitation period has expired. Thus it does not extend the time in which an action must be brought under section 11. Rather, it permits an action to be brought even if the limitation period under that section has expired. What it appears to me to do is to provide for a parallel limitation period. This ties in with section 33 (3)

(b), which section 28 does not mention. The cogency of the evidence must be assessed under section 33 (3) (b) by comparison with what the evidence would have been if brought within the time allowed by *section 11*; not within the time allowed by *section 28*. It follows, in my judgment, that it is highly questionable whether the comparison that the judge posed for himself was the right comparison. Nevertheless both counsel, who have a wealth of experience in these cases, were prepared to accept that the period of delay to be considered under this head did not begin until the expiry of the time allowed by section 28, so I shall proceed on the assumption that they are right. But it must be stressed that in considering "all the circumstances of the case" the whole period of delay since the accrual of the cause of action must be considered.

49. In considering the cogency of CD's evidence the judge said at [54]:

> "The allegation about the rape is one which is unlikely to be affected by the passage of time in terms of cogency. The Claimant did not say he could not remember it, merely that he did not like to recall it."

50. What, in my judgment, is missing in this passage is any reference to the fact that in 2003 (10 years after the expiry of the limitation period allowed by section 11 and 7 years after he had attained his majority) he positively asserted that he had no complaint about his time at St William's; that in 2007 he said no more than that another boy might have been sexually abused; and that even in his witness statement of 2014 the evidence about the alleged rape was no more than a single sentence. It also overlooks the fact that he told Prof Maden in 2015 that "It's all a blank really".

51. There is a further difficulty with the judge's reasoning on this point. When he came to consider CD's evidence he noted a number of instances in which CD's evidence appeared to be contradicted by contemporaneous documents; as well as the inconsistencies in his evidence. He had previously quite correctly directed himself about the importance of testing evidence against the contemporaneous documents. Yet at [78] he said:

> "I have therefore considered the contemporaneous documents and the various inconsistencies in the Claimant's evidence. I take the view that *they are either explainable due to the passage of time* and the Claimant's wish to suppress the memory and avoid talking about the abuse, or are insufficiently compelling to overcome my impression of the Claimant in the witness box as a witness of truth." (Emphasis added)

52. Having reached that conclusion on the merits, the judge then considered the allegations of non-sexual physical abuse. At [80] he said:

> "I think it likely however that the Claimant has exaggerated the number of occasions when he was slapped by Brother James and Mr Hartnett *due to the passage of time* and the unreliability of memory for details of this nature."

53. Both these findings amount to a finding that the cogency of CD's evidence had indeed been affected by the passage of time; and is not readily reconcilable with the judge's

earlier view that the allegation of rape was unlikely to be affected in terms of cogency by the passage of time. In other words, the judge's preliminary assessment was at least in part falsified by his later findings. In that situation, the judge ought, in my judgment, to have reconsidered that preliminary assessment.

54. In addition, when CD was asked about the record that he was upset about criminal charges being brought against adults he cared about, the judge recorded that: "He was unable to explain this or recall how he felt at the time."

55. The judge then turned to the defendants' evidence. He noted that "the main perpetrator Brother James was able to give evidence". As to that he said:

> "From the Defendant's point of view either Brother James is telling the truth about the incident occurring or he is not. It is not really something that either of the participants should have forgotten."

56. However, the judge had earlier recorded Brother James' evidence that he had no specific memory of CD as a pupil. This was not a case in which Brother James denied that any sexual abuse had taken place with anyone. He admitted that some sexual abuse had taken place; but not with CD, and not in Scotland. In the light of that evidence, the way in which the judge brushed aside any difficulty in recalling events said to have taken place over 20 years earlier is, in my view, surprising.

57. The judge had already referred to the defendants' inability to trace potential witnesses. The only one he singled out for special mention was Trish Monkman. He said at [53]:

> "The inability to trace Trish Monkman is unfortunate but this is probably the only missing witness who may have had something useful to say and it is difficult to know whether she would have been any easier to locate in 1999."

58. In my judgment the judge seriously underestimated the prejudice to the defendants in not being able to call Ms Monkman. She was CD's key worker at the time, and all the indications from the contemporaneous documents are that they had a good relationship. She recorded what appeared to be his enjoyment of the trip to Scotland (as indeed did Mr Allen). Although the judge may have been correct in considering the position as at 1999 compared with 2005 under this specific head, in considering all the circumstances of the case it would be perverse to regard the defendants' inability to call as a witness someone who knew CD well at the relevant time as being other than serious prejudice. She might well have been able to put flesh on the bones of what the files showed. In addition, the judge omitted to consider the defendants' inability to call Cathy Burke, which whom CD also had a trusting relationship, and who might have done likewise. It is reasonable to suppose that the likelihood is that both of them would have given evidence consistent with the written records that they maintained in the course of their employment which, as the judge recognised, were not supportive of CD's case. We do not, of course, know exactly what either of these women would in fact have said. But that is the point. The defendants have been deprived of the opportunity of calling them. As Mr Kent QC, for the defendants, pointed out it is one thing for a judge at trial to arrive at a conclusion on the balance

of probabilities on the basis of the evidence, however imperfect, that is called before him. It is another thing entirely to conclude that the answer would have been the same in any event.

59. The judge then considered two of the other factors mentioned in section 33 (3), about which no criticism is made. He then turned to consider:

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

60. He said:

> "On the Claimant's case he was unable to consider taking action about the abuse until he learnt others were also making a claim in 2005. I have to bear in mind that however that he would have known even at aged 18 that what had happened to him was wrong, but I have accepted his evidence that he suppressed the memory and was too embarrassed and ashamed to speak about it until he was much older and had the love and support of his wife and family."

61. The judge had earlier found that CD met his wife when he was 17 years old, and that their son was born in September 1998. Thus by the time that the litigation began, CD had been married and a father for some 7 years. The striking omission from the judge's consideration of this element was the fact that although CD had joined in the litigation, his witness statement in support of his claim did not until 2014 allege that he himself had been raped, over seven years after the action had begun. As I have said, at the time when the action was begun and for many years afterwards, the defendants can have had no inkling that that case was to be made against them. Although the judge accepted CD's evidence that he was too ashamed and embarrassed to speak about it (even to his own solicitors or the experts who had interviewed him) the judge made no finding about whether that was reasonable, let alone prompt.

62. Mr Preston argued on CD's behalf that because of arguments about vicarious liability (which went all the way to the Supreme Court) the service of Particulars of Claim was dispensed with; and that that dispensation meant that CD was under no obligation to notify the defendants of his real case. The factual premise underlying this submission is, to say the least, shaky. We have not been shown anything which had the effect of abrogating paragraph 16 of the order made by HHJ Hawkesworth QC on 5 September 2006. Indeed, I note that in the judgment of Lord Phillips in the Supreme Court in this very case, it was recorded at [15] that some 146 claimants in the group litigation had given particulars of the abuse that they claimed to have suffered. But even if the factual premise is sound, I disagree with the conclusion to which it is said to lead. Sir Murray Stuart-Smith dealt with a similar argument in *Robinson v St Helens Metropolitan BC* [2002] EWCA Civ 1099, [2003] PIQR P9 at [30]:

> "In effect [counsel for the claimant] submitted that even if the writ had been issued within the three years of 1992, the damage would have already been suffered by the defendants through

> inability to trace witnesses and get their evidence. Moreover, he submitted that proceedings would have been likely to have been stayed pending the outcome of the *Phelps* case. This ignores the fact that the sooner a claim is notified to a defendant the greater opportunity he will have to trace witnesses and recover documents even though the actual trial may be deferred until a test case has been determined."

63. The point is not a technical one about pleadings and compliance with court orders: it is a practical point about notifying the defendant of the real claim.

64. The next matter that the judge considered was:

> "the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received"

65. The judge said at [58]:

> "I accept that the Claimant knew enough about his cause of action on attaining majority but on his case was disabled from pursuing his claim due to the psychological effects of the abuse. He first took legal advice in 2005."

66. I regret to say that in my judgment this is a deficient analysis. It mixes up CD's taking of legal advice in 2005 about the alleged *physical* abuse, and his failure to mention the alleged *sexual* abuse until 2014. In this passage the judge has elided the taking of advice about one cause of action with the reason why CD did not pursue a different cause of action.

67. Lastly the judge turned to consider "all the circumstance of the case". He dealt with and rejected an argument advanced on behalf of CD that the moral culpability of the defendants should weigh in CD's favour. He also considered and rejected the argument for the defendants that it would be disproportionate to allow the case to proceed unless the rape were proved. But what is missing from his consideration of "all the circumstances of the case" is any consideration of the overall delay between the date when the alleged rape took place and the date when the claim relating to that rape was first notified to the defendants, and the prejudicial effect of that overall delay on the defendants' ability to defend the claim.

68. He concluded:

> "In my judgment, in this case a fair trial can take place and it would be equitable in the circumstances to allow the claim to proceed."

69. It is necessary to say something about the significance of a fair trial. The fact that a fair trial can take place is not in itself determinative. As this court said in *Ministry of Defence v AB* [2010] EWCA Civ 1317, (2010) 117 BMLR 101 at [212]:

> "While we do not disagree with the conclusion that a fair trial would still be possible, we do think that a delay as long as this

> should not be brushed aside quite so readily. Although a trial might be fair, the defendant must have been disadvantaged by the passage of time as long as 16 years. If the present case had been brought in time, many of the witnesses whom the MOD would have wished to call would still have been alive and able to give evidence. That is not an insignificant feature and should have been brought into the balance when deciding the s 33 issue."

70. See also *RE v GE* [2015] EWCA Civ 287 at [76] to [78].

71. Although a decision to disapply the limitation period is a discretionary decision, I consider that the judge made a number of errors of law, such as entitles this court to intervene.

72. In view of my conclusion on this point I can take the other two grounds of appeal for which permission has been given more shortly. The defendants argue that one significant element of prejudice that they have suffered is a change in the law. First, the decision of the House of Lords in *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2002] 1 AC 215 considerably expanded the scope of vicarious liability. Second, the decision of the House of Lords in *A v Hoare* to depart from its earlier decision in *Stubbings v Webb* meant that CD was able to take advantage of the power to disapply the limitation period which would not have been available before. Under the ruling in *Stubbings v Webb* the relevant limitation period would have been six years, measured in accordance with section 28 from the date when CD attained his majority. Any action would therefore have had to have been brought by 30 January 2002. *A v Hoare* was not decided until 30 January 2008, with the consequence that the defendants could have applied to strike out the claim.

73. As far as the first of these changes is concerned, the change took place before the expiry of the limitation period permitted by section 28, whether the underlying cause of action was governed by section 11 or by section 2. In *AS v Poor Sisters of Nazareth* [2007] SC 688, on which the defendants relied, the relevant change seems to have occurred after the expiry of the limitation period. As far as the second is concerned, as Lord Browne-Wilkinson explained in *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 AC 349:

> "The theoretical position has been that judges do not make or change law: they discover and declare the law which is throughout the same. According to this theory, when an earlier decision is overruled the law is not changed: its true nature is disclosed, having existed in that form all along. This theoretical position is, as Lord Reid said in the article "The Judge As Law Maker" (1972-1973) 12 J.S.P.T.L. (N.S.) 22, a fairy tale in which no one any longer believes. In truth, judges make and change the law."

74. But the consequence is that a decision of the higher courts has retrospective effect. In the same case Lord Goff said:

> "Occasionally, a judicial development of the law will be of a more radical nature, constituting a departure, even a major departure, from what has previously been considered to be established principle, and leading to a realignment of subsidiary principles within that branch of the law. Perhaps the most remarkable example of such a development is to be found in the decisions of this House in the middle of this century which led to the creation of our modern system of administrative law. It is into this category that the present case falls; but it must nevertheless be seen as a development of the law, and treated as such.
>
> Bearing these matters in mind, the law which the judge then states to be applicable to the case before him is the law which, as so developed, is perceived by him as applying not only to the case before him, but to all other comparable cases, as a congruent part of the body of the law. Moreover when he states the applicable principles of law, the judge is declaring these to constitute the law relevant to his decision. Subject to consideration by appellate tribunals, and (within limits) by judges of equal jurisdiction, what he states to be the law will, generally speaking, be applicable not only to the case before him but, as part of the common law, to other comparable cases which come before the courts, whenever the events which are the subject of those cases in fact occurred.
>
> It is in this context that we have to reinterpret the declaratory theory of judicial decision. We can see that, in fact, it does not presume the existence of an ideal system of the common law, which the judges from time to time reveal in their decisions. The historical theory of judicial decision, though it may in the past have served its purpose, was indeed a fiction. But it does mean that, when the judges state what the law is, their decisions do, in the sense I have described, have a retrospective effect. That is, I believe, inevitable. It is inevitable in relation to the particular case before the court, in which the events must have occurred some time, perhaps some years, before the judge's decision is made. But it is also inevitable in relation to other cases in which the law as so stated will in future fall to be applied. I must confess that I cannot imagine how a common law system, or indeed any legal system, can operate otherwise if the law is be applied equally to all and yet be capable of organic change."

75. Since the underpinning of the common law is that the law, once declared, applies to all comparable cases "whenever the events which are the subject of those cases in fact occurred", I consider that the possibility that the common law might be changed with retrospective effect is not a legitimate reason for refusing to exercise the discretion under section 33 in a claimant's favour. Still less is it legitimate when what has changed is not the common law, but the interpretation of a statutory provision which

has been in force during the whole of the relevant period in exactly the same terms. Quite apart from anything else, if we were to attempt to reconstruct the progress of a hypothetical action begun in, say, 1999 we might well reach the conclusion that the leading case on whether section 11 applied to cases of deliberate injury would have been *CD v The Catholic Child Welfare Society* rather than *A v Hoare*. A similar argument was presented to Nicol J in *Murray v Devenish* [2018] EWHC 1895 (QB), and he rejected it. In my judgment he was right to do so. This ground of appeal fails.

76. The final ground of appeal for which permission has been granted is the assertion that the "unwarranted attack" on Prof Maden ought to have weighed heavily in the balance against CD. The point under this ground is this. In the course of his evidence in chief CD suggested that he had only seen Prof Maden for 10 or 15 minutes, rather than one and a half or two hours. There seems to have been little foundation for that assertion, and not unnaturally Prof Maden was affronted by this perceived attack on his professionalism. However, the judge does not appear to me to have based his decision on the expert evidence that was called before him. His decision was based on his assessment of the credibility of CD's evidence. In dealing with the particular assertion that CD had made in evidence the judge described it as a mistake rather than a lie. While this may have been a charitable conclusion for him to have reached, he saw and heard the witness and was entitled to reach that conclusion. The fact that a claimant makes a mistake in evidence is not a weighty matter in the exercise of discretion under section 33. This ground of appeal fails.

77. However, for the reasons I have given I consider that the appeal should be allowed.

78. The consequence is that we must now re-exercise the discretion. The factors that weigh the most heavily with me are the following:

i) The cause of action in relation to the sexual assault accrued in July 1990 but CD did not reveal the nature of the allegation that he wished to make until February 2014, and even then in the tersest of terms. The overall effective delay is therefore nearly 24 years. The complaint as it eventually emerged is therefore a thoroughly stale complaint.

ii) By that time the litigation had been ongoing for many years, and CD had had the benefit of legal advice since 2005.

iii) In the period since July 1990 the defendants had lost touch with potentially highly relevant witnesses, whose evidence might be expected to have been consistent with the contemporaneous records that they made.

iv) CD's complaint was uncorroborated, came out of the blue in 2014 contradicted previous statements; and was at variance with contemporaneous documents.

v) On the judge's own findings the cogency of CD's evidence was itself affected by the passage of time.

vi) Although the judge awarded CD a "modest allowance" (unquantified) for minor physical assaults, it would not be proportionate to disapply the limitation period on that account.

79. In my judgment the defendants were exposed to the real possibility of significant prejudice in their ability to defend this claim so long after the event, and without the ability to call relevant witnesses. I would allow the appeal, reverse the judge's decision to disapply the limitation period, and enter judgment for the defendants.

Lady Justice Rafferty:

80. I agree.