

SCOTLAND / JUDGMENT

Godfrey v. Quarriers [2006] ScotCS CSOH_160 (10 October 2006)

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[2006] ScotCS CSOH_160,

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[2006] CSOH 160 A9/06 OPINION OF LADY SMITH in the cause ANDREW GODFREY Pursuer; against QUARRIERS Defenders: ____ Pursuer: McEachran , QC , Stirling ; Drummond Miller, WS Defender: Moynihan , QC , Dunlop; Simpson & Marwick 10 October 2006 Preliminaries [1] This is one of a number of claims at the instance of an adult who, for a period during his childhood, was resident in a home run by the defenders. He seeks damages in respect of physical injuries sustained as a result of alleged assaults in the home and the development of a skin disease, an obsessive compulsive neurosis, and a post traumatic stress disorder, allegedly caused by the treatment he received there. The case came before me on the procedure roll, along with six other similar actions.

Introduction

[2] Limitation is raised as an issue by the defenders. They plead that the action is time barred under section 17 of the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act"). The pursuer reached the age of majority on 11 January 1990 . The present action was raised on 4 November 2005 . The pursuer pleads that the action is not time barred but that if it is, it should be allowed to proceed nonetheless, under the equitable discretion available under section 19A of the 1973 Act. The defenders do not accept that the pursuer has made relevant averments for a case under section 19A. [3] The defenders' motion was for dismissal of the action. The pursuer sought a proof at large, leaving all pleas standing. [4] Separately, the defenders challenged the relevancy of a passage of averments to which I refer later in this opinion.

Background

[5] The precise factual background against which, on the pursuer's averments, the action is brought is not easy to follow from the pleadings which are hampered by a lack of clarity and cogency but it would appear to be as follows: in about December 1978, when he was nearly seven years old, the pursuer became a resident in the home at Quarrier's Village, run by the defenders, and remained there as a resident until 6 June 1984. He was, it is averred, subjected to cruel physical assaults meted out as punishments, throughout that time, which caused him physical injuries. At dates which are not specified and could, on the averments, have been prior to the start of the triennium, he developed an obsessive compulsive neurosis and a skin disease and was admitted to a psychiatric hospital on account of a breakdown. Between the ages of 21 and 26 years, he attempted to suppress memories of the abuse by abusing drugs and alcohol. In 1992, he had a major depressive episode. In about 2004, he saw an item on the television news about child abuse in institutions in Scotland and was encouraged by an acquaintance to consult a solicitor. He did so. His solicitor, Mr Fyfe, instructed a psychological report and that report, dated 15 May 2005 indicated that the pursuer had been diagnosed as suffering from a post traumatic stress disorder. Counsel was instructed to draft a summons on June 2005 , the summons was drafted and returned to the Edinburgh agents on 16 June 2005 and the action was, according to the averments, "raised shortly thereafter". It was not in fact raised until 14 November 2005 . It is averred (article 9 of Condescendence) that: "He suffers from intense psychological distress if reminded of the abuse..... The trauma of the abuse has endured with him all his life." and (article 10 of Condescendence): "the pursuer put memories to the back of his mind as a way of coping." [6] It is also averred that the pursuer was in Woodilee Hospital between 25 September 1997 and 26 November 1997 and: "While the pursuer was in Woodilee Hospital , he denied everything about his past. Questions about his memory were raised. It was not until after the pursuer had been in Hospital that he was able to reflect on his past." [7] In short, the pursuer avers that he was a resident in the home between 1978 and 1984, during which time he was physically assaulted, something of which he was aware. At some point thereafter, he developed a psychiatric condition which involved him being hospitalised for a period of about two months in 1997. His approach throughout was to put memories to the back of his mind. He was able, though, to reflect on his past after he had been in hospital; his hospitalisation having ended in November 1997, his averments must be taken to indicate that he has been able to reflect on what happened to him in the home since then. He was not prompted to do anything about it though until after he had seen a television news item in 2004 and after an acquaintance had told him he should see a solicitor. He did so on 21 December 2004 . An action was raised almost a year later, in November 2005. Three months of that period was attributable to the lapse of time between his solicitor instructing a psychological report and it being received. The remainder of the period is largely unexplained. [8] It is also, I note, averred that the pursuer suffers from "severe mental illness" but I should record that it is not suggested on his behalf in the pleadings nor was it suggested in submission that there had been any period during which he had lacked capacity since reaching majority, which he would appear to have done in or about 1990, some fifteen years prior to the raising of this action. [9] Regarding limitation, the pursuer avers: "The triennium

does not begin until 2004 at the earliest when he saw the television programme which prompted him to contact a Solicitor in December 2004. It was not until the medical report dated th May, 2005 that the pursuer became aware that he had chronic PTSD and that it was attributable to his time in the Home. The pursuer did not become aware, nor was it reasonably practicable for him in all the circumstances to become aware of the facts (i) that the injuries were sufficiently serious to justify him bringing an action of damages and (ii) that the injuries were attributable in whole or in part to an act or omission until 2004 at the earliest. The pursuer experienced systematic childhood physical and emotional abuse. He suffers from severe mental illness. The reasonable man in the same position as the pursuer, namely having experienced systematic childhood physical and emotional abuse and suffering from severe mental illness, would not have become aware of the statutory facts until 2004 at the earliest. The disabling long term effect of the abuse must be given effect to. Accordingly the claim has not time barred. Esto the claim has time barred (which is denied) it would be equitable to allow the pursuer's claim to proceed in terms of Section 19A of the Prescription and Limitation (Scotland) Act 1973 for the foregoing reasons.

Furthermore the delay in raising the action is attributable to the pursuer's treatment by Mr Harris, for whom the defenders are liable. It would not be equitable to sustain the defenders' plea of time bar in the circumstances where they are responsible for the delay. The defenders would not be prejudiced if the claim were to proceed. The defenders have archives dating back to at least 1878. The defenders retain extensive records of the pursuer's time in Quarriers Children's Home. Extensive medical records are available. Extensive records from Strathclyde Regional Council Social Work Department covering the period when the pursuer was in Quarriers Children's Home are available. Witnesses are available. The pursuer's brother Robert is available. Bill Dunbar, Assistant Director at Quarriers Children's Home and a person who attended the pursuer's reviews, is available as a witness. He can remember events including a Christmas Service in 1980. The defenders are aware that it can be distressing for adults who were in care as a child to confront their past. The defenders are aware that memories of the past can be brought up which people thought had been forgotten." Limitation Submissions for the Defenders [10] Counsel for the defenders submitted that the pursuer's pleadings indicated that he was plainly aware of problems which he related to being abused in the home, throughout. The tenor of his averments was that he had reexperienced the abuse that he suffered, all his life. He was suing in respect of a continuum of events which had begun when he was a resident in the home. There was no question of him suing in respect of any separate or severable injury. In these circumstances, his case failed to meet the requirements of section 17 of the 1973 Act. [11] Reference was made to the terms of section 17. It was submitted that it required a pursuer to show that he was not in fact aware and could not reasonably practicably have become aware of the relevant facts until a date within three years prior to the raising of the action. Account also required to be taken of the provisions of section 22(3). It was not relevant to ask into which category of case the action fell. Nor was it relevant to ask whether the pursuer was aware that he had a cause of action. What was relevant to ask was: what was the injury in question? when did the pursuer become aware of it? when did he become aware that it was sufficiently serious to justify a claim for damages? when did he become aware that it was attributable at least in part to an act or omission? when did he become aware that the defender was a person to whose act or

omission the injuries were attributable in whole or in part? Then, one also had to ask when would it have been reasonably practicable for the pursuer to become aware of those facts, bearing in mind that once he was "on notice" of any one of the material facts, he had to take all reasonably practicable steps to inform himself. The statutory focus was on the nature of the injury as known to the pursuer. [12] Reference was made to the cases of *Cowan v Toffolo Jackson & Co Ltd* 1998 SLT 1000, *Nimmo v British Railways Board* 1999 SLT 778 , *Carnegie v Lord Advocate* 2001 SC 802 , *Agnew v Scott Lithgow* 2003 SC 448 , *B V Murray* 2004 SLT 967 and *MP v Sister Zoe O'Neil & Ors* 2006 CSOH 93 . Two principal submissions were made on the basis of that review of Scottish authority. One was that the objectivity of the section 17 test was emphasised. The other was that, even if *Carnegie* was correct in holding that it was possible to have two different start dates for the running of the triennium if separate and distinct injuries though arising from a single delict were averred (and it was not accepted that *Carnegie* was correctly decided on that point) this was not such case. Attention was drawn to the caveat set out in *Agnew* regarding the approach to English authorities on limitation. [13] Counsel for the defenders, anticipating the argument against them, also referred to a recent line of English authority regarding the interpretation and application of sections 11 and 14 of the Limitation Act 1980 ("the 1980 Act"): *Stubbings v Webb*

[1992] 1 QB 197;

[1993] AC 498; *Dobbie v Medway Health Authority*

[1994] 1 WLR 1234 ; *KR v Bryn Alyn*

[2003] QB 1441 ; and *Adams v Bracknell Forest Borough Council*

[2005] AC 498. These cases were not, it was said, indicative of the correct approach under the 1973 Act. In particular, the approach taken in the *Bryn Alyn* case ought not to be followed for that reason and also because it differed from the approach set out by the House of Lords in *Adams* where specific disapproval was stated of dictum in the case of *Nash v Eli Lilly & Co* [1993] 1 WLR 782 to the effect that the test under section 14(3) of the 1980 was a "subjective" one. In *Bryn Alyn* , the Court of Appeal had followed the approach in *Nash*. By implication, the House of Lords would not have agreed with the approach in *Bryn Alyn*.

[14] Counsel for the defenders also submitted that the pursuer had failed to aver a relevant case for his application under section 19A of the 1973 Act. He referred to the case of *Clark v McLean* 1994 SC 410 for a submission that the question at this stage was that of whether or not the pursuer's averments were relevant so that, if proved, they could allow the court to exercise its discretion under section 19A. He also referred to the case of *Nimmo v British Railways Board* as an example of a case where a gap in the pursuer's narration in his averments regarding the delay that had occurred was fatal to his case.

[15] There was an unexplained period in the pursuer's averments, it was submitted. The seven year gap between 1997 and 2004 was wholly unexplained which, as in the case of *Cowan v Toffolo Jackson* was of particular note since it extended into the period within which the start of the triennium required to fall. [16] In the event that the motion for

dismissal was not sustained, the defenders motion was for a preliminary proof on the time bar issues.

Submissions

for the Pursuer [17] Counsel for the pursuer stressed that the context of these cases was that the pursuers were suing in respect of having been sexually abused in the 1960's and 1970's. There were at least 500 similar actions pending in the Court of Session. The claims only came to light in the 1990's. These cases were in respect of psychological damage and it may be harder for a pursuer to know if he has suffered such damage or to know to what it is attributable. Diagnosis accordingly becomes important. Reliance was placed on the case of Bryn Alyn which was said to amount to recent English authority for the triennium not starting to run until a claimant has a diagnosis or contacts his solicitor. That was because an adult claimant may not realise that his injuries were significant in the sense of being sufficiently serious to justify bringing an action until they were told that by a medical expert. [18] Under reference to section 17 of the 1973 Act it was said that there was a difference between actionability and knowledge in law that there was a good case. It was necessary to look at not just quantum of injury but also justification. Whilst it was accepted that quantum of injury was at the nub of the statutory provision, the problem was that these pursuers had been suppressing memories. They felt ashamed. In response to being asked, repeatedly, whether the pursuer's submission was that a claimant, for section 17 purposes, required to ask himself anything in addition to how severe his injuries were, and if so, what, no answer was given beyond a repeated reference to the asserted fact that 'these pursuers' as a group, have been suppressing memories, it was difficult for them to come forward, they had been silenced by their treatment and that they were unlikely to be aware of their legal rights . It was accepted that the section 17 test was an objective one but then counsel added that it was also a question of whether the individual pursuer would have thought that his injuries were sufficiently serious to justify litigation. [19] The pursuer in the present case had, it was said, used drugs and alcohol to suppress his memories; that was a good example of the "sort of thing" that was going to prevent "these people" coming forward. [20] What was referred to as the Bryn Alyn approach ought to be followed. By that I understood counsel for the pursuers to mean that I ought to regard the section 17 requirements as having both objective and subjective elements in the sense that the relevant question was whether a reasonable person with the pursuer's particular background, namely of child abuse manifesting itself in psychological injuries, would have thought that his injuries justified suing at an earlier stage? That is that, ultimately, despite earlier indications that it was accepted that objectivity lay at the heart of section 17, the position adopted on his behalf was that a strongly subjective test ought to be applied. [21] It was also submitted on behalf of the pursuer that his psychological injuries were distinct from his physical ones. "These cases" were, it was said, really about the long term psychological effects on the pursuers. The test was not whether the pursuer knew he had been assaulted but whether he knew his injuries were sufficiently serious to justify suing. "Perhaps", it was said, in what seemed to be a tentative submission, there were "separate trienniums". Reference was made to *Carnegie v Lord Advocate* . Whilst the case of *Dunlop v McGowans* 1980 SC (HL) 73 was authority for the proposition that the

obligation to make reparation for an act, neglect or default was a single and indivisible obligation and that the prescriptive period began when that obligation to make reparation became enforceable, that being when there was a concurrence of *damnum* and *iniuriam*, it was not in point. It did not concern the obligation to make reparation for personal injuries and the effects of the limitation. [22] Regarding the circumstances of the present case, it was submitted that the averments that the pursuer had had a lot of mental health problems, that attributability might be in question, and that he had been putting away his memories as a means of coping indicated that he was not aware of the statutory facts until within three years prior to the raising of the action. Regarding section 19A, reliance was placed on the averments on record from p.17C to the end of article 10: "Esto the claim has time barred (which is denied) it would be equitable to allow the pursuer's claim to proceed in terms of Section 19A of the Prescription and Limitation (Scotland) Act 1973 for the foregoing reasons. Furthermore the delay in raising the action is attributable to the pursuer's treatment by Mr Harris, for whom the defenders are liable. It would not be equitable to sustain the defenders' plea of time bar in the circumstances where they are responsible for the delay. The defenders would not be prejudiced if the claim were to proceed. The defenders have archives dating back to at least 1878. The defenders retain extensive records of the pursuer's time in Quarriers Children's Home. Extensive medical records are available. Extensive records from Strathclyde Regional Council Social Work Department covering the period when the pursuer was in Quarriers Children's Home are available. Witnesses are available. The pursuer's brother Robert is available. Bill Dunbar, Assistant Director at Quarriers Children's Home and a person who attended the pursuer's reviews, is available as a witness. He can remember events including a Christmas Service in 1980. The defenders are aware that it can be distressing for adults who were in care as a child to confront their past. The defenders are aware that memories of the past can be brought up which people thought had been forgotten." Relevant Legislation [23] Section 17 provides: "Actions in respect of personal injuries not resulting in death 17.1(1) This section applies to an action of damages where the damages claimed consist of or include damages in respect of personal injuries, (being an action to which section 18 of this Act applies) brought by the person who sustained the injuries or any other person. (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 three 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. Interpretation of Part II and supplementary provisions 22. (3) For the purposes of the said subsection (2)(b) knowledge that any act or omission was or was not, as a matter of law, actionable, is irrelevant. (4) An action which would not be entertained but for the said subsection (2)(b) shall not be tried by a jury." The matters set out in subparagraphs (i), (ii) and (iii) of section 17(2)(b) are generally referred to as the "statutory facts". Section 19A of the 1973 Act provides: "(1) 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." [24] The pursuers' approach requires account also to be taken of certain of the provisions of the Limitation Act 1980 sections 11, 14 and 33: "11(1) This section applied to any action for damages for negligence.....or breach of duty.....where the damages claimed by the plaintiff for the negligence....or breach of duty consist of or included damages in respect of personal injuries to the plaintiff or any other person....

- (3) An action to which this section applied shall not be brought after the expiration of the period applicable in accordance with subsection (4) below. (4)...the period applicable is three years from the date on which the cause of action accrued; or (b) the date of knowledge (if later) of the person injured. 14(1)..in section 11.....of this Act references to a person's date of knowledge are references to the date on which he first had knowledge of the following facts
 - (a) that the injury in question was significant; and (b) that the injury was attributable in whole or in part to an act or omission which is alleged to constitute negligence.....or breach of duty; and (c) the identity of the defendant.....and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence or breach of duty is irrelevant. (2) For the purposes of this section an injury is significant if the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment. (3) For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire (a) from facts observable or ascertainable by him; or (b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek; but a person shall not be fixed under this subsection with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice." 33(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which
 - (a) the provisions of section 11...prejudice the plaintiff; and (b) any decision of the court under this subsection would prejudice the defendant; the court may direct that those provisions shall not apply to the action..." Discussion and Conclusions Relevancy of Apology Averments: [25] Article 7 of Condescence is in the following terms: "In August 2002 a Petition was lodged with the Scottish Parliament calling on the Scottish Parliament inter alia to urge the Scottish Executive to conduct an inquiry into past institutional child abuse, particularly for those children who were in the care of the state under the supervision of religious orders. In response to an invitation from the Public Petitions Committee to

comment on the Petition, the defenders stated that their position was that if any individual suffered abuse in Quarriers Children's Home then they apologised." [26] Counsel for the defenders submitted that these averments were irrelevant. They did not amount to averments of an admission of liability. They did not amount to an admission that any abuse took place. They referred to a statement made that amounted to no more than the common courtesy of an apology tendered on the basis of a hypothesis. [27] Counsel for the pursuer began, on this matter, by stating that it was appropriate for the court to know that notwithstanding the conviction of the second defender in a different litigation at the instance of a different pursuer regarding his experiences at the home, these defenders did not accept that that abuse had occurred. The averments regarding the apology were, against that background, relevant. Nothing further was said in answer to the challenge to their relevancy. [28] I am readily satisfied that the averments contained in article 6 of Condescence are quite irrelevant. The pursuer's attempt to justify these averments was not readily comprehensible. They do not amount to an admission of liability. They do not amount to an admission that anything happened to this pursuer whilst he was a resident in the home. They do not, in short, advance the pursuer's case at all and I have no difficulty in upholding the defenders' submission and excluding them from probation. I will pronounce an interlocutor to that effect, accordingly. Limitation [29] Rules to protect defenders from having to meet stale claims have been in existence for many years. The rules would also seem to indicate that it is considered to be in the best interests of pursuers that they prosecute their claims expeditiously. The law also expects people to make such enquiries and seek such advice as they can when they have good reason to do so. The ordinary rule is that time starts to run when an obligation becomes enforceable at common law. Thus time normally starts to run when there is a concurrence of damnum and iniuriam and if an action is not raised within the statutory time limit, any obligation to make reparation becomes unenforceable. The law recognises, however, that the ordinary rule can operate too harshly so there are statutory provisions designed to alleviate that hardship (see: section 17(2)(b) of the 1973 Act) and the court is also, separately, given a wide unfettered discretion to, in effect, waive statutory limitation if it seems equitable to do so in an individual case (see: section 19A of the 1973 Act). The question that arises in this case (and in the six others before me) is whether the pursuer has demonstrated enough to bring himself within the category of pursuers for whom the hardship of time running from the date that the obligation became enforceable is alleviated by section 17(2)(b) or to enable him to call on the court to exercise its section 19A discretion in his favour. It is important to remember that the provisions of those two sections are different and that there is no indication of Parliament having intended that the distinction between them be blurred. Also, account should be taken of the fact that section 19A is able to afford a remedy if it is equitable to do so, in circumstances where section 17(2) does not do so. There is thus no apparent need to interpret 17(2) widely or liberally to fill any perceived gap on the grounds that justice demands it. That is what section 19A is there for. Bryn Alyn and the English cases: [30] The pursuer's case was founded on the approach that had been adopted by the Court of Appeal in the case of Bryn Alyn. I propose, accordingly, to begin by looking at the English authorities

to which I was referred. [31] The earliest one referred to was *Stubbings v Webb* where a plaintiff sought damages for mental illness and psychiatric disturbance allegedly caused by sexual abuse to which she had, she said, been subjected by her adoptive father and brother when a child. She made allegations of rapes having occurred when she was aged 12, indecent acts and sexual assaults having occurred when she was aged 14 and physical assaults resulting in nose bleeds having occurred when she was aged 15. She suffered mental illness from her early 20's. She reached the age of majority in 1975. She did not become aware that her mental illness was attributable to the acts complained of until September 1984 when she consulted a psychiatrist (following on her having contacted an incest helpline after seeing a television programme on the subject). An action was raised in August 1987, less than three years after the plaintiff acquiring that knowledge. Potter J allowed the action to proceed. The Court of Appeal dismissed an appeal against his decision. They considered the plaintiff's actual knowledge which was that she knew of the acts complained of when they occurred. They then considered the question of whether she knew, at any time before August 1984, whether the injury on which her action was founded was 'significant' or that it was attributable to the acts of her adoptive father. On the question of the significance of injury, at p.206, Bingham LJ said : "... I do not underestimate, dismiss or in any way minimise the distress, humiliation and degradation which conduct of the kind alleged against Mr Webb involved for a sensitive child. But there is nothing in the indecent assaults and conduct alleged against him which caused her physical injury. There is nothing which could ground an indictment for causing actual bodily harm, nothing which could be particularised under the heading, "Particulars of personal injury." There were, of course, the assaults which the plaintiff says she suffered from Mr Webb when she was 15, which caused her nose bleeds, but in the state of society as it existed in the late 1970's and early 1980's the plaintiff would not reasonably have considered these assaults sufficiently serious to justify proceedings even against an acquiescent and creditworthy defendant. The rarity of such claims, if indeed, there were any at all, is proof enough of that, given that domestic violence is not a recent phenomenon. When one turns to impairment of the plaintiff's mental condition the position is somewhat different. The plaintiff did know certainly well before 18 August , that her mental condition was impaired sufficiently seriously to justify proceedings against an acquiescent and creditworthy defendant. But Did the plaintiff know within (three years of her majority) that this serious impairment of her mental condition was attributable in whole or in part to the acts of Mr Webb ...?" [32] The Court of Appeal were satisfied that the plaintiff did not know and could not reasonably have known that her mental illness was so attributable. Time had not, accordingly, in terms of sections 11 and 14 of the 1980 Act started to run prior to 18 August 1984 . The earlier injuries were disregarded: they reached the view that although the plaintiff was aware of them well before three years after majority, they were de minimis (a view which may seem surprising given the rape allegation see: Lord Griffiths obiter comments in the case in the report of the appeal to the House of Lords,

[1993] AC 498 at p.505-506). Although Bingham LJ referred to what the plaintiff would have reasonably considered as regards the level of severity of the injuries, it is evident from his reference to society as a whole that he had in mind that a reasonable citizen would have regarded the assaults as *de minimis* and he was thus applying a largely objective test. [33] At p.211 Nolan LJ commented: "... the available evidence does not show that she should reasonably have regarded her physical or mental injuries at that stage as sufficiently serious to justify the institution of proceedings for damages, even against hypothetically solvent and unresisting defendants. It has to be borne in mind that until the last few years proceedings of the present kind were unheard of." [34] His comments would seem to accord with Bingham LJ's approach of looking at the question of how severely the injuries in question would have been regarded by a reasonable person at the relevant time. His focus on the quantum of injury is reinforced by a passage at 211E: "... I consider that lawyers advising the plaintiff in 1975, or at any time between then and 1978, would have looked for physical or mental injuries more serious than those shown to have existed at that stage before advising that institution of proceedings was justified. *A fortiori*, I cannot accept that the plaintiff should have reasonably considered her injuries sufficiently serious for that purpose, at that stage." [35] At p.212, Sir Nicholas Browne-Wilkinson VC, although indicating that he agreed with the reasons given by Bingham LJ continued, in a passage which might be thought to depart from focussing on the quantum of the injury: "The question is whether in 1975 the plaintiff acted reasonably in not then suing...for the serious wrong alleged to have been done to her. In my judgment it is important not to consider the question by reference to the social habits and conventions of 1991. Over recent years, for the first time civil actions have been brought by victims of adult rape against their assailants. As to actions against child abusers, this is apparently the first case in which the alleged victim has sought to sue her abusers. In the present climate and state of knowledge it would in my judgment be very difficult, if not impossible for a plaintiff coming of age in the late 1980's to establish that she acted 'reasonably' in not starting proceedings alleging child abuse within three years of attaining her majority. But we are concerned with the reasonableness of the plaintiff's behaviour in the period 1975-78. At that time civil actions based on sexual assaults were unknown in this country." [36] In *Dobbie v Medway Health Authority*, the plaintiff raised an action against a health authority which had employed a surgeon who removed her breast allegedly unnecessarily and without her consent, in 1989. The surgery had taken place in 1973. The plaintiff had suffered severe psychological illness as a result of the mastectomy. It was not until 1988 that she had become aware that her breast need not have been removed. It was argued, on her behalf that, shortly put, time did not start running until the plaintiff knew that something had gone wrong; prior to that she was distressed and had been led to believe that what had happened was usual and proper. At p.1240, in a passage which might be thought to run counter to the approach of the court in *Stubblings*, insofar as subjective awareness of the right to sue may have weighed quite sufficiently with the court there, Sir Thomas Bingham MR, as he then was, with regard to the statutory requirements that must be met before time starts to run, said: "This condition is not satisfied where a man knows

that he has a disabling cough or shortness of breath but does not know that his injured condition has anything to do with his working conditions. It is satisfied when he knows that his injured condition is capable of being attributed to his working conditions, even though he has no inkling that his employer may have been at fault." [37] At p.1241, under reference to the terminology of sections 11 and 14, he said: "The requirement that the injury of which a plaintiff has knowledge should be 'significant' is in my view directed solely to the quantum of the injury and not to the plaintiff's evaluation of its cause, nature or usualness. Time does not run against a plaintiff, even if he is aware of the injury, if he would reasonably have considered it insufficiently serious to justify proceedings against an acquiescent and creditworthy defendant, if (in other words) he would reasonably have accepted it as a fact of life or not worth bothering about. It is otherwise if the injury is reasonably to be considered as sufficiently serious within the statutory definition: time then runs (subject to the requirement of attributability) even if the plaintiff believes the injury to be normal or properly caused." and at p.1243, under reference to the particular circumstances of the plaintiff's case, he said: "The personal injury on which the plaintiff seeks to found her claim is the removal of her breast and the psychological and physical harm which followed. She knew of this injury within hours, days or months of the operation and she at all times reasonably considered it to be significant. She knew from the beginning that this personal injury was capable of being attributed to or, more bluntly was the clear and direct result of, an act or omission of the health authority. What she did not appreciate until later was that the health authority's act or omission was (arguably) negligent or blameworthy. But her want of that knowledge did not stop time beginning to run." [38] Hence, any question of sympathy for the plaintiff was seen as quite irrelevant, as was the fact that she did not, until 1988, realise that she could sue for what had happened to her. In what appears to be an important passage, Steyn LJ, as he then was, said, at p.1248: "Stripped to its essentials counsel's argument is simply an attempt to argue that the injured party must know that he has a possible cause of action. That is not a requirement of section 14(1). Moreover, in 1974, the Law Reform Committee rejected a proposal that the injured party must have knowledge "that he has a worthwhile cause of action:"... The present argument is simply a thinly veiled variant of a possible solution which was rejected by the Law Reform Committee in 1974 and by Parliament in 1975 and 1980." [39] I turn next to the case of *KR & others v Bryn Alyn Community (Holdings) Ltd* , a decision of the Court of Appeal in respect of fourteen consolidated cases . In the case of *B v Murray* , Lord Johnston observed that it was not an easy case. That seems, to me, to be an understatement. I share the difficulty both he and Lord Glennie in the case of *MP* experienced in trying to follow its reasoning when set against the wording of the relevant English legislation. [40] The plaintiffs, who were adults, all alleged that they had been abused as children when resident in care homes run by the defendants. Their claims were principally in respect of psychiatric injury resulting from the abuse. The appeal focussed initially on the question of whether the trial judge had been correct to disapply the time bar under section 33 of the 1980 Act. However, in the course of the appeal, the plaintiffs were also allowed to advance a cross appeal against the trial judge's ruling against them

under section 14 of the 1980 Act. It is the part of the Court of Appeal's judgment dealing with that argument which was relied on so heavily on behalf of the pursuers in the cases before me and has been relied on by the pursuers, thus far unsuccessfully, in other similar cases before this court. [41] Under reference to the terms of section 14(2) of the 1980 Act, the Court of Appeal, at paragraph 32, refer to a passage in the Court of Appeal's judgment in the case of *Nash v Eli Lilly & Co*

[1993] 1 WLR 782, 791 , for an explanation of the 'test' set by those provisions: "...it is clear that the test is partly a subjective test, namely: 'would this plaintiff have considered the injury sufficiently serious?' and partly an objective test, namely: 'would he have been reasonable if he did not regard it as sufficiently serious?' It seems to me that the subsection is directed at the nature of the injury as known to the plaintiff at that time. Taking that plaintiff, with that plaintiff's intelligence, would he have been reasonable in considering the injury not sufficiently serious to justify instituting proceedings for damages?" [42] At paragraph 40 of the judgment, it is observed that section 14(2) was designed principally to provide for cases of late diagnosis of physical diseases, such as asbestosis and it is accepted that at first sight, it does not fit readily into the circumstances of historic child abuse claims. That much seems unobjectionable. The paragraph goes on: "The test, properly interpreted, is likely to be somewhat unrealistic in many child abuse cases when applied to claims for immediate injury. Such injury is likely to include, in addition to any physical injury, a mix of emotions and other mental effects, for example, humiliation, distress, shame, guilt and fear of being disbelieved or of disclosure. In such cases, depending on the severity of the victim's condition, it could have been unreasonable and unreal to have expected him, as he moved from childhood to three years beyond majority, to consider recourse to the civil courts for damages for something he just wanted to put behind him. Given the circumstances of the abuse and his subsequent way of life, making such a claim, or seeking advice about it, might reasonably never occur to him. He might have known at the time of the abuse that it was wrong; he might have harboured resentment, great grievance, or even a desire for revenge, perhaps even a wish to report it to the police, but not necessarily to litigate for damages." [43] The court thus seems to adopt at the outset an approach which involves considering the central question to be whether or not it was reasonable to have expected a plaintiff to have raised an action at an earlier stage in what appears to be a wholly subjective approach. In paragraph 41, it continues: "Application of the section 14(2) meaning of "significance" to child victims of abuse is often the more difficult because many of them, as in the case of these claimants, come to it already damaged and vulnerable because of similar illtreatment in other settings. such misconduct was for many of these claimants 'the norm.'" [44] Then, critically, at paragraph 42, the court sets out what it regards as the question that, for the purposes of section 14, requires to be asked: "...whether such an already damaged child would reasonably turn his mind to litigation as a solution to his problems?" [45] There is then reference to the progress into adulthood "and a twilight world of drugs, further abuse and violence and, in some cases, crime" of many such claimants. Much is said regarding claimants in cases of

historic child abuse that is sympathetic in tone. The interests of defendants that underpin the laws of limitation, are not mentioned in this part of the judgment that deals with the application of section 14. [46] There is extensive reference to *Stubbings v Webb* and although there is no clear statement to the effect that the Court of Appeal rely on it as support for their formulation of the question posed at paragraph 42, they would seem, by implication to do so. They, accordingly, would appear to have read the decision in *Stubbings* as supporting their view that a strongly subjective approach should be adopted in which the core question does not focus on quantum of injury but on whether or not the particular plaintiff would have thought of resorting to litigation. They did not expressly consider section 14(3) of the 1980 Act nor the criticism voiced by Lord Steyn in *Dobbie* , to which I have referred, of what seems to have been the approach that they approved. [47] I then turn to the case of *Adams v Bracknell*, a case in which the claimant who had always been aware of having difficulties with reading and writing was diagnosed as dyslexic when aged 27 and within three years thereafter, raised an action against the local education authority which had had responsibility for the schools he attended between 1981 and 1988. He alleged that they had been negligent in their failure to assess him in such a way as to identify dyslexia when he was at school. He had suffered from depression, panic and a lack of esteem. At paragraph 7, Lord Hoffman observes that such an action was "a new development". However, their Lordships do not appear to have approached their interpretation of section 14 any differently on account of that. Their Lordships required to consider the question of whether or not the claimant had constructive knowledge of the fact that the reading and writing problems of which he was well aware were attributable to the defendants by a date which meant the action was time barred. At paragraph 33, Lord Hoffman states: "Section 14(3) uses the word 'reasonable' three times. The word is generally used in the law to import an objective standard, as in the 'reasonable man'. But the degree of objectivity may vary according to the assumptions which are made about the person whose conduct is in question. Thus reasonable behaviour on the part of someone who is assumed simply to be a normal adult will be different from the reasonable behaviour which can be expected when the person is assumed to be a normal young child or a person with a more specific set of personal characteristics. The breadth of the appropriate assumptions and the degree to which they reflect the actual situation and characteristics of the person in question will depend upon the reasons why the law imports an objective standard." [48] At paragraph 44, Lord Hoffman refers to the discussion of the application of the constructive knowledge provisions in the case of *Forbes v Wandsworth HA*

[1007] QB 402 (a case where the plaintiff had lost a leg after surgery, had trusted his surgeon and did not find out until ten years later that there would have been chance of saving his leg if the surgeon had acted sooner and the Court of Appeal held that section 14(3) would fail in its purpose unless it was assumed that a reasonable victim of an injury such as the loss of a leg would display some curiosity about it) where Evans LJ said, at p.422 : "Since there is a wide discretionary power to extend the period in circumstances which Parliament has

defined in section 33, there is no clear requirement to construe the knowledge provisions in section 14 narrowly or in favour of individual plaintiffs. I therefore consider that they should be interpreted neutrally so that in respect of constructive knowledge under section 14(3) the objective standard applies." [49] Lord Hoffman found that reasoning persuasive and added his own observations at paragraph 45: "Since the 1975 Act, the postponement of the commencement of the limitation period by reference to the date of knowledge is no longer the sole mechanism for avoiding injustice to a plaintiff who could not reasonably be expected to have known that he had a cause of action. It is therefore possible to interpret section 14(3) with a greater regard to the potential injustice to defendants if the limitation period should be indefinitely extended." [50] Overall, the approach in Adams is to the effect stated by Lord Hoffman at paragraph 51, namely that the normal expectation will be: "...that a person suffering from a significant injury will be curious about its origins." [51] Thus, the approach taken in Nash which involved taking account of the character or level of intelligence of the individual, was disapproved of at paragraph 46. Counsel for the pursuers in the present cases recognised that that might be a problem for them, given the influence that the Nash approach seemed to have had on the decision in Bryn Alyn . However, their response was that the Adams disapproval could be ignored because it voiced disapproval of a different passage from that quoted in Bryn Alyn. That is correct but it is not the answer since the passage quoted in Adams is to the same effect as that quoted in Bryn Alyn . [52] Applying what Lord Hoffman identified as the correct approach to the facts of the case before them, he said, at paragraph 49: "In principle, I think the judge was right in applying the standard of reasonable behaviour to a person assumed to be suffering from untreated dyslexia." and, at paragraph 50: "...it would need some evidential foundation before one could assume that such a person was likely to be unable to speak about the matter to his doctor." (my emphasis) [53] Thus, what Lord Hoffman appears to have been looking for was not evidence that that particular plaintiff would have been unlikely to be able to talk to his doctor but that the category into which he fell, namely persons suffering from untreated dyslexia, would have been unable to do so. [54] Lord Scott of Foscote, at paragraph 73, like Lord Hoffman, urges that the interests of defendants and the availability of section 33 be not forgotten: "There may seem to be an unfairness to claimants in banning them on lapse of time grounds from bringing actions that they did not know they could bring. But there is also an unfairness to defendants in allowing actions to be brought after a lapse of time that has seriously prejudiced their ability to refute the claims made against them and for which they are in no way responsible. In my opinion, the approach to section 14(3) constructive knowledge should be mainly objective. What would a reasonable person placed in the situation in which the claimant was placed have said or done? If the result of applying the mainly objective test would seem unfair to a particular claimant, the issue of fairness, as between the claimant and defendant, can be considered under section 33." [55] In all these circumstances, I consider that it is correct to say that their Lordships in Adams were minded to adopt a far more objective approach and that they did so to the extent and in a way that doubt is cast as to the soundness of the approach in Bryn Alyn . That being so, unless, on examination

of the Scottish authorities, some commonality of approach as between them and Bryn Alyn can be identified, I consider that it would be quite wrong to regard Bryn Alyn as persuasive. I would add that, although Adams concerned knowledge of attributability, logic would seem to indicate that their Lordship would have applied the same approach to each of the requisite statutory facts. The Scottish Authorities [56] Turning to the Scottish authorities, in the case of *Cowan v Toffolo Jackson & Co Ltd*, the pursuer averred that he retired through breathlessness in 1986 and raised an action claiming damages for asbestosis in 1993. At procedure roll, the pursuer argued that his claim was not time barred because he was not diagnosed as suffering from an asbestos related disease until 1991. At p.1002, Lord Nimmo Smith, having noted that the case was *ex facie* time barred and having referred to section 17 of the 1973 Act, in a passage which emphasises the importance of the "reasonably practicable" part of the section 17(2)(a) test, said: "...it is for the pursuer to make sufficient averments of those circumstances such that, if they are proved, the court may conclude that it was not reasonably practicable for him to become aware of these facts The pleadings appear to be directed to the question of when the pursuer first had actual knowledge that he was suffering from an asbestosrelated disease on 23 October 1991; but that is not enough because the pursuer must aver not only when he first became aware of the relevant facts but also that it was not reasonably practicable for him to have become aware of them before that..... In my opinion, in order to satisfy the accepted requirements the pursuer would need to make candid averments about his medical history between 1987 and October 1991, and the interaction between the advice he received in 1987 and any advice he received from his general practitioner, as related to his general state of health during that period." [57] Lord Nimmo Smith found that there were no such averments and dismissed the action. [58] Similar circumstances arose in the case of *Nimmo v British Railways Board* 1998 SLT 778 where a pursuer raised an action of damages for hearing loss in 1997 in circumstances where he had been aware of having a hearing difficulty from 1977 but had not been told that it was due to exposure to noise at work until 1996. A doctor had, however, arranged for his noise exposure at work to be reduced in 1992, by which time his hearing loss was significant. Lord Eassie noted that the action was *prima facie* time barred since on the pursuer's own averments he had significant hearing loss by 1992 and his employment with the defenders had ceased before then. At p.781, he said: "...the onus is on the pursuer to aver and, if need be prove, (i) that he was not aware of one or more of the facts mentioned in the subheads of (paragraph 17(2)(a) of the 1973 Act) and, moreover, (ii) that it was not reasonably practicable for him become aware of one or more of those facts. While one may find in the pursuer's pleadings averments to the effect that he was not told that his deafness was induced by exposure to noise until either June or possibly July 1996, there are no averments to the effect that it was not reasonably practicable for him to acquire that knowledge at any point before either of those dates." He found, accordingly, that the case was time barred under section 17. [59] Regarding section 19A, Lord Eassie found that the averments were insufficient to justify the court exercising its discretion. At p.783, of the section 19A discretion he said: "...it is for the pursuer to justify his being given that opportunity. In

order to do that it is, in my view, incumbent upon the pursuer to provide a full account of the circumstances leading to the delay in the bringing of the action. In the absence of an adequate account the court is effectively being asked to exercise its discretion on insufficient material." and since he was not satisfied that any explanation was given of the steps taken after the pursuer's medical examination in 1992 or of the steps taken in the year after a further medical examination in 1996, he declined to exercise the available discretion and dismissed the action. [60] I turn then to the case of *Carnegie v Lord Advocate* an action in which the pursuer had claimed damages for physical and psychological injuries. The physical injuries were due to assaults which occurred more than three years prior to the raising of the action. The psychological injury was a sequela which had developed in May 1992. The action was raised in March 1995. After a preliminary proof on time bar, the defender's plea was repelled. The defender reclaimed and the pursuer cross appealed in a submission to the effect that more weight should have been given to his personal circumstances when the application of section 17 was being considered. It seems that, in particular, an argument was advanced that the judge should have taken account of the pursuer's reluctance to sue on account of fear that he would lose his job. At paragraph 15, Lord Johnston considered the meaning and import of the English provisions under reference to what was said by Geoffrey Lane LJ in the case of *McCafferty v Metropolitan Police District Receiver*

[1977] 1WLR 1073 and added: "The Master of the Rolls, Sir Thomas Bingham (as he then was) said something to the same effect in *Dobbie v Medway Health Authority* where, at p.1241, he refers to the comparable English provisions being directed solely at the ' quantum of the injury '. [16] I agree generally with that analysis However, I do not consider that subjectivity can be left out of the matter if there are factors present which weigh upon the gravity of the particular injury to the particular pursuer. Thus, while a sturdy rugby player may ignore to all intents and purposes, the effect of a bruise, to a haemophiliac it would be of the utmost gravity. Equally it may be that a particular injury which may have a particular bearing on a particular career, such as damage to a finger to a potential or actual surgeon, may also bear upon the question of gravity or seriousness. I am, however, satisfied that it is not appropriate to go beyond these physical characteristics or personal relevant characteristics in relation to the actual injury to look at the context of the environment upon which the injury was sustained and it is certainly not relevant to take into account such factors as whether or not it was reasonable not to sue for fear of losing one's job." [61] Lord Glennie discussed the above passage in the MP case, at his paragraph 34 where he expressed some dubiety as to what Lord Johnston had in mind when he referred to "personal relevant characteristics in relation to the actual injury." It seems to me that what is clear is that Lord Johnston, like the Master of the Rolls in *Dobbie* , was concerned only with quantum of injury, that is only with matters personal to a pursuer that could properly affect the objective assessment of the level of severity that he should have attributed to it. Shortly put, a personal matter only fell to be taken account of if it weighed upon the gravity of the injury. [62] In *Carnegie* it was held that there was a

separate triennium for the claim for psychological injury. That was on the view that it was a wholly distinct injury, not a continuation or exacerbation of the physical injuries which had been sustained outwith the time bar. I find it difficult to reconcile that approach with the principle that an obligation to make reparation is a single, indivisible obligation which comes into existence once there is any concurrence of iniuria and damnum, a principle which would seem to be reflected in the fact that section 17(2)(a) provides for only one single period of three years, not successive ones. Carnegie is, however, binding on me and I would have to follow it if the facts of the present case fell within the category of cases in which the Inner House found that there could be a separate triennium, namely where there was a wholly distinct injury which was not simply a continuation of an earlier one. The pursuer in this case does not, however, aver a wholly distinct injury. It is plain from his averments that the psychological condition, chronic PTSD, which is said to have been diagnosed in May 2005 relates back to and is a development of the other injuries which he avers he suffered whilst in the home. [63] I turn then to the case of Agnew v Scott Lithgow. It was a decision of the Inner House where a pursuer sought damages for what was, at that time, referred to as "vibration white finger". He first had symptoms in 1985 but did not know what caused them (the relevant fact in question in this case was, accordingly that the pursuer had injuries which were attributable to an act or omission section 17(2)(b)(ii) of the 1973 Act); his exposure ceased in 1995 and around November/December 1995, he heard talk of vibration white finger and of colleagues with similar symptoms making claims. He did not, however, seek legal advice until November 1998, following upon which he discovered that the cause of his condition was his exposure to vibration at work which had ceased over three years earlier. It was argued on his behalf that several subjective factors regarding the pursuer ought to have been taken into account: that he had never heard of vibration white finger during his period of exposure, that he was not particularly intelligent, that he thought his symptoms were to do with ageing and cold weather, that he was a man who had had to be persuaded to make even a DSS claim and that he was generally hesitant about asserting his rights. [64] At paragraph 23 in the opinion of the court, there is the following passage which seems highly relevant to the considerations that arise in the present case: "There is no room, in our view, for interpreting the provisions of section 17(2) as allowing any additional unspecified period for what was described by counsel for the reclaimer as 'dithering time'. The language of the section does not support such an approach. It is incumbent on a pursuer to take all reasonably practicable steps to inform himself of all the material facts as soon as he is put on notice of the existence of any of these. And the onus is on the pursuer to establish that he has done so. The question is not whether he had a reasonable excuse for not taking steps to obtain the material information but whether it would have been reasonably practicable for him to do so (Elliot v J & C Finney , Lord Sutherland at p.210). The fact that the pursuer did not like approaching officialdom or that he was a man who frequently had to be prompted by his relatives and friends to take action is not conclusive because an objective test must also be applied. The hypothetical pursuer can, of course, also rely on the provisions of section 19A of the Act." [65] That approach is one which seems to be very much in line with that

which was adopted in *Adams*, particularly as explained in the speech of Lord Hoffman, to which I have already referred. The reference to Lord Sutherland in *Elliot*, is also instructive. In the passage referred to, he commented: "I do not consider that the mere fact that he did not feel like asking these questions can in any way render the acquiring of the information not reasonably practicable." [66] It can thus be seen that the Inner House approach is that it is not a question of asking what excuse for failing to find out is tendered on behalf of the pursuer. There is a firm adherence to and focus on the different question of what was and was not reasonably practicable for a pursuer to be aware of or find out. [67] I turn then to the case of *B v Murray* 2004 SLT 96, the facts of which were similar to the present case in that it concerned a former care home inmate suing for alleged ill treatment whilst she was an inmate. The action was raised more than three years after the manifestation of alleged psychological symptoms but it was argued on behalf of the pursuer that the case was not time barred as she had not become aware of any entitlement to sue until newspaper articles appeared in the 1990's and she had raised the action within three years of that awareness. The *Bryn Alyn* case was relied on heavily by the pursuer and it was said that, in any event, a *Carnegie* type case was open to her since her psychological injury was wholly separate and distinct. At paragraph 8, Lord Johnston said: "I confess that I do not find the case of *Bryn* easy, nor am I satisfied that it is going to be as simple to apply as was done in the case despite the length of the judgment. What however is conclusive to my mind in the present case is the pursuer does not make a distinct and separate claim as was done in *Carnegie* in respect of her psychological problems within three years of them manifesting themselves. She makes a claim going right back to a time in the home covering everything that happened to her and is seeking damages in respect of those elements. Secondly, and even more importantly, her own averments disclose that at least at some stage during the home period she came to realise that what was happening to her and her fellow inmates was wrong and attributable to the nuns who were running the home. It accordingly seems to me that by her own averments she is contradicted any way that she can invite *Bryn* to apply to the present case and no amount of proof will alter that position." [68] Finally, I would refer to the decision of Lord Glennie in the case of *M P v Sister Zoe O'Neill & Others*, which followed a preliminary proof on timebar. The pursuer in that case sought damages for psychological injuries which she alleged were attributable to her experiences whilst resident in a children's home between 1966 and 1970 or 1965 and 1969. *Bryn Alyn* was, again, relied on. At paragraphs 3536, in a passage with which I am in full agreement, he identifies and discusses the relevant test: "The question is: on what date would it have been reasonably practicable in all the circumstances for such a person to become aware of the statutory facts?" [69] He continues: "It is important, at this point, to emphasise that the test is when it would have been 'reasonably practicable' to have become so aware; not when it would have been reasonable to make the relevant enquiries. Put another way, if the pursuer is aware of some relevant facts, and it is reasonably practicable to find out more by asking questions or taking advice, it is not relevant to ask whether his or her failure to do so is reasonable. Feelings of inadequacy, embarrassment, reluctance to come forward, fear of being disbelieved, and the like, may be entirely understandable and

provide a reasonable excuse for not taking the matter further at a particular time, but they do not touch on the practicability of finding out, the only relevant issue with which section 17(2)(b) is concerned. In any discussion about the subjective/objective test, and what subjective factors can be taken into account, it is easy to lose sight of this point." At paragraph 57, Lord Glennie also said: "... I see nothing in the case of Bryn Alyn which leads me to conclude that I should depart from the guidance given by *Carnegie v Lord Advocate* as clarified, it seems to me, by *Agnew v Scott Lithgow*. The question to be asked is whether, at some time more than three years before proceedings were commenced (i.e. by midMay 1977 at latest), the pursuer was aware of the statutory facts, or, if not, whether it was reasonably practicable for the pursuer to have become aware of those facts by that time. In making an assessment of the question whether it was reasonably practicable for her to have become so aware, I must disregard issues relating to her intelligence or personal characteristics, except to the extent caused by the alleged abuse, and ascertain whether it was reasonably practicable for a reasonable person (with such characteristics, if so caused) placed in the situation in which the pursuer was placed to have become so aware." [70] I agree with his formulation of the relevant question and with his self instruction to disregard issues relating to the intelligence or personal characteristics of the pursuer. As regards his proviso, on the basis that Lord Glennie has in mind no more than the case where a pursuer can point to something cogent caused by the alleged abuse which makes it impracticable for a pursuer to ascertain the statutory facts (which, given his earlier discussion and rejection of the Bryn Alyn approach, must be the case) I would agree with it also. That would be in line with the approach of their Lordships in *Adams*. Thus, if a pursuer was unaware of the cause of a significant symptom because the state of medical knowledge was such that, at an earlier stage, he could get no clear answer on the question of attribution it might be held to have been not reasonably practicable for him to have found out the cause sooner than he did. If, on the other hand, he did not find out sooner because he chose not to ask, he could not thereby show that it was not reasonably practicable for him to find out if asking would in fact have produced a clear answer. The test would remain, one of reasonable practicability, not of whether the pursuer has a reasonable excuse for not taking action any earlier. And, moreover, the test as regards the first of the statutory facts would remain not that of whether or not it would have occurred to a reasonable person in the position of the pursuer to sue but of what view such person would have taken of the level of severity of his injury. [71] Separately, I can see that there could be cases where a personal characteristic of the pursuer other than something caused by the alleged abuse might be considered relevant to consideration of the question of whether it was reasonably practicable for him to ascertain the statutory facts. If, for instance, a pursuer was, for a period of time, living in a part of the world where he was not able to get medical advice as to the significance of a symptom, it seems that the view might properly be taken that it would not have been reasonably practicable for him to have become aware of the first of the statutory facts during that period. [72] It also seems to me that it is important that the provisions of section 22(3) of the 1973 Act are not lost sight of. In section 22(3), Parliament appears to make it plain that it is not intended that a pursuer

be saved from the effects of time running on the ground that he did not realise that he could have sued for what happened to him. [73] So what does this analysis of the authorities mean for the pursuer in the present case? I am satisfied that it demonstrates that the pursuer's approach is misconceived and that the defenders have correctly identified this as a case where the pursuer's averments do not support a relevant case that the hardship of time running is alleviated for him by the provisions of section 17(2)(b) of the 1973 Act. [74] The pursuer seeks to advance a claim that goes right back to his time in the home. I accept the defenders' submission that, on the averments, he is suing in respect of a continuum of events. No severability considerations such as were considered in *Carnegie* arise. He sues for assaults suffered whilst a resident in the home and for various psychological sequelae which have developed at unspecified dates since then. He refers to attempting to suppress memories and suppressing memories, that is that, of his own volition, he turned his mind away from what he alleges happened to him. He also avers that he has persistently experienced distressing flashbacks and intense psychological distress if reminded of the abuse (article

- 9) and that the trauma of the abuse has endured with him "all his life". Secondly, the pursuer's averments appear to me to amount to a clear indication that he did in fact have an awareness of all the statutory facts prior to November 2002 but did nothing about them until he was encouraged to consult a solicitor in 2004. [75] In the above circumstances, the pursuer is in no position to advance a case that it would not have been reasonably practicable for him to become aware of the statutory facts prior to 10 January 1993 (the end of the third year after the pursuer reached the age of majority) or indeed prior to November 2002. He was, on his own averments, aware that he had significant injuries attributable to what had happened to him in the home, long before then. They were, on the pursuer's averments, clearly of sufficient quantum to meet the requirements of section 17(2)(b)(i). He knew that his symptoms arose from his treatment in the home and he knew who was responsible for that treatment. In reality, what the pursuer's case amounts to is an attempt to have treated as relevant that which section 22(3) of the 1973 Act provides is irrelevant, namely, a pursuer's knowledge as to whether or not an act or omission was actionable. That was evident from the submissions made and from the strong reliance on the case of *Bryn Alyn*. I had the clear impression that the pursuer's approach was to ask the question whether an already damaged person suffering ongoing difficulties would reasonably turn his mind to litigation but, for the reasons I have already given that question, which lay at the heart of the approach in *Bryn Alyn* is not the correct one to ask for the purposes of section 17 of the 1973 Act. Such a question may well properly arise in the context of an application under section 19A of the 1973 Act but that is a different matter. [76] I turn now to the pursuer's case under section 19A. The discretion afforded is wide and unfettered (*Donald v Rutherford*) but it is, nonetheless, for the pursuer to put forward averments which, if proved, would justify him being given the opportunity to pursue an action outwith the triennium. I agree, further, with the view expressed by Lord Eassie in *Nimmo* that where a pursuer seeks to have the discretion exercised in his favour, it is incumbent on him to provide a full account the

circumstances surrounding the delay. In this case, that involves providing a full account of the circumstances which explain why more than fifteen years elapsed between the pursuer reaching the age of majority, in January 1990 and the action being raised in November 2005. The averments as to what was happening in the pursuer's life during that period are sketchy and very general. They indicate that he has had drug and alcohol problems, a major depressive episode in 1992, and period of some two months as an in patient in Woodilee Hospital in 1997 during which he was sectioned under the relevant mental health legislation and mental health problems throughout 1999. They can, however, hardly be described as providing a full account. The averment regarding the news item that led to the pursuer being encouraged to see a solicitor gives no time specification beyond it having been "in about 2004". No explanation is attempted as to why the pursuer refrained from taking action before he did or as to why he chose to put his memories to the back of his mind rather than taking action until the end of 2004, at which time, on his own averments, the mental health problems from which he suffered were as present as they had been prior thereto. That would appear to negate any case to the effect that the whole fifteen year delay is attributable to the pursuer's mental illness problems, if that is what is intended, not that it is clear that it is. As the defenders' counsel commented, the seven year gap between 1997 and 2004 is wholly unexplained. Further, when it comes to the part of the pursuer's pleadings that deal with section 19A (which was relied on by the pursuer's counsel in support of the submission that a relevant section 19A case had been pled), all that is averred is as follows: "Esto the claim has time barred (which is denied) it would be equitable to allow the pursuer's claim to proceed in terms of Section 19A of the Prescription and Limitation (Scotland) 1973 for the foregoing reasons. Furthermore the delay in raising the action is attributable to the pursuer's treatment by Mr Harris, for whom the defenders are liable. It would not be equitable to sustain the defenders' plea of time bar in circumstances where they are responsible for the delay. The defenders would not be prejudiced if the claim were to proceed." Further averments to the effect that evidence has not been lost are then made and the passage ends with the following: "The defenders are aware that it can be distressing for adults who were in care as a child to confront their past. The defenders are aware that memories of the past can be brought up with people thought had been forgotten." [77] The averments about Mr Harris and which refer to the defenders being responsible for the delay seem to pose the wrong question which is not whether it would be equitable to allow the defenders to advance a plea of time bar but whether, in circumstances where the action is time barred it would be equitable, nonetheless to allow it to proceed, with the onus resting on the pursuer. The last two sentences of the passage are also of no obvious relevance to the section 19A issue. Further, almost a year passed between the pursuer first consulting a solicitor and the action being raised and almost five months at the end of that period, between the summons being prepared and the action being raised, is unexplained. [78] In all the circumstances, it seems to me that the pursuer has failed to provide the full and clear explanation for delay that is required. There is thus no justification for allowing a proof on the section 19A application. Further Procedure: Preliminary Proof or Not? [79] It was submitted for the pursuer that there should be a proof before answer "at large", rather than a

preliminary proof and although I do not now require to determine the issue, I should indicate how I would have disposed of the matter had I required to do so.

Submissions

for the Pursuer [80] Issues of time bar and section 19A normally arose where a solicitor had missed a deadline, it was said. Such cases could properly be dealt with by way of preliminary proof. There was unlikely to be an overlap of evidence and the proofs were not likely to be lengthy. Further, preliminary proofs appeared to have occurred because that was the procedure that parties had agreed. The present case was different. [81] Reliance was placed on the case management decision of Toulson J to allow the cases of William Ablett & Ors v Devon County Council & The Home Office unrepd Ct Appeal 4.12.00 to go trial without hiving off the limitation issues that arose because he was not satisfied that to do so would produce "better or cheaper justice" (para 8) since it would have been necessary, at a preliminary trial, to go deep into the very issues which would also form the subject matter of any trial on liability. Ablett , like the present case, concerned claims at the instance of adults in respect of abuse alleged to have been suffered in a children's home many years earlier. Reference was also made to: Thomson v Newey & Eyre & Ors 2005 SC 373, a case involving a claim for economic loss and personal injuries arising out of a sequestration where the Inner House decided to allow a proof before answer at large because of the extent to which the facts bearing on time bar and the facts bearing on the merits of the claim were intermingled. Noble v de Boer 2004 SC 548, a case where the sheriff had allowed a preliminary proof on issues as to the identity of the employer of the pursuer and the identity of the employer of the defender. The Inner House observed that the decision to allow that procedure was competent but, in the circumstances of that case, unfortunate since it rendered a protracted and expensive litigation more protracted and more expensive. As a generality, preliminary proof should, it was said, only be allowed on matters wholly distinct from the merits of the action. It was questionable whether a preliminary proof should have been ordered. Particular reliance was placed on this case, it being submitted that it contained a very strong statement against allowing preliminary proof if there was going to be any intermingling of the facts. McCafferty v McCabe 1898 4F 872, a case where a workman claimed damages for injuries sustained at work. He sought a jury trial. The defender denied having employed the pursuer. The pursuer moved that the issue of his employment be separated out and determined at a preliminary proof. That motion was refused. The Lord President indicated that there was no sufficient ground for separating out what was part of the train of facts for the jury's consideration and Lord McLaren observed that the question of employment was so involved in the merits of the case that it could not easily be separated. [82] It was submitted that in the present case and indeed, in all seven cases before me, the merits and time bar issues were inextricably linked. There would be duplication if the pursuer was successful at preliminary proof. At that proof, there would need to be expert evidence about his psychiatric injury to explain the delay. There would need to be evidence about his whole life since leaving the home. The pursuer ought not to be required to give evidence twice. The pursuers in these actions were very damaged, vulnerable people and it would be grossly unfair to force them to do so. As a practicality, there were

hundreds of similar cases pending in the Court of Session. If they were not moved forward quickly, the court would be dealing with them for many years. It was necessary to look at the 'big picture'. Whilst inevitably there were limitation problems in these cases, it was within judicial knowledge that that was because of the shame, fear, confusion and silence that was engendered by such abuse. The only answer for these cases having arisen so late could be that their treatment silenced the claimants. The English courts had developed a way of dealing with them, as exemplified by Ablett and this court should follow that example and allow a proof at large.

Submissions

for Defenders [83] For the defenders, reference was made to the allowance of preliminary proof being the normal practice. The defenders here were being asked to meet claims, including the present one, arising some 30 or 40 years after the events complained of. Preliminary proof was the appropriate way to ensure that the pursuers were properly entitled to go forward. There would not be wholesale duplication of evidence. The pursuers would not, at preliminary proof, be cross examined as to their experiences in the home nor would corroborating witnesses need to be led; the matter could be approached, for time bar purposes, by assuming that whatever they said about what happened to them was correct, leaving over to the later proof (if the pursuers were successful on time bar) the question of whether or not they had proved those averments. A preliminary proof would be significantly shorter. Conversely, a proof at large on time bar, merits and quantum, would be of indeterminate length and scope. Decision on Further Procedure [84] It is competent for preliminary proof to be granted in respect of a specified plea. Whether or not to do so is a matter of the exercise of a discretion. It is generally considered appropriate to do so where evidence requires to be led in support of a preliminary plea in bar of the action; for example a plea of time bar. It is often done where a pursuer seeks to have the court exercise the equitable discretion allowed for by section 19A of the 1973 Act; indeed, it would be very unusual to leave a section 19A plea standing and allow a proof before answer. That is so despite the fact that a section 19A proof will often involve exploring matters which will also require to be explored at a subsequent proof on the merits; the nature of a pursuer's injuries may, for example, be responsible for a pursuer having delayed in seeking legal advice as in the case of *Comber v Greater Glasgow Health Board* 1989 SLT 639 . It is not correct to suggest, as did counsel for the pursuers, that preliminary proofs on time bar are generally confined to cases where solicitors have missed deadlines. Whilst there have been a number of cases where applications under section 19A of the 1973 in such circumstances, have proceeded by way of preliminary proof, those are not the only circumstances where such proofs have been allowed. [85] If a preliminary proof were allowed in this case, the issue of whether what the pursuer alleges to have happened to him in the home actually happened would not require to have been determined. Nor would the issue of whether any post traumatic stress disorder from which the pursuer suffers was caused by anything that happened to him at that time. Nor would quantum. I am satisfied that any preliminary proof would be likely to have been significantly shorter than a proof at large. If the defenders were successful, the action would have gone no further, unlike the situation in, for instance, the case of *Noble*, where the preliminary proof allowed never had the potential to bring

an end to the whole litigation. [86] I bear in mind also the guidance given by the Inner House in the case of *Clark v McLean* 1994 SC 410, which was referred to by counsel for the defenders in the course of general submissions that they made regarding section 19A of the 1973 Act with regard to three of the seven cases before me. At p.413, delivering the opinion of the court, Lord Maclean said: "The onus being on the pursuer to satisfy the court that the terms of section 19A(1) should be applied, the court must first determine whether the pursuer's case in relation to the application of that section is relevant. If the case is relevant, the court must consider whether or not there is sufficient agreement between the parties on the material facts for it to decide upon the applicability of the section. If there is not, then as was envisaged in *Donald v Rutherford* 1984 SLT 70 and given effect to in *Comber v Greater Glasgow Health Board* 1989 SLT 639 , the court should allow a preliminary proof on these facts. If, on the other hand, there is sufficient agreement on the material facts, then the court must proceed to adjudicate upon the application of section 19A(1). In our view, it should seldom be necessary for the court, in an action for damages for personal injuries involving only two parties, to allow a proof with all pleas standing, including those relating to timebar and those relating to the merits of the action." [87] It would thus seem that the norm is not that a personal injury claim involving only two parties will proceed to proof at large without any time bar pleas first being considered at either a debate, in the event that all material facts can be agreed, or at a preliminary proof. For such a case to do so would be the exception and there would, accordingly, have to be something unusual or special about its circumstances to justify such a procedure. [88] In essence, the pursuer's case seems to be that this case is unusual and should be seen as justifying an unusual approach because the pursuer seeks to claim in respect of having been abused as a child and because there are so many similar litigations waiting in the wings. It does not seem to me that these cases should be regarded as being in a separate category which, for what essentially were put forward as reasons of sympathy, should be allowed to go straight through to a proof at large. It is not, I consider, within judicial knowledge that the limitation problems that arise are for the reasons given by counsel for the pursuers. Each case requires to be considered on its own facts and circumstances and a view reached as to the reason for the delay that has occurred. I do not see that it would be fair or just to assume that the delay has occurred because of shame, fear and confusion that has arisen because of the nature of the claim. But even if that was so, I do not see that that should result in the normal preliminary proof procedure being departed from. Had I been fixing further procedure, I would have allowed a preliminary proof in respect of the pursuer's fourth plainlaw. I will, however, in the circumstance, pronounce an order dismissing the action. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: https://www.bailii.org/scot/cases/ScotCS/2006/CSOH_160.html

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Prepared on 27 October 2026 · Esheria