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HISTORIC ABUSE: THE HARD REALITY FOR VICTIMS

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In this article, Miss Russell focuses on how the Scottish courts have responded to the attempts by victims of historic abuse to obtain reparation¹ in the civil courts. She observes that the response has been far from positive with most of the victims having their actions dismissed and being left uncompensated. The perpetrators of abuse and those who employed them are routinely succeeding in evading their obligations and the law appears impotent in all but the most exceptional cases to prevent the defenders from escaping justice. The author concludes that legislative reform is urgently required and assesses the potential impact of certain proposals for reform .

Introduction

It is now some seven years since Tom Shaw produced his Report, “Historic Abuse Systemic Review: Residential Schools and Children’s Homes in Scotland 1950 to 1995.”² This independent report which was commissioned by the Scottish Government revealed a catalogue of abuse suffered by children in care. It highlighted failures in homes and residential schools run by the state, charities and churches.

While criminal convictions have been secured against some individuals³ and payments have been made by the Criminal Injuries Compensation Authority to some of the victims of historic abuse,⁴ civil actions in the Scottish courts have not fared well. In the only Scottish case to have reached the House of Lords,⁵ Lord Hope made reference to the public apology made by the then First Minister⁶ in relation to the treatment meted out to some children in institutional care. His Lordship went on to observe that the First Minister “did not mention the fundamental problem which was already facing the claimants in all these cases. This is the defenders’ contention that due to the delay in raising proceedings they are all time-barred.”⁷

This article considers the various arguments which have been deployed in an effort to allow historic abuse actions to proceed. It concludes that such arguments have met with little success to date and suggests that the legislative framework requires to be overhauled

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¹ Reparation is “the pecuniary remedy afforded by law for loss caused by a wrong.” (*Aitchison v Glasgow City Council; sub nom. A v Glasgow City Council; F v Quarriers* [2010] CSIH 9; 2010 S.C. 411; 2010 S.L.T. 358 per Lord President Hamilton at [10] under reference to Glegg, AT, *The Law of Reparation in Scotland* (4th Duncan ed, W Green, Edinburgh, 1955), p 3.

² The Shaw Report, “Historic Abuse Systemic Review: Residential Schools and Children’s Homes in Scotland 1950 to 1995” (2007). The Report is available at www.scotland.gov.uk/Publications/2007/11/20104729/0 [Accessed October 29, 2014].

³ See *Gorrie v Marist Bros* 2002 S.C.L.R. 436; *K v Gilmartin's Exrx* 2004 S.C. 784; *Whelan v Quarriers and Porteous* [2006] CSOH 159; *Jordan v Quarriers and Nicholson* [2006] CSOH 155; *J v Fife Council* 2007 S.L.T. 85; 2009 S.C. 163; *McE v de La Salle Brothers; sub nom. M v Hendron* [2007] CSIH 27; 2007 S.C. 556; 2007 S.L.T. 467; *G v Glasgow City Council* [2010] CSIH 69; 2011 S.C. 1.

⁴ See *A v N* [2013] CSOH 161; 2013 G.W.D. 33-661; 2014 S.C.L.R. 225; *Gorrie v Marist Bros* 2002 S.C.L.R. 436.

⁵ *AS v Poor Sisters of Nazareth*; sub nom *B v Murray* [2008] UKHL 32; 2008 S.C. (H.L.) 146; 2008 S.L.T. 561.

⁶ The apology was made by Jack McConnell in the Scottish Parliament, on 1 December 2004.

⁷ *AS v Poor Sisters of Nazareth*; sub nom *B v Murray* [2008] UKHL 32; 2008 S.C. (H.L.) 146; 2008 S.L.T. 561at [4].

to enable justice to be delivered to the victims. Proposals for reform have been made by the Scottish Law Commission and Scottish Government and, while adult survivors of abuse would no doubt argue that the proposals do not go far enough, the writer suggests that they may nonetheless represent a step in the right direction.

Prescription and Limitation-the distinction

Professor Walker has observed that "[t]he concepts of prescription and limitation of actions are both concerned with the effects of the passage of time on a person's rights but are of different natures and have different applications and effects."⁸

The fundamental difference between the concepts is that prescription has an extinctive effect on an obligation⁹ whereas limitation does not. Limitation simply renders an action unenforceable, i.e. it is remedy barring. The difference between the two concepts was articulated by Lady Clark in *D's Curator Bonis v Lothian Health Board*¹⁰ in the following terms:

"A right or claim which has prescribed after a prescriptive period of time is not only unenforceable, it is extinguished. The effect of the limitation rule is to make a right or claim in certain circumstances unenforceable after a stated period of time. But the limitation rule does not extinguish the right or claim."¹¹

The main rationale of the law of prescription and limitation is to control the pursuit of stale claims.¹² The pursuer's dilatoriness can clearly create difficulties for the defender in marshalling evidence many years after the events in question have taken place. Delay inevitably affects the quality of the evidence available. Put simply, memories fade and direct recollections may be lost.

While the court will take account of prescription of its own accord, it is for the defender to state a plea of limitation. Thus, in *Aitchison v Glasgow City Council; sub nom. A v Glasgow City Council; F v Quarriers*,¹³ the Lord President (Hamilton) stated:

"The effect of limitation in Scotland is not to extinguish the relative obligation but to provide to the alleged wrongdoer a right, *which he may or may not choose to exercise*, to have the action dismissed where it has been raised against him out of time."¹⁴ (emphasis added.)

⁸ David M. Walker; *The Law of Prescription and Limitation of Actions in Scotland*, 6th edn, (Edinburgh: W Green, 2002), p.1.

⁹ "Prescription is the common extinction and abolishing of all rights." (Stair, II, 12, 1.).

¹⁰ *D's Curator Bonis v Lothian Health Board* 2010 S.L.T. 725 at [29].

¹¹ See, also, *Macdonald v North of Scotland Bank* 1942 S.C. 369 at 373 per Lord Justice-Clerk Cooper.

¹² In *Cartledge v E Jopling & Sons Ltd* [1963] A.C. 758 Lord Pearce (at 782) described the limitation legislation as "a practical compromise intended to encourage and secure reasonable diligence in litigation and to protect defendants from stale claims when the evidence which might have answered them has perished." More recently, the Supreme Court of Canada said in *M(K) v M(H)* 1992 Can LII 21 (SCC); 96 D.L.R. (4th) 289; [1992] 3 S.C.R. 6 (at 30) that "statutes of limitation are an incentive for plaintiffs to bring suit in a timely fashion", such that "plaintiffs are expected to act diligently and not 'sleep on their rights'."

¹³ *Aitchison v Glasgow City Council; sub nom. A v Glasgow City Council; F v Quarriers* [2010] CSIH 9; 2010 S.C. 411; 2010 S.L.T. 358.

¹⁴ *Aitchison v Glasgow City Council; sub nom. A v Glasgow City Council; F v Quarriers* [2010] CSIH 9; 2010 S.C. 411; 2010 S.L.T. 358 at [12]. It follows that the defender may choose not to state a plea of limitation-see *J v Fife Council* 2007 S.L.T. 85; 2009 S.C. 163. In that event, any decree which passes against the defender will be valid and enforceable.

Prescription

The concept of prescription originated in Roman law. The modern law is found in the Prescription and Limitation (Scotland) Act 1973. The Act established a new short negative prescription of five years (the quinquennium) (section 6) and also provides for a long negative prescription of 20 years (the vicennial prescription) (section 7).

Prescription is now of very limited application in the context of historic abuse litigation. This is because the short negative prescription does not apply to obligations to make reparation in respect of personal injuries¹⁵ and, since 1984, the long negative prescription has ceased to apply to such obligations. The long negative prescription did apply to obligations arising from personal injury under the 1973 Act, as originally enacted. However, the Scottish Law Commission was concerned that, because the running of the twenty-year prescription was not delayed by the pursuer's lack of awareness of his loss, a personal injuries claim might be extinguished by this means before a person knew that he was injured (in cases of latent disease, for example). The Commission therefore recommended that obligations arising from personal injury (and death) be excluded from the operation of the twenty-year prescription.¹⁶ That recommendation was duly implemented by the Prescription and Limitation (Scotland) Act 1984.¹⁷ Section 7(2) of the 1973 Act, as amended, now provides that the long negative prescription does *not* apply to obligations to make reparation in respect of personal injuries within the meaning of Part II of the Act (or death resulting therefrom). The amendment was not retrospective¹⁸ with the result that obligations which had already prescribed before 26 September 1984 (the date of the coming into force of the 1984 Act) remained extinguished.

It is only in respect of obligations which became enforceable before 26 September 1964 that the long negative prescription will have extinguished the obligation to make reparation in respect of personal injury. This was the case in *K v Gilmartin's Executrix*.¹⁹ There, the pursuer sought damages in respect of abuse allegedly inflicted upon him by his schoolteacher between 1955 and 1961. The commencement date for the long negative prescription is the date on which the obligation becomes enforceable²⁰ and, in this case, (which involved a continuing wrong) that was the date on which the wrong ceased²¹ at the end of 1961. The obligation was therefore extinguished by the long negative prescription at the end of 1981. The obligation had therefore already prescribed before the coming into force of the 1984 Act.²²

In cases of abuse which occurred after, or continued beyond, 26 September 1964 however, the obligation to make reparation in respect of personal injury will not be subject to prescription. The *obligation* to make reparation will therefore subsist in such

¹⁵ Section 6(2) and Schedule 1, paragraph 2 (g) of the 1973 Act.

¹⁶ Report on *Prescription and the Limitation of Actions; Report on Personal Injuries Actions and Private International Law Questions* (Scot Law Com No. 74) (1983), para 2.6.

¹⁷ Section 6(1) and Sch 1, para 2 of the 1984 Act.

¹⁸ Section 5(3) of the 1984 Act.

¹⁹ *K v Gilmartin's Executrix* 2004 S.C. 784.

²⁰ The relevant provisions are section 7(1) and section 11 of the 1973 Act.

²¹ Section 11(2) and section 11(4) of the 1973 Act.

²² The court rejected the pursuer's contention that the psychiatric injury which was said to have emerged in 1995 gave rise to a separate obligation to make reparation.

cases. However, the pursuer's *action* may nonetheless suffer limitation. In other words, the right of action may be rendered unenforceable owing to the passage of time.

Limitation

Limitation is a statutory creation with the relevant provisions now being found in the Prescription and Limitation (Scotland) Act 1973. It should be noted, and judicial warnings have been given to this effect,²³ that the provisions in Scotland differ from those in England. In *McE v de La Salle Brothers*; sub nom. *M v Hendron*²⁴ Lord Osborne said that the use of cases decided in one jurisdiction as authorities in the other is "most unwise and likely to lead to substantial confusion."²⁵

Section 17 of the 1973 Act makes provision for a three year limitation period for actions of damages where the damages claimed consist of or include damages in respect of personal injuries. The term "personal injuries" is defined as any disease and any impairment of a person's physical or mental condition.²⁶ The term is therefore apt to include not only any physical injuries sustained as a result of the wrongful conduct but also the psychological sequelae thereof. Johnston observes that no distinction is made between negligently and deliberately inflicted personal injuries.²⁷ This is an important point in the context of historic abuse where the alleged wrongdoing would clearly fall into the latter category at least as far as the actual perpetrator is concerned. Although actions against employing institutions have traditionally been framed in negligence (in respect of any direct liability which they may incur), the case of *Lister v Hesley Hall Ltd*²⁸ now provides scope for such institutions to be sued vicariously in respect of the deliberate wrongdoing of their employees.²⁹

²³ See, for example, *Aitchison v Glasgow City Council*; sub nom. *A v Glasgow City Council*; *F v Quarriers* [2010] CSIH 9; 2010 S.C. 411; 2010 S.L.T. 358 at [46].

²⁴ *McE v de La Salle Brothers*; sub nom. *M v Hendron* [2007] CSIH 27; 2007 S.C. 556; 2007 S.L.T. 467.

²⁵ *McE v de La Salle Brothers*; sub nom. *M v Hendron* [2007] CSIH 27; 2007 S.C. 556; 2007 S.L.T. 467 at [161]. Lord Marnoch emphasised, at [192], that "the statutory provisions considered in England ... are markedly different from those which obtain in Scotland." Lord Clarke, at [187], spoke of "the inappropriateness of seeking to interpret the Scottish provisions by reference to the provisions of English legislation" before adding: "That, in my judgment, simply invites the addition of confusion to what is already a difficult task." See, also, the note of caution sounded by Lady Cosgrove in *Agnew v Scott Lithgow Ltd (No 2)* 2003 S.C. 448 at [22] to the effect that "the English statutory provisions are couched in quite different terms. ... The English authorities thus require to be approached with considerable caution." See, also, the observations of Lord Glennie in *M v O'Neill* 2006 S.L.T. 823 at [50] and those of Lord President Hamilton in *AS v Poor Sisters of Nazareth*; sub nom *B v Murray* [2007] CSIH 39; 2007 S.C. 688 at [27].

²⁶ section 22(1) of the 1973 Act as substituted by section 3 of the 1984 Act.

²⁷ David Johnston, *Prescription and Limitation*, 2nd edn (Edinburgh: SULI/ W. Green, 2012), para 10.03. Thus, the anomalies which obtained for some time in England (see, for example, *S v W (Child Abuse: Damages)* [1995] 1 F.L.R. 862) have been avoided in Scotland. The anomalous situation in England has now been resolved as result of the decision in *A v Hoare* [2008] UKHL 6; [2008] 1 A.C. 844 the effect of which has been said to have "unified the limitation regimes applying to cases of direct assault and cases of negligence." (See Richard Scorer, "Sins of the past" 2010 N.L.J. 160 (7420), 789).

²⁸ *Lister v Hesley Hall Ltd* [2001] UKHL 22; [2002] 1 A.C. 215. It has been said that "[a]fter [Lister], claims against the operators of schools, detention centres and similar institutions for sexual abuse by employees came thick and fast" (per Lord Hoffmann in *A v Hoare* [2008] UKHL 6; [2008] 1 A.C. 844 at [22].)

²⁹ See *Gorrie v Marist Bros* 2002 S.C.L.R. 436 where the action was originally framed in negligence against a religious teaching order but amendment was permitted (following the decision in *Lister*) to allow a vicarious liability case to be pled against the defender in respect of the assaults allegedly committed by its

From what date does the three-year period (the triennium) start to run?

Section 17(2) provides for a number of possible starting dates for the limitation period. The first potential starting date is perhaps the most obvious, that being the date on which the injuries were sustained.³⁰ Psychological injuries may however emerge many years after physical injuries have been sustained. Although, at one time, it was considered that distinct and separate injuries could generate a separate triennium,³¹ such a view attracted much criticism³² and has now been firmly discredited³³ as a result of the Inner House decision in *Aitchison v Glasgow City Council; sub nom. A v Glasgow City Council; F v Quarriers*.³⁴ There, the pursuer raised an action in August 2003. He alleged that he had been sexually abused in a children's home when he was 9 (in 1974) and thereafter physically punished for revealing the abuse and that he now suffered from post traumatic stress disorder. The defenders pled that the action was time-barred. Lord McEwan accepted that the claim was simply for psychiatric damage and not physical injury. The psychiatric harm arose in 2001. Following *Carnegie v Lord Advocate*³⁵ (which had allowed a separate triennium in respect of separate and distinct injuries produced by the same wrong) his Lordship held that the action was not time-barred and allowed a proof before answer. The council reclaimed. Five judges in the Inner House overruled *Carnegie*.³⁶ The one action rule³⁷ was reaffirmed. That rule is to the effect that Scots law allows only one action in relation to a single wrong and that all loss, injury or damage resulting therefrom must be claimed in that one action. The judicial determination or

employee. The case is discussed in more detail in Eleanor J. Russell, "Amendment and Time Bar-A Review" 2008 S.L.T. (News) 5. See, also, *W v Trustees of the Roman Catholic Archdiocese of St Andrews and Edinburgh* [2013] CSOH 185; 2014 G.W.D. 1-25.

³⁰ Section 17(2)(a) of the 1973 Act. See, *Watson v Fram Reinforced Concrete Co & Winget Ltd* 1960 S.C. (H.L.) 92.

³¹ See, for example, the approach adopted in *Shuttleton v Duncan Stewart & Co Ltd* 1996 S.L.T. 517; *Carnegie v Lord Advocate* 2001 S.C. 802 (a case involving bullying in the army where the pursuer's psychological injuries emerged sometime after his physical injuries); *Hill v McAlpine* 2004 S.L.T. 736.

³² See the observations of Lord Clarke and Lord Marnoch in *McE v de La Salle Brothers; sub nom. M v Hendron* [2007] CSIH 27; 2007 S.C. 556; 2007 S.L.T. 467 at [187] and [193] respectively. In *Stephen Findleton v Quarriers* [2006] CSOH 157 Lady Smith (at [52]) found it "difficult to reconcile [the separate triennium] 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." Her Ladyship made identical remarks in *Moira King v Quarriers* [2006] CSOH 156 at [61], *Jordan v Quarriers and Nicholson* [2006] CSOH 155 at [64], *Godfrey v Quarriers* [2006] CSOH 160 at [62] and *Whelan v Quarriers and Porteous* [2006] CSOH 159 at [58]. See, also the comments of Lord Glennie in *M v O'Neill* 2006 S.L.T. 823 at [29]. The Scottish Law Commission observed that the separate triennium (or *Carnegie*) approach offended against the fundamental principle that a single, indivisible right of action accrues when there is a conjunction of *iniuria* and *damnum*. See Scottish Law Commission, *Report on Personal Injury Actions: Limitation and Prescribed Claims*, para 2.21.

³³ The law of limitation is thus brought into line with that of prescription. See *K v Gilmartin's Executrix* 2004 S.C. 784.

³⁴ *Aitchison v Glasgow City Council; sub nom. A v Glasgow City Council; F v Quarriers* [2010] CSIH 9; 2010 S.C. 411; 2010 S.L.T. 358.

³⁵ *Carnegie v Lord Advocate* 2001 S.C. 802.

³⁶ See Eleanor J. Russell, "Cheerio Carnegie" 2010 S.L.T. (News) 81.

³⁷ See *Dunlop v McGowans* 1980 S.C. (H.L.) 73; *Stevenson v Pontifex & Wood* (1887) 15 R. 125.

settlement of such an action is treated as exhausting the claim in respect of that wrong.³⁸ It follows that it is no longer open to a pursuer to argue that a separate triennium arises in relation to later emerging injuries which are distinct from an earlier “sufficiently serious” injury caused by the same wrong.

Of course, the injuries may be attributable to a continuing act or omission.³⁹ In such cases, the action must be commenced within three years of the date on which the injuries were sustained or the date on which the wrong ceased, whichever is later.⁴⁰

Is there any possible starting date other than the date on which the injuries were sustained or the date on which a continuing wrong ceased? The answer to that question is “yes”. Provision is made for situations where the pursuer was unaware of certain statutory facts and also where he or she was subject to legal disability, such as nonage or unsoundness of mind.

Dealing first with the issue of lack of awareness, section 17(2)(b) contains a date of awareness provision which is designed to alleviate the hardship of the ordinary rule of limitation which, it has been judicially acknowledged, can operate too harshly.⁴¹ In terms of the date of awareness provision, time runs from the date on which the pursuer became or on which, in the court’s opinion, it would have been *reasonably practicable* for him in all the circumstances to become aware of all of the following facts:

1. that the injuries were sufficiently serious to justify 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);
2. that the injuries were attributable in whole or in part to an act or omission; and
3. that the defender was a person to whose act or omission the injuries were attributable or the employer or principal⁴² of such a person.

The date of awareness provision⁴³ was incorporated into the legislative framework principally as a result of the perceived unfairness to pursuers in insidious disease cases where they were unaware that they had suffered injury but their actions were nonetheless held to be time-barred.⁴⁴ The date of constructive awareness (namely, the date on which it

³⁸ The harshness of that rule is mitigated by the opportunity to claim provisional damages in terms of section 12 of the Administration of Justice Act 1982.

³⁹ The date on which a continuing act or omission ceased may be a matter of dispute and require to be determined after proof—see *A v N* [2013] CSOH 161; 2013 G.W.D. 33-661; 2014 S.C.L.R. 225. There, it was argued that the delictual wrong (sexual abuse) had continued beyond the age of sixteen and well into adulthood (until the pursuer was approximately 30 years of age). That argument was rejected, however.

⁴⁰ Section 17(2)(a) of the 1973 Act.

⁴¹ See the observations of Lady Smith in *Godfrey v Quarriers* [2006] CSOH 16 at [29].

⁴² The word “principal” is not given a narrow construction. “[I]t truly refers to the issue of vicarious liability.” (*W v Trustees of the Roman Catholic Archdiocese of St Andrews and Edinburgh* [2013] CSOH 185; 2014 G.W.D. 1-25 per temporary judge, P Arthurson Q.C. at [17]).

⁴³ The awareness provision was first introduced by the Limitation Act 1963 (although in that Act the term “knowledge” was used rather than the term “awareness”. The English legislation continues to use the term “knowledge”—see the Limitation Act 1980, section 11(4) and section 14(1).

⁴⁴ In *Cartledge v E Jopling & Sons Ltd* [1963] A.C. 758 a cause of action in respect of pneumoconiosis was held to have accrued as soon as any injury was suffered and was not postponed until such time as

would have been “reasonably practicable” for the pursuer to become aware of the statutory facts) may predate the date of actual awareness and, where that is the case, the earlier date will be the effective *terminus a quo*.⁴⁵ In relation to the issue of constructive awareness, it has been judicially stated that it would be reasonably practicable for a pursuer to become aware of necessary information if he could do so without excessive expenditure of time, effort or money.⁴⁶ The question is not whether the pursuer had a reasonable excuse for not asking the material questions but rather whether it would have been *reasonably practicable* for him to do so.⁴⁷ While the awareness provision has been successfully employed in certain contexts⁴⁸ it has not availed victims of historic abuse, as will be discussed below.

The effluxion of time does not begin until the pursuer is aware (actually or constructively) of *all* three facts stipulated in section 17(2)(b). The first statutory fact is that the injuries were sufficiently serious to justify bringing an action of damages. (This fact is subject to the two statutory assumptions noted above, namely admitted liability and solvency of the defender.) The second statutory fact relates to attribution of those injuries to a wrong⁴⁹ and the third statutory fact is that the defender is a person to whom that wrong is attributable or the employer or principal of such a person.⁵⁰ If the pursuer is justifiably unaware of any one of the statutory facts, the commencement of the limitation period is delayed on that account.

It is important not to lose sight of the issue of constructive awareness. Indeed, this element of the statutory test was emphasized by Lord Nimmo Smith in *Cowan v Toffolo Jackson & Co Ltd*.⁵¹ His Lordship stated:⁵²

“[T]he 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.”

When considering the issue of whether section 17(2)(b) is engaged, it is important to note that knowledge of legal actionability has no relevance. This is specifically provided in section 22(3) of the Act which states:

knowledge of the injury was acquired. Lord Reid stated (at 773) that “some amendment of the law [was] urgently necessary”.

⁴⁵ See *Elliot v J & C Finney* 1989 S.L.T. 208.

⁴⁶ *Elliot v J & C Finney* 1989 S.L.T. 208 per Lord Sutherland at 210-211.

⁴⁷ *Elliot v J & C Finney* 1989 S.L.T. 208 at 210; *Agnew v Scott Lithgow Ltd (No 2)* 2003 S.C. 448 at [23] *Jamieson v O'Neill* [2014] CSOH 117; 2014 Rep. L.R. 98.

⁴⁸ See, for example *Blake v Lothian Health Board* 1993 S.L.T. 1248 (pursuer not aware that his back injuries were *sufficiently serious* to justify the raising of an action); *Shuttleton v Duncan Stewart & Co Ltd* 1996 S.L.T. 517 (pursuer not aware that his injuries (pleural thickening) were *sufficiently serious* to justify the raising of an action); *Clark v Scott Lithgow Ltd* 2006 Rep. L.R. 16 (pursuer not aware that his injuries (eventually diagnosed as vibration white finger) were attributable to an act or omission of the defender).

⁴⁹ See *Agnew v Scott Lithgow Ltd (No 2)* 2003 S.C. 448.

⁵⁰ See *Elliot v J & C Finney* 1989 S.L.T. 208; *McArthur v Strathclyde Regional Council* 1995 S.L.T. 1129; *Jamieson v O'Neill* [2014] CSOH 117; 2014 Rep. L.R. 98.

⁵¹ *Cowan v Toffolo Jackson & Co Ltd* 1998 S.L.T. 1000. See, also, the observations of Lord Eassie in *Nimmo v British Railways Board* 1998 S.L.T. 778 at 781.

⁵² *Cowan v Toffolo Jackson & Co Ltd* 1998 S.L.T. 1000 at 1002.

“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.”⁵³

It follows that if the pursuer has actual or constructive awareness of all three statutory facts but is ignorant that he has a legal remedy, time runs against him nonetheless. This has proved pivotal in many historic abuse cases, as will be discussed below.

Returning now to the statutory facts which *are* relevant, the first statutory fact requires awareness that the injuries are sufficiently serious to justify litigation. The test of “sufficiently serious injuries” appears to be based on the reasonable pursuer.⁵⁴ It is principally objective in nature with quantum of injury being at the nub of the statutory provision. Johnston has observed that “the essence of the provision is an awareness that injury has been sustained which is sufficiently serious to exceed a minimal threshold in terms of quantum of damages.”⁵⁵ Personal characteristics of the pursuer are relevant only to the extent that they bear on quantum (for example, the fact that the pursuer is a piano player or surgeon would be relevant in relation to a finger injury). The test takes no account, however, of factors such as a fear of compromising future job prospects or of losing one’s job as a result of making a complaint or of the personal inconvenience of bringing proceedings.⁵⁶ (This fact has been considered in a number of historic abuse cases and will be considered in that context later in this article.)

In *Carnegie v Lord Advocate*⁵⁷ the pursuer sought damages for physical and psychological injuries, the physical injuries having resulted from assaults which occurred more than three years before the raising of the action. The psychological injury developed in May 1992. The action was raised in March 1995. The defender took a plea of time-bar. The Lord Ordinary indicated that he would have regarded the incidents as sufficiently serious to justify the bringing of an action by the end of 1991. In the Inner House the pursuer submitted that more weight should have been accorded to his personal circumstances when the application of section 17(2)(b)(i) was being considered by the Lord Ordinary. In particular, account should have been taken of the pursuer's reluctance to sue on account of fear that he would lose his job. While expressing the view that the relevant provision was directed at quantum of injury, Lord Johnston continued:⁵⁸

".... 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

⁵³ Section 22(3) was inserted into the 1973 Act by virtue of the 1984 Act, section 3. However, it had already been accepted by the House of Lords that lack of awareness of actionability was irrelevant for the purposes of section 17(2)(b) in *McIntyre v Armitage Shanks Ltd* 1980 S.C. (H.L.) 46.

⁵⁴ *Blake v Lothian Health Board* 1993 S.L.T. 1248.

⁵⁵ Johnston, *Prescription and Limitation*, (2012), para 10.53.

⁵⁶ *G v Glasgow City Council* [2010] CSIH 69; 2011 S.C. 1 at [22]-[23]. There Lord Eassie stated at [23] that “[g]iven the objective nature of the test for the seriousness of the injury, we would...conclude that such personal factors as ... suggested by counsel for the pursuers in his admittedly extreme example of the St Kilda litigant, are plainly excluded just as much as the example of the employee reluctant to criticise, by way of claim, his employer with whom he has a continuing employment relationship.”

⁵⁷ *Carnegie v Lord Advocate* 2001 S.C. 802.

⁵⁸ *Carnegie v Lord Advocate* 2001 S.C. 802 at [16].

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."

In *Elliot v J & C Finney*⁵⁹ the third statutory fact (i.e. the identity of the wrongdoer) was the focus of attention. The victim of a road traffic accident failed to ask a police officer about the identity of the other driver when the police officer attended him in hospital. Lord Sutherland commented:⁶⁰

"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."

Elliot was approved at appellate level in the decision of the Extra Division in *Agnew v Scott Lithgow Ltd (No 2)*.⁶¹ There, the pursuer sought damages from his former employers for "vibration white finger". He first had symptoms in 1982 but did not know what caused them. It was therefore the second statutory fact which was in issue, namely that the pursuer had injuries which were attributable to an act or omission. The pursuer's exposure to vibrating tools ceased in September 1995 and later that year, 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, as a result of which he discovered that the cause of his condition was exposure to vibration in the workplace. His action was raised in June 1999. The defenders' plea of time-bar was sustained by the temporary judge. The pursuer reclaimed. It was argued on the pursuer's behalf that several subjective factors regarding the pursuer ought to have been taken into account: that he had never heard of vibration white finger while he worked in the shipyards; that he was not particularly intelligent; that he ascribed his symptoms to ageing and cold weather; that he was a man who had had to be persuaded to make a DSS claim and that he was generally hesitant about asserting his rights.

Lady Cosgrove, delivering the opinion of the court, observed⁶² that "the real question to be determined by this court is the date of the pursuer's constructive awareness that his injuries were attributable in whole or in part to his employers' act or acts in exposing him to vibrating machinery."

Her Ladyship continued:⁶³

"There is no room, in our view, for interpreting the provisions of section 17(2) as allowing any additional unspecified period for ...'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

⁵⁹ *Elliot v J & C Finney* 1989 S.L.T. 208.

⁶⁰ *Elliot v J & C Finney* 1989 S.L.T. 208 at 210.

⁶¹ *Agnew v Scott Lithgow Ltd (No 2)* 2003 S.C. 448.

⁶² *Agnew v Scott Lithgow Ltd (No 2)* 2003 S.C. 448 at [14].

⁶³ *Agnew v Scott Lithgow Ltd (No 2)* 2003 S.C. 448 at [23].

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...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."

More recently in *Jamieson v O'Neill*⁶⁴ it was again emphasized that the statutory test is not one of reasonable excuse but one of reasonable practicability. There, the pursuer was scalded and scarred as an infant while he was in care. His mother was reluctant to tell him that he had been in care. It was only when the pursuer was 25 years of age that his mother told him that he had been in care and that that was when the injuries had occurred. It was submitted on the pursuer's behalf that it would not have been reasonably practicable for him to have awareness of the second and third statutory facts more than three years before the action was raised. Lord Tyre disagreed, stating that "the contention on behalf of the pursuer does confuse reasonable practicability with reasonable excuse."⁶⁵ His Lordship continued:⁶⁶

"It may be that, so long as the pursuer did not have a reason to believe that his injuries had been caused by anyone's fault except perhaps that of his mother, he had a reasonable excuse for choosing not to take steps to investigate and pursue a claim for damages. But as the authorities make clear, that is not the test."

It was held that the pursuer could reasonably have discovered the cause of his injury at an earlier stage. He could, for example, have obtained his medical records which would have revealed the cause of the injury.

Are there any other avenues which might serve to delay or suspend the running of time? Section 17(3) of the 1973 Act provides that any period during which the injured party was subject to legal disability by reason of nonage or unsoundness of mind falls to be disregarded in the computation of the triennium.

Dealing first with nonage, the limitation period only begins to run once any period of nonage has ceased. In *McCabe v McLellan*⁶⁷ Lord President Hope, in the Inner House, observed:⁶⁸

"sec. 17(3) provides that the entire period of legal disability due to nonage must be disregarded in the computation of the period of three years to which sec. 17(2) of the Act refers. That rule...cannot of itself be said to create any unfairness. It recognises that a person is unable, while under a legal disability, to take any action to enforce any rights which he may have to make a claim."

The Age of Legal Capacity (Scotland) Act 1991⁶⁹ provides that statutory references to "legal disability" are to be construed as a reference to a person under the age of 16 years (insofar as relating to events after the Act's commencement, that being September 25, 1991). Accordingly, where injuries have been inflicted on a child, he or she must now

⁶⁴ *Jamieson v O'Neill* [2014] CSOH 117; 2014 Rep. L.R. 98.

⁶⁵ *Jamieson v O'Neill* [2014] CSOH 117; 2014 Rep. L.R. 98 at [11].

⁶⁶ *Jamieson v O'Neill* [2014] CSOH 117; 2014 Rep. L.R. 98 at [11].

⁶⁷ *McCabe v McLellan* 1994 S.C. 87.

⁶⁸ *McCabe v McLellan* 1994 S.C. 87 at 97.

⁶⁹ Section 1(2) of the 1991 Act.

commence proceedings within three years of attaining the age of sixteen.⁷⁰ In relation to events which occurred prior to the commencement of the 1991 Act, an action required to be raised within three years of the child attaining the age of 18.⁷¹

Turning to the concept of “unsoundness of mind,” the 1973 Act provides no definition of the term. Some guidance as to its meaning was provided however in *Bogan’s Curator Bonis v Graham*.⁷² There the temporary judge, D Robertson Q.C., held that the term must be construed in relation to the subject matter with which the Act was dealing. The term therefore had to mean a condition such that a person was incapable of managing his affairs in relation to the accident and any court action arising out of it. B had sustained severe brain damage with a profound effect on the higher cognitive functions such as thinking, initiative and memory. It was doubtful how much she understood or was able to retain for any length of time. Her mind had ceased to be in proper working order and she was of unsound mind within the meaning of section 17(3). In *Elliot v J & C Finney*⁷³, Lord Sutherland suggested⁷⁴ that it might be argued that a person in a coma is not of sound mind and that section 17(3) would cover such a situation. There is no requirement to prove a causal relationship between the mental incapacity and the delay in raising the action.⁷⁵

The equitable discretion to disapply the time-bar

Section 19A⁷⁶ of the Prescription and Limitation (Scotland) Act 1973, as amended, invests the court with a statutory discretion to waive the statutory limitation in personal injury cases if it is equitable to do so.

Section 19A 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."

The statutory provision has retroactive effect, section 19(2) of the Act providing that it is to have effect not only as regards rights of action accruing *after* the section’s commencement but also as regards those accruing *before* that date in respect of which a final judgment has not been pronounced.⁷⁷

⁷⁰ He may of course argue for a later commencement date based on the continuing wrong provision or on the lack of awareness provision (both discussed above) or indeed on the unsound mind provision (discussed below.)

⁷¹ Age of Majority (Scotland) Act 1969, section 1.

⁷² *Bogan’s Curator Bonis v Graham* 1992 S.C.L.R. 920.

⁷³ *Elliot v J & C Finney* 1989 S.L.T. 208.

⁷⁴ *Elliot v J & C Finney* 1989 S.L.T. 208 at 210.

⁷⁵ *Paton v Loffland Brothers North Sea Inc* 1994 S.L.T. 784; *Sellwood’s Curator Bonis v Lord Advocate* 1998 S.L.T. 1438.

⁷⁶ The section was inserted by section 23(a) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 in response to the House of Lords’ decision in *McIntyre v Armitage Shanks Ltd* 1980 S.C. (H.L.) 46; 1980 S.L.T.112. There, an action by a workman who had contracted pneumoconiosis was held to be time-barred. He knew all the relevant facts but had been advised by the local secretary of his trade union that he could not sue.

⁷⁷ In *AS v Poor Sisters of Nazareth*; sub nom *B v Murray* [2008] UKHL 32; 2008 S.C. (H.L.) 146; 2008 S.L.T. 561, for example, the appellants’ actions fell into the latter category.

In *Carson v Howard Doris Ltd*⁷⁸ Lord Ross provided some guidance as to what factors might be relevant to the application of the discretion. His Lordship stated:⁷⁹

"I am of opinion that the Court should consider *inter alia*: (1) the conduct of the pursuer since the accident and up to the time of his seeking the Court's authority to bring the action out of time, including any explanation for his not having brought the action timeously; (2) any likely prejudice to the pursuer if authority to bring the action out of time were not granted; and (3) any likely prejudice to the other party from granting authority to bring the action out of time. Of course, each case depends on its own facts and there may well be other factors to be considered also in any particular case."

The court's discretion is unfettered⁸⁰ and its exercise (or otherwise) depends upon the facts and circumstances of the individual case.⁸¹ The core question in considering whether the discretion should be operated is "where do the equities lie?"⁸² It has been judicially stated at the highest level that "proof that the defender will be exposed to the real possibility of significant prejudice will usually determine the issue in his favour."⁸³ The pursuer bears the onus of proof in relation to the equitable discretion-he must aver and prove that it is equitable to allow the action to proceed.⁸⁴ In *Nimmo v British Railways Board*⁸⁵ Lord Eassie stated:⁸⁶

"... it is... 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." Although lack of knowledge of the law and legal remedies is not relevant to the section 17(2)(b) enquiry, it may be germane to the issue of the equitable discretion. Thus, in *Comber v Greater Glasgow Health Board*⁸⁷ Lord Morton exercised the discretion in favour of the pursuer who was "ill-informed about modern society" and had not known that she could raise an action.⁸⁸

The existence of an alternative right of action against a third party (for example, a solicitor who has failed to raise proceedings timeously) may be a relevant factor in the court's consideration of whether to exercise the discretion.⁸⁹

⁷⁸ *Carson v Howard Doris Ltd*. 1981 S.C. 278.

⁷⁹ *Carson v Howard Doris Ltd*. 1981 S.C. 278 at 282.

⁸⁰ *Donald v Rutherford* 1984 S.L.T. 70, per Lord Cameron (at 75) and per Lord Dunpark (at 78); *Forsyth v A F Stoddard & Co Ltd* 1985 S.L.T. 51 (at 53) per Lord Justice-Clerk Wheatley; *Woodland v The Advocate General for Scotland and Ors* 2005 S.C.L.R. 163 (at 170) per Temporary Judge J Gordon Reid, Q.C.; *McCabe v McLellan* 1994 S.C. 87 (at 97) per Lord President Hope.

⁸¹ *Donald v Rutherford* 1984 S.L.T. 70; *Forsyth v A F Stoddard & Co Ltd* 1985 S.L.T. 51 at 53.

⁸² *B v Murray (No. 2)* 2005 S.L.T. 982 at [29]; *Forsyth v A F Stoddard & Co Ltd* 1985 S.L.T. 51 at 55; *Elliot v J & C Finney* 1989 S.L.T. 605 at 608.

⁸³ *AS v Poor Sisters of Nazareth*; sub nom *B v Murray* [2008] UKHL 32; 2008 S.C. (H.L.) 146; 2008 S.L.T. 561 per Lord Hope at [25]. See, also, *Kane v Argyll and Clyde Health Board* 1999 SLT 823 (IH); 1997 S.L.T. 965 (OH).

⁸⁴ *AS v Poor Sisters of Nazareth*; sub nom *B v Murray* [2008] UKHL 32; 2008 S.C. (H.L.) 146; 2008 S.L.T. 561 at [25]; *Clark v McLean* 1994 S.C. 410 at 413; *Forsyth v A F Stoddard & Co Ltd* 1985 S.L.T. 51 at 53.

⁸⁵ *Nimmo v British Railways Board* 1998 S.L.T. 778.

⁸⁶ *Nimmo v British Railways Board* 1998 S.L.T. 778 at 783.

⁸⁷ *Comber v Greater Glasgow Health Board* 1989 S.L.T. 639.

⁸⁸ See, also, *McLaren v Harland & Wolff* 1991 S.L.T. 85.

⁸⁹ *Donald v Rutherford* 1984 S.L.T. 70; *Forsyth v A F Stoddard & Co Ltd* 1985 S.L.T. 51; *Morrice v Martin Retail Group Ltd* 2003 S.C.L.R. 289; *Lannigan v Glasgow City Council* 2004 G.W.D. 26-562; *Clark v McLean* 1994 S.C. 410; *Wilson v Telling (Northern) Ltd* 1996 S.L.T. 380.

While it will be sometimes be possible for the matter of the discretion to be disposed of on the pleadings,⁹⁰ in other cases it will be necessary for the court to hear evidence in relation to matters bearing on the equitable discretion.⁹¹

As far as the section 19A discretion is concerned, a generous element of latitude resides with the presiding judge.⁹² The question arises as to whether it is satisfactory for redress to depend upon the accident of a case coming before a sympathetic or liberal judge. Because the equitable extension is a discretionary matter, appellate courts are generally loath to interfere with its exercise.⁹³ The matter will only be open for reconsideration if a clear error or misdirection has occurred in the court below⁹⁴ such that the exercise of the discretion is vitiated.

Application of the foregoing principles to historic abuse cases

It will be remembered that an action must be commenced within three years of the date on which the injuries were sustained or the date on which the wrong ceased, whichever is later.⁹⁵ In most cases of historic abuse, a continuing course of conduct is alleged. At first sight, it might therefore appear that the appropriate *terminus a quo* will be the date on which the pursuer ceased to be exposed to the abuse (if that is later than the date on which the injuries were sustained). One must not lose sight however of the provision in relation to nonage (section 17(3) of the 1973 Act). In most cases of historic abuse, the injuries have been inflicted upon a child. Time will not run against the child until he or she attains the age of sixteen even if the injuries were sustained or the abuse ceased before that date. (In relation to events which occurred prior to the commencement of the Age of Legal Capacity (Scotland) Act 1991, (and such events will commonly feature in historic abuse actions), an action required to be raised within three years of the child attaining the age of 18.⁹⁶)

In most historic abuse cases, actions have been raised many years, sometimes decades, after the assaults took place and many years after any period of nonage has ceased. In

⁹⁰ There may be sufficient agreement on the facts between the parties to enable the court to adjudicate on the matter of the discretion without resort to proof. Of course, if the pursuer's pleadings in relation to the discretion are inadequate, the case may be dismissed on the basis that no relevant case has been pled-see *Nimmo v British Railways Board* 1998 S.L.T. 778.

⁹¹ While, on rare occasions a proof at large has been the preferred procedural option (see *A v N* [2013] CSOH 161; 2013 G.W.D. 33-661; 2014 S.C.L.R. 225), it is more usual for a preliminary proof on time-bar to be allowed-see the guidance offered by Lord MacLean in *Clark v McLean* 1994 S.C. 410 at 413.

⁹² "The very nature of a discretionary power creates uncertainty as to how it will be exercised in individual cases: it will be exercised in each case in accordance with a judge's perception of equity, which may differ from the views of other judges." (Scottish Law Commission, *Report on Personal Injury Actions: Limitation and Prescribed Claims* (The Stationery Office, 2007), Scot Law Com. No. 207, para 3.17).

⁹³ *Kane v Argyll and Clyde Health Board* 1999 S.L.T. 823 (IH). See, also, the observations of Lord Hope in *AS v Poor Sisters of Nazareth*; sub nom *B v Murray* [2008] UKHL 32; 2008 S.C. (H.L.) 146; 2008 S.L.T. 561 at [18] to the effect that "it is not the function of this House to exercise afresh a discretion that was vested in the Lord Ordinary. This is especially so when the way he exercised his discretion has already been reviewed by the Inner House on appeal."

⁹⁴ *Donald v Rutherford* 1984 S.L.T. 70 at 75 per Lord Cameron; *McCabe v McLellan* 1994 S.C. 87. See, more generally, the discussion in Thomson (ed), *Delict* (Edinburgh: W Green/SULI, 2007) at paras 9.123-9.124.

⁹⁵ Section 17(2)(a) of the 1973 Act.

⁹⁶ See, for example, *AS v Poor Sisters of Nazareth*; sub nom *B v Murray* [2008] UKHL 32; 2008 S.C. (H.L.) 146; 2008 S.L.T. 561; *Gorrie v Marist Bros* 2002 S.C.L.R 436.

order to surmount that difficulty, many victims have sought to rely on the date of awareness provision of section 17(2)(b) of the 1973 Act. Such attempts have not fared well, however. Of course, victims of historic abuse may also seek to invoke the equitable discretion in section 19A of the Act but, in this respect, too, the victims have met with little success. It is therefore hard to dispute the conclusion reached by one commentator in this field who observed:

“Given [recent court decisions] prospects for victims of (historic) child abuse, at least in securing “compensation” through the civil courts in Scotland, seem now wholly circumscribed if not excluded.”⁹⁷

It is the provisions of sections 17(2)(b) and section 19A of the 1973 Act (and the manner of their interpretation in the context of historic abuse) which will now be examined in detail. Some reference will also be made to the unsoundness of mind provision (of section 17(3) which again has not availed the victims of historic abuse.

The lack of awareness provision in the context of historic abuse

In theory, the awareness provision might have some application in the context of child sexual abuse. Indeed, the Scottish Law Commission has observed:⁹⁸

“The awareness test may enable some victims of child sexual abuse to bring an action of damages as of right, that might occur for example, where the victim was aware of having been the subject of sexual activity with an adult during his childhood but reasonably regarded the experience as not inflicting personal injury sufficiently serious to sue until the later emergence of psychiatric illness and advice as to its attributability to the childhood sexual activity.”⁹⁹

In practice, however, as a review of the relevant case law reveals, victims of historic abuse have had little success in invoking the date of awareness provision to delay the running of the limitation period.

In *B v Murray (No. 1)*¹⁰⁰ the pursuer, a former resident of Nazareth House, sought damages in respect of alleged ill-treatment during her residency there between 1966 and 1979. The defenders stated a plea of time-bar and the action came to debate before Lord Johnston. It was argued on the pursuer’s behalf that her action had not suffered limitation because she had not become aware of any entitlement to sue until newspaper articles appeared in May 1997 and she had raised the action within three years of that awareness arising. That argument was rejected, Lord Johnston stating:¹⁰¹

“[H]er own averments disclose that at least at some stage during the home period she came to realise that what was happening to her ... was wrong and attributable to the nuns who were running the home.”

⁹⁷ Gordon Junor, “Case Comment -B v Murray, 2007 S.L.T. 605” 2007 S.L.T. (News) 169.

⁹⁸ Scottish Law Commission, *Report on Personal Injury Actions: Limitation and Prescribed Claims*, para 3.22.

⁹⁹ The Commission did offer the following caveat however: “These cases nevertheless present a number of difficulties... There are... disputed views among psychologists and psychiatrists of the possible consequences... of child sexual abuse for a victim’s subsequent ability to recall or recount the abuse.” (Scottish Law Commission, *Report on Personal Injury Actions: Limitation and Prescribed Claims*, para 3.22.)

¹⁰⁰ *B v Murray (No. 1)* 2004 S.L.T. 967.

¹⁰¹ *B v Murray (No. 1)* 2004 S.L.T. 967 at [8].

The commencement of the limitation period could *not* therefore be delayed until May 1997 when the pursuer learned that she had a right of action as a result of the media publicity surrounding the allegations. Instead, the limitation period ran from the date of her attainment of majority (i.e. when nonage ceased.)

In historic abuse litigation, just as in other personal injury litigation, personal characteristics of the pursuer will not (other than in the limited circumstances outlined in *Carnegie*¹⁰²) be relevant to the question of whether injuries are sufficiently serious to justify the raising of an action. When three of the Nazareth House abuse claims came before the Inner House in *AS v Poor Sisters of Nazareth*; sub nom *B v Murray*¹⁰³ the pursuers attempted to argue otherwise. They asserted that the correct approach to section 17(2)(b)(i) involved not only the issue of quantum of injury but also consideration of whether the pursuer would realise that the injury called for resort to litigation. The pursuers, it was said, belonged to a class of persons - victims of historic child abuse - who were afflicted by the “silencing effect” of such abuse. They had certain homogenous characteristics – they came from poor family backgrounds, they felt shame and embarrassment, they lacked confidence and did not think that they would be believed. Until alerted by media publicity that they could claim damages they were not aware (either actually or constructively) that their injuries were sufficiently serious to justify litigation. That argument was rejected. Delivering the opinion of the court, Lord President Hamilton observed:¹⁰⁴

“subhead (i) of section 17(2)(b) requires one to assume that liability for the claim is not disputed and that the defender is able to meet the claim; and those two assumptions, together with the provisions of section 22(3) [absence of awareness of actionability irrelevant], reflect and illuminate the nature of this statutory fact. Since the fact is not concerned with liability or solvency (since both must be assumed), or with knowledge of actionability, the subhead is concerned only with the extent of the injury, in terms of quantum of damages. In other words, the actual or constructive awareness in relation to this subhead is awareness that injury has been suffered which is sufficiently serious to be above a minimum threshold in terms of quantum of damages. Time does not run against a claimant who lacks actual or constructive awareness that he has suffered injury or that the gravity of his injury is sufficient to bring it above the minimum - and quite low - threshold of justifying proceedings on the assumptions of admitted liability and a solvent defender.”

His Lordship continued:¹⁰⁵

“Whether the likely amount of damages would justify taking proceedings no doubt involves some element of judgment, particularly in marginal cases and, as Lord Caplan noted in *Blake*, there are inevitably some inconveniences in taking legal proceedings, even if liability is admitted and the defender is good for the eventual decree. It will also be the case that, as was observed in *Carnegie*,...some subjective, or perhaps more

¹⁰² *Carnegie v Lord Advocate* 2001 S.C. 802 per Lord Johnston at [16].

¹⁰³ *AS v Poor Sisters of Nazareth*; sub nom *B v Murray* [2007] CSIH 39; 2007 S.C. 688.

¹⁰⁴ *AS v Poor Sisters of Nazareth*; sub nom *B v Murray* [2007] CSIH 39; 2007 S.C. 688 at [25].

¹⁰⁵ *AS v Poor Sisters of Nazareth*; sub nom *B v Murray* [2007] CSIH 39; 2007 S.C. 688 at [26].

properly, individual personal features may enter into the assessment of quantum in that...injury to a finger may be of much greater consequence to a concert pianist than to someone whose work and hobbies do not involve fine finger movements. But subject to those observations we consider that the statute can only be construed as intending subhead (i) to be concerned with quantum, an objective assessment having to be made whether the gravity of the injury to the pursuer in question was such that it would have justified proceedings on the statutory assumptions of undisputed liability and a solvent defender.”

In relation to the pleadings in support of the lack of awareness argument, Lord President Hamilton stated:¹⁰⁶

"[T]he pleadings ...do not seek in any meaningful way to advance the case that until a date subsequent to May 1997 the respective reclaimers were unaware, and could not reasonably practicably have become aware, that the injuries which they have suffered were of sufficient gravity to warrant proceedings on the statutory assumptions. It is not said, for example, that damages for the physical injuries sustained at the time of the alleged assaults while in the respondents' care would have been of insufficient amount to justify proceeding at that time but that, subsequent to May 1997, a previously latent serious injury emerged which then rendered the taking of proceedings justified on the same statutory assumptions. Nor is it said that there was any unawareness of the extent of injury which could not be overcome by the taking of reasonably practicable steps. On the contrary, the averments for the respective reclaimers contend for an immediate and thereafter successive continuing injury in the shape of the initial alleged physical assaults and other deficits in the standard of care, leading to psychological difficulties; the loss of employment opportunities; and loss of earnings following their leaving Nazareth House".

The court pointed out¹⁰⁷ that the pursuers did not properly seek to raise any issue of constructive awareness. Their pleadings disclosed circumstances of *actual* awareness of the statutory facts for more than three years prior to the raising of the actions.

In *G v Glasgow City Council*¹⁰⁸ the pursuer alleged that she had been physically and sexually abused while resident at Kerelaw Residential School between 1992 and 1995. The pursuer was born in June 1978 and ceased to be of nonage in June 1994. Her action was raised on 9 January 2007. The defender took a time-bar plea. The pursuer alleged that at the time of the abuse she did not regard herself as being injured *sufficiently seriously* to justify bringing an action of damages (i.e. she invoked s17(2)(b)(i) of the 1973 Act to delay the running of time). She averred that she had blocked out memories of the abuse and it was only in August 2004, when she was contacted by police officers who were investigating abuse at the school, that she had had to confront the abuse. This made her psychological symptoms worse and she now suffered repeated flashbacks and nightmares. The pursuer averred that it was not until she attended solicitors in May 2006 that she had awareness of all the statutory facts. The Inner House examined the pursuer's

¹⁰⁶ *AS v Poor Sisters of Nazareth*; sub nom *B v Murray* [2007] CSIH 39; 2007 S.C. 688 at [28].

¹⁰⁷ *AS v Poor Sisters of Nazareth*; sub nom *B v Murray* [2007] CSIH 39; 2007 S.C. 688 at [30].

¹⁰⁸ *G v Glasgow City Council* [2010] CSIH 69; 2011 S.C. 1.

averments respecting her ill treatment. She alleged that two male members of staff had sexually abused her, this sexual abuse comprising digital penetration, masturbation in her presence and forcing the pursuer to perform fellatio upon them. She alleged physical (non sexual) assaults by the same staff members (on one occasion her face was allegedly struck against a radiator) and by a named female member of staff. The Inner House held (under reference to *AS v Poor Sisters of Nazareth*¹⁰⁹) that an *objective* assessment of the seriousness of the injuries was required. Lord Eassie, delivering the opinion of an Extra Division, stated:¹¹⁰

"In our view, what was necessary was to consider the nature and consequences of the wrongs averred by the pursuer to have been inflicted upon her and taking the averments respecting those matters pro veritate to decide whether, *viewed objectively*, they would have warranted taking proceedings on the statutory assumptions of admitted liability and guaranteed solvency of the defender". (emphasis added)

The pursuer's averment to the effect that, at the time of the incidents, she did not regard herself as having been injured sufficiently seriously to justify her bringing an action of damages did "not really address the collective protracted history of abuse" which she alleged.¹¹¹ Furthermore, the fact that recovery from painful physical injuries was made did not mean that the injuries were insignificant. Lord Eassie continued:¹¹²

"Further, it has to be borne in mind that the claim advanced by the pursuer against the defenders concerns an accumulation of wrongs for which the defenders are alleged to be responsible and in our view it is the totality of the claim rather than the separate incidents viewed each in isolation which must be considered in applying the provisions of section 17(2)(b)(i). On considering the claim on that basis, and applying the important statutory assumptions that the defenders admit liability and are able to meet any decree, we are unable to see any basis upon which the claim could properly and objectively be judged of insufficient worth to warrant proceedings on those statutory assumptions. In our view, it cannot be said that the catalogue of physical and serious sexual abuse of which the pursuer now complains would not have furnished, on her leaving the school, a claim of damages of sufficient magnitude to make worthwhile the raising of proceedings ...In other words, it cannot be said that the damages which would be awarded to the pursuer in respect of that abuse would be so small as not to justify the taking of steps by way of litigation on those particular statutory assumptions. ...the pursuer's averments do not contain any relevant basis for postponing her awareness of the statutory facts in section 17(2)(b) until a date within the three years preceding the raising of the action on 9 January 2007. Her invocation of section 17(2)(b) is thus misconceived."

¹⁰⁹ *AS v Poor Sisters of Nazareth*; sub nom *B v Murray* [2007] CSIH 39; 2007 S.C. 688.

¹¹⁰ *G v Glasgow City Council* [2010] CSIH 69; 2011 S.C. 1 at [21].

¹¹¹ *G v Glasgow City Council* [2010] CSIH 69; 2011 S.C. 1 per Lord Eassie at [30].

¹¹² *G v Glasgow City Council* [2010] CSIH 69; 2011 S.C. 1 at [31]-[32].

Accordingly, the action was held to be time-barred.¹¹³

In *W v Glasgow City Council*¹¹⁴ the submissions at debate were virtually the same as in *G*. However the alleged injuries in *W* were less serious. There were no allegations of sexual abuse. Lord Eassie stated:¹¹⁵

“The pursuer avers a succession of relatively minor matters... followed by ... averments of the development of significant mental problems following the police making contact with [her] in February 2005. We cannot say that on the pleadings the action is plainly time-barred... in this case we cannot say, on averment, that the actual actionable complaints individually or collectively would clearly have warranted the taking of proceedings prior to a date earlier than three years before the raising of the action.”

The pursuer’s section 17 argument could not therefore be disposed of without the hearing of evidence and the Inner House therefore upheld the Lord Ordinary’s interlocutor allowing a proof before answer with all pleas standing.

In *D v Murray*,¹¹⁶ another historic abuse action in which the pursuer sought to invoke section 17(2)(b), the statutory provision was once again held not to be engaged. The pursuer averred that he had been abused while resident in Nazareth House, Aberdeen between 1974 and 1979. His action was not raised until 2000 but, in answer to the defenders’ plea of time-bar, the pursuer argued that he did not have the requisite awareness until he read a newspaper article in May 1997 regarding children who were abused in homes run by religious orders. The pursuer averred that he had complained to a named trainee social worker about his treatment at the time and that he had suffered nightmares about the home throughout his teenage and adult life. Lord Drummond Young held that the pursuer did not have a lack of knowledge about what had happened to him, the seriousness thereof or who was responsible for the abuse. Rather, he did not think that anyone would listen to his complaints about the home until he read the newspaper articles. That did not satisfy the criteria of section 17(2)(b). Lord Drummond Young stated:¹¹⁷

“On his averments, the pursuer had actual awareness of the critical facts, and thus the question of constructive awareness simply does not arise. Constructive awareness is only relevant in the absence of actual awareness. In this connection, too, it is pertinent to point out that, while under section 17(2)(b) there may be some room for consideration of personal characteristics, such as the significance of a particular injury to the pursuer’s occupation, the overall judgment involved is objective: consequently reluctance to bring an action or lack of knowledge of the law is irrelevant.”

¹¹³ Proof before answer was allowed on the question whether it was equitable to allow the action to proceed in terms of section 19A of the 1973 Act.

¹¹⁴ *W v Glasgow City Council* 2011 S.C. 15.

¹¹⁵ *W v Glasgow City Council* 2011 S.C. 15 per Lord Eassie at [11]-[12].

¹¹⁶ *D v Murray* [2012] CSOH 109; 2012 G.W.D. 24-503.

¹¹⁷ *D v Murray* [2012] CSOH 109; 2012 G.W.D. 24-503 at [15].

It was held that the triennium began to run in 1985 when the pursuer attained the age of majority and accordingly the action was time-barred.

The combined effect of these cases is that a victim of historic abuse is likely to be deemed to have been aware within the meaning of section 17(2)(b) as at the date of the actual abuse with the possible exception of cases where the abuse is of a relatively minor nature. In most cases of historic abuse, the victim will have been aware that he or she had suffered sufficiently serious injuries to justify legal action and will know to whom the relevant acts or omissions were attributable. These are the only facts of which the pursuer must be aware before time begins to run. A lack of awareness of an entitlement to sue until newspaper articles highlighted institutional abuse, an assertion that one belongs to a class of victims which has been silenced by the abuse or a belief that one's complaints would not be believed will not serve to engage section 17(2)(b) of the 1973 Act.

There has been some judicial recognition of the silencing effect of abusive treatment. In the English case of *Ablett v Devon County Council*¹¹⁸ it was said that:

“[I]t is in the nature of abuse of children by adults that it creates shame, fear and confusion, and these in turn produce silence. Silence is known to be one of the most pernicious fruits of abuse.”¹¹⁹

The silencing effect of abuse was also alighted upon in the Shaw Report, wherein it was stated:¹²⁰

“A major theme among former residents’ experiences, as told to the review, is that they didn’t talk about their abuse as children or, if they did, they weren’t believed or were punished. As children, they learned to be silent about what they had experienced as grave injustices....According to Pinheiro, the history of violence against children is a history of silence.”¹²¹

While the silencing effect of abuse commonly features in the pleadings of victims of alleged abuse,¹²² it will be remembered that the “silencing effect” argument was firmly rejected by the Inner House as a means of delaying the commencement of the limitation period in *AS v Poor Sisters of Nazareth*; sub nom *B v Murray*.¹²³ There, Lord President Hamilton, having quoted the dicta of Sedley LJ in *Ablett* (above), stated:¹²⁴

¹¹⁸ *Ablett v Devon County Council* (unreported, Ct of Appeal, 4 December 2000) per Sedley LJ at [4].

¹¹⁹ See also the comments of Lord Boyd in *M v Advocate General for Scotland* [2013] CSOH 169; 2014 S.L.T. 475 at [20]: “As Sedley J remarked in *R v Criminal Injuries Compensation Board* at p.702, one of the fruits of crimes of sexual violence is the silence of the victim. That is a direct consequence of the crime and is widely recognised as such in the criminal justice system. To suggest that this effect disappears once the child has reached adulthood is to misunderstand the pervasive nature of the trauma which victims of childhood sexual abuse invariably suffer.”

¹²⁰ The Shaw Report, “Historic Abuse Systemic Review: Residential Schools and Children’s Homes in Scotland 1950 to 1995” (2007), Chapter 6 “Former residents’ experiences”. The Report is available at www.scotland.gov.uk/Publications/2007/11/20104729/0. [Accessed October 29, 2014].

¹²¹ Paulo Sergio Pinheiro, Independent Expert for the United Nations Secretary General’s Study on Violence against Children, see <http://www.violencestudy.org/r25>

¹²² *Godfrey v Quarriers* [2006] CSOH 160 at [18].

¹²³ *AS v Poor Sisters of Nazareth*; sub nom *B v Murray* [2007] CSIH 39; 2007 S.C. 688.

¹²⁴ *AS v Poor Sisters of Nazareth*; sub nom *B v Murray* [2007] CSIH 39; 2007 S.C. 688 at [35].

“[W]e do not consider that matters can be so simplified...the circumstances of the current reclaimers are not consistent with the paradigm or construct of the standard ‘institutional child abuse victim’...There are differences between individual cases. As is indicated in the speeches in *Adams v Bracknell Forest Borough Council*,¹²⁵ were it to be contended that the original insult produced a special medical or psychiatric difficulty in the recall of events or their narration to others, that requires to be instructed by appropriate expert evidence. In the proof before Lord Drummond Young that exercise was essayed, but in the event in light of the whole expert evidence the essay was...not successful. We are thus unable to accept the assertion of counsel for the reclaimers that there is a special class of abuse victims for whom it is to be taken as a matter of judicial knowledge that there is a ‘silencing effect’.”¹²⁶

Repression, suppression, blocking out or locking away of memories also surface in the pleadings and submissions of pursuers in many historic abuse cases.¹²⁷ Such conditions have similarly been held to have no relevance to the date of awareness provision. Indeed, in view of the express provision in section 17(3) of the 1973 Act regarding unsoundness of mind, it has been judicially asserted that “it may be legitimate to infer that any mental condition falling short of unsoundness of mind would not be appropriate for consideration in the application of s 17(2)(b).”¹²⁸

In *McE v de La Salle Brothers; sub nom. M v Hendron*¹²⁹ the Inner House held that where a pursuer as an adult is aware (either actually or constructively) of all the statutory facts, there is no statutory basis for the running of time to be further interrupted by suppressed memory or induced reticence. The pursuer alleged that he had suffered abuse at St Ninian’s residential school, Stirling, between 1963 and 1966. His action, which was commenced in May 2000, was met with a plea of time-bar. The issue of repressed memory featured in the pursuer’s pleadings, it being averred that until he underwent therapy the consequences of the abuse were such that the pursuer did not possess the awareness required by section 17(2)(b).¹³⁰ The court held that the action was time-barred. The pursuer’s pleadings indicated that he *was* aware that he had been subject to very serious assaults and “it would be absurd if a claimant could avoid the consequences of

¹²⁵ *Adams v Bracknell Forest Borough Council* [2004] UKHL 29; [2005] 1 A.C. 76.

¹²⁶ See, also, *Colin Findleton v Quarriers* [2006] CSOH 161 where Lady Smith stated at [12]: “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.”

¹²⁷ *K v Gilmartin's Exrx* 2004 S.C. 784 at [2] (it was the concept of prescription which was in issue in that case); *Godfrey v Quarriers* [2006] CSOH 160 (see [5], [7], [18] and [74]); *Whelan v Quarriers and Porteous* [2006] CSOH 159 (see [6], [7], [19] and [69]); *Stephen Findleton v Quarriers* [2006] CSOH 157 (see [5], [6], [7], [8] and [63]); *Moirra King v Quarriers* [2006] CSOH 156 (see [9] and [73]); *Jordan v Quarriers and Nicholson* [2006] CSOH 155 (see [7], [9] and [21]).

¹²⁸ *McE v de La Salle Brothers; sub nom. M v Hendron* [2007] CSIH 27; 2007 SC 556; 2007 S.L.T. 467 per Lord Osborne at [159].

¹²⁹ *McE v de La Salle Brothers; sub nom. M v Hendron* [2007] CSIH 27; 2007 S.C. 556; 2007 S.L.T. 467.

¹³⁰ This is the type of argument which had succeeded in the Canadian case *M(K) v M(H)* 1992 Can LII 21 (SCC); (1992) 96 D.L.R. (4th) 289; [1992] 3 S.C.R. 6 albeit that the legislation in Canada is different.

s17(2)(b) by saying that he had put to the back of his mind his actual awareness of the statutory facts.”¹³¹

While Lord Osborne considered that averments in relation to suppression of memory might be relevant to the application of section 19A, there were “insuperable obstacles”¹³² in endeavouring to make this aspect of the case relevant to the application of section 17. His Lordship stated:¹³³

“To the extent that sec 17(2)(b) speaks of actual awareness, the legal significance of that awareness in my view, simply cannot be affected by the suppression of memory, at least to the effect that it reflects an act of will.”

Lord Osborne continued:¹³⁴

“If...suppression of memory were to be seen as, in some way, psychologically inevitable in the circumstances, then it is necessary to consider what significance, if any, that might have in the context of the provisions of sec 17. As I see it, the issue has to be resolved in the light of the provisions of sec 17(2)(b) relating to what might be called notional awareness, and also those of sec 17(3). If it were the case that ‘it would have been reasonably practicable for him in all the circumstances to become aware of all the’ statutory facts, then suppression of memory, in my opinion, would have no relevance... Section 17(3) of the 1973 Act specifically excludes from the computation of the period specified in subsec (2) any time during which the person who sustained the injuries ‘was under legal disability by reason of ... unsoundness of mind’. Having regard to that provision in particular, I consider that the running of time cannot be interrupted by a mental condition short of unsoundness of mind. In particular, it cannot be interrupted by the development of suppressed or impaired memory or induced reticence. No averments have been made by the pursuer to the effect that, at any time during the relevant period of time he was suffering from ‘unsoundness of mind’. In all these circumstances I cannot regard the particular chapter of the pursuer's averments which features suppressed memory as relevant to his case under sec 17(2) of the 1973 Act.”

It is evident that arguments about repression of memory or silencing have failed to secure for victims of alleged historic abuse a later starting date (in terms of section 17(2)(b)) for the running of the triennium.¹³⁵

*M v O’Neill*¹³⁶ was the first historic abuse case in Scotland where preliminary proof was

¹³¹ *McE v de La Salle Brothers*; sub nom. *M v Hendron* [2007] CSIH 27; 2007 S.C. 556; 2007 S.L.T. 467 per Lord Osborne at [173].

¹³² *McE v de La Salle Brothers*; sub nom. *M v Hendron* [2007] CSIH 27; 2007 S.C. 556; 2007 S.L.T. 467 at [173].

¹³³ *McE v de La Salle Brothers*; sub nom. *M v Hendron* [2007] CSIH 27; 2007 S.C. 556; 2007 S.L.T. 467 at [173].

¹³⁴ *McE v de La Salle Brothers*; sub nom. *M v Hendron* [2007] CSIH 27; 2007 S.C. 556; 2007 S.L.T. 467 at [174]-[175].

¹³⁵ Although such factors may be relevant to the section 19A issue (disapplication of the time-bar on equitable grounds), the issue of prejudice to the defender usually proves to be determinative in that regard.

¹³⁶ *M v O’Neill* 2006 S.L.T. 823.

heard on the application of section 17(2)(b).¹³⁷ The pursuer sought damages for psychological injuries which she alleged were attributable to her experiences whilst resident in Smyllum Orphanage, Lanark, in the late 1960s. Although the pursuer sought assistance from various professional people about her mental and psychological difficulties, she did not tell them about her problems at the home. It was not until 1997 that she told anyone outside her family about the abuse. This came about when she saw a newspaper report about Smyllum Park in 1997. This, she said, brought back memories and she thereafter consulted solicitors. Her action, which was raised in May 2000, was met by a plea of time-bar. Lord Glennie stated:¹³⁸

“The pursuer must also have been aware that the psychological injuries were sufficiently serious to justify her bringing an action of damages. It is important in this context to note the statutory assumptions. She is assumed to know that liability will not be disputed. This has two consequences. First, she does not have to concern herself with any uncertainties, factual or legal, as to whether her action will succeed. She knows that, if she brings the action, she will succeed in establishing liability. Second, although she may still have to give evidence for purposes of establishing quantum, she will do so against the background that she knows that liability is not in dispute; and therefore there is no real possibility that her account of what happened will not be believed. This second point is of great importance, since it is often said that fear of not being believed is the greatest deterrent to the bringing of a claim in circumstances such as the present: see e.g. *Bryn Alyn at para 40*. That fear is removed from the equation by the statutory assumption. She is assumed also to know that the defenders are able to meet any award of damages. It seems to follow from these two statutory assumptions, that the factors relevant to an awareness of whether the injuries are “sufficiently serious to justify his bringing an action of damages” will be circumscribed. To put it colloquially: there is very little “downside” to bringing such an action. The question whether it is worthwhile bringing an action of damages will be judged substantially by reference to matters of quantum (“is it worth suing to get such and such an award?”). This is the approach suggested by Sir Thomas Bingham MR in *Dobbie at p 1241* when he said that the question (under the English provisions) was directed solely at the “*quantum* of the injury”, a suggestion which met with approval in *Carnegie v Lord Advocate at para 15*. I suspect that there may be cases where the pursuer is motivated not by the likely recovery of damages but by a need for vindication or “closure”. In such a case the “*quantum*” of the injury, if that is the right expression to use, may need to be looked at in a rather broader sense.”¹³⁹

His Lordship continued:¹⁴⁰

¹³⁷ In *B v Murray (No 1)* 2004 S.L.T. 967 the point had been dealt with on procedure roll.

¹³⁸ *M v O'Neill* 2006 S.L.T. 823 at [33].

¹³⁹ It is noteworthy that the pursuers in *B v Murray (No 2)* 2005 S.L.T. 982 disclaimed any interest in financial compensation (Mrs B’s position was explained by Lord Drummond Young at [136] as follows: “She considered that people have to be accountable, and she regarded himself as representing both herself and all victims of abuse. Mrs B stated that she did not want money, but wanted to see the nuns in court; she saw herself as representing others, and wanted to ensure that the Catholic Church could not hide behind a time bar.”

¹⁴⁰ *M v O'Neill* 2006 S.L.T. 823 at [38].

“...Once she is taken to be aware of the injuries and their possible attribution, the only other question is when she became aware, or could reasonably practicably have become aware, that they are sufficiently serious to justify bringing an action. In answering this question, it seems to me that the statutory assumptions discussed above circumscribe the inquiry. In particular, at this second stage, a reluctance to come forward for fear of not being believed is effectively excluded by the statutory assumption that the defenders will admit liability, i.e. will accept her account of what happened to her at the home as being true. It cannot therefore be considered as relevant to her assessment of whether the injury is serious enough to make it worthwhile bringing an action. The inquiry at this second stage is, therefore, whether it would have been reasonable for the particular pursuer to think it not worthwhile to make the claim, having regard essentially to matters of quantum.”

Lord Glennie observed:¹⁴¹

"... The question to be asked is whether, at some time more than three years before proceedings were commenced (i.e. by mid-May 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."

Lord Glennie concluded that long before 1997, the pursuer was linking her distressed mental state to her experiences at the home. Lord Glennie stated:¹⁴²

“The pursuer knew well before 1997 that she had been abused. She knew that she was suffering distress, which she linked to that abuse. The newspaper articles which began to appear in 1997 did not tell her anything about her injuries or their seriousness. All she learned from those articles was that there might be a possibility of making a claim. On the statutory test, this was irrelevant. She could only have decided to see a solicitor in October 1997 because she already knew of the abuse and that she was suffering distress in her mind as a result of it. The newspaper publicity simply gave her the insight and the encouragement to come forward. Without that existing knowledge, the newspaper article would have told her nothing. She could have come forward earlier. A reasonable person would have done so, and would thereby have acquired at an earlier date the knowledge — of attribution (in so far as there was any doubt about it), of diagnosis, and of the possibility of raising an action — which she in fact acquired in 1997–8. The explanations given for not coming forward earlier — fear of not being believed, reticence, embarrassment, low intelligence, or simple reluctance to come forward — are not relevant to the statutory test. Such characteristics are personal to the pursuer, are not

¹⁴¹ *M v O'Neill* 2006 S.L.T. 823 at [57].

¹⁴² *M v O'Neill* 2006 S.L.T. 823 at [48].

shown to have been caused by the alleged abuse, and are irrelevant to the objective nature of the test laid down in the statute.”

Lord Glennie emphasised that the statutory test was whether it was *reasonably practicable* for the pursuer to become aware of the statutory facts and stated:¹⁴³

“Feelings of inadequacy, embarrassment, reluctance to come forward, fear of being disbelieved...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 issue with which s17(2)(b) is concerned.”

The action was accordingly time-barred in terms of section 17(2)(b).

The approach evidenced in *M v O'Neill* has proved detrimental to victims of historic abuse many of whom have provided detailed averments as to why they have been inhibited from taking action. The courts have repeatedly emphasised, however, that the question under section 17(2)(b) is whether it would have been reasonably practicable for such victims to become aware of the statutory facts not whether they had a reasonable excuse for their inaction.

For the purposes of section 17(2)(b) the question is whether the pursuer was aware (actually or constructively) that he had suffered sufficiently serious injuries (in terms of quantum) to justify raising proceedings and that these injuries were attributable to an act or omission of the defender. It is not appropriate to ask whether an already damaged person suffering ongoing difficulties would reasonably turn his mind to litigation,¹⁴⁴ a point made by Lady Smith in a number of historic abuse cases brought against Quarriers homes. In *Godfrey v Quarriers*¹⁴⁵ her Ladyship, following debate on the issue of section 17(2)(b), stated:

“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... 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.”

Her Ladyship made identical remarks in four other cases against Quarrier's Homes which

¹⁴³ *M v O'Neill* 2006 S.L.T. 823 at [36].

¹⁴⁴ That question lay at the heart of the English Court of Appeal's approach in *KR & others v Bryn Alyn Community (Holdings) Ltd* [2003] QB 1441 but the “*Bryn Alyn* approach” -which was undoubtedly more sympathetic to the claimant- was subsequently disapproved in *A v Hoare* [2008] UKHL 6; [2008] 1 A.C. 844. Over the years, a number of pursuers in Scottish historic abuse cases had sought to rely on *Bryn Alyn* in their various arguments-see the *Quarriers* cases discussed below, *B v Murray (No 1)* 2004 S.L.T. 967, *McE v de La Salle Brothers; sub nom. M v Hendron* [2007] CSIH 27; 2007 S.C. 556; 2007 S.L.T. 467 and *M v O'Neill* 2006 S.L.T. 823.

¹⁴⁵ *Godfrey v Quarriers* [2006] CSOH 160] at [75].

came to debate before her.¹⁴⁶ In all five cases it was held, on the basis of the averments, that the pursuer *did* have the requisite awareness of the statutory facts more than three years before the raising of the action.¹⁴⁷

It will be remembered that knowledge of actionability is irrelevant to the section 17(2)(b) enquiry. In *Whelan v Quarriers and Porteous*¹⁴⁸ Lady Smith said:¹⁴⁹ “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”.

In each of the five Quarriers cases mentioned above, Lady Smith observed: “In reality what the pursuer’s case amounted to was 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.”¹⁵⁰

Many pursuers in historic abuse cases have attempted to utilise the lack of awareness provision where the essence of their case is that they were ignorant (or unaware) that they had a legal right of action until a fairly late stage in the day. Such ignorance of actionability (as the *Quarriers* litigation clearly demonstrates) cannot be relied upon to delay the running of time for the purposes of section 17(2)(b).¹⁵¹ From the perspective of abuse victims, this is unfortunate, particularly in view of dicta to the effect that the nature of the abusive treatment of vulnerable people in society may make them “even less likely to be able to appreciate their rights.”¹⁵² The difficulty is particularly pronounced where the victim is of low or limited intelligence.

The inescapable conclusion is that the date of awareness provision (which might assist victims of insidious or latent disease) is unlikely, at least as it is currently framed (and interpreted) to alleviate the hardship as far as historic abuse victims are concerned. It is clear that section 17(2)(b) has not been interpreted liberally by the courts. Indeed, in *Whelan v Quarriers and Porteous*¹⁵³ Lady Smith offered a justification for the strict approach taken in relation to the interpretation of section 17(2):

¹⁴⁶ *Whelan v Quarriers and Porteous* [2006] CSOH 159 at [70], *Stephen Findleton v Quarriers* [2006] CSOH 157 at [64], *Moira King v Quarriers* [2006] CSOH 156 at [74] and in *Jordan v Quarriers and Nicholson* [2006] CSOH 155 at [77].

¹⁴⁷ *Stephen Findleton v Quarriers* [2006] CSOH 157 at [63]; *Moira King v Quarriers* [2006] CSOH 156 at [73]; *Godfrey v Quarriers* [2006] CSOH 160 at [75]; *Whelan v Quarriers and Porteous* [2006] CSOH 159 at [69]; *Jordan v Quarriers and Nicholson* [2006] CSOH 155 at [76].

¹⁴⁸ *Whelan v Quarriers and Porteous* [2006] CSOH 159.

¹⁴⁹ *Whelan v Quarriers and Porteous* [2006] CSOH 159 at [67].

¹⁵⁰ *Whelan v Quarriers and Porteous* [2006] CSOH 159 at [70]; *Moira King v Quarriers* [2006] CSOH 156 at [74], *Stephen Findleton v Quarriers* [2006] CSOH 157 at [64]; *Jordan v Quarriers and Nicholson* [2006] CSOH 155 at [77]; *Godfrey v Quarriers* [2006] CSOH 160 at [75]. See, also, *Dobbie v Medway Health Authority* [1994] 1 W.L.R. 1234 where Steyn LJ stated in the context of the analogous English provisions (at 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 [the relevant statutory provision].”

¹⁵¹ Note, however, that section 19A of the 1973 Act (the judicial discretion to disapply the time bar) may be prayed in aid in such situations.

¹⁵² *B v Murray (No. 1)* 2004 S.L.T. 967 at [15] per Lord Johnston.

¹⁵³ *Whelan v Quarriers and Porteous* [2006] CSOH 159.

“[A]ccount 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 section 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.”¹⁵⁴

Given the paucity of historic abuse cases in which section 19A applications have succeeded¹⁵⁵ it is arguable whether section 19A has served the purpose of filling “any perceived gap” on the grounds that justice demands it.

The legal disability provision in the context of historic abuse

It will be remembered that in terms of section 17(3) of the 1973 Act the running of time is suspended while the injured party is subject to legal disability. It follows that, where abuse has been inflicted upon a child, time does not run until the period of nonage has ceased. Because most historic abuse actions are raised many more than three years after the attainment of legal capacity, other statutory provisions have traditionally been relied upon by pursuers, most obviously the date of awareness provision of section 17(2)(b) and the equitable discretion of section 19A.

As well as excluding any period of nonage from the calculation of the limitation period, section 17(3) of the 1973 Act also excludes any time during which the person who sustained the injuries “was under legal disability by reason of... unsoundness of mind.” It will be remembered that in *McE v de La Salle Brothers; sub nom. M v Hendron*¹⁵⁶ Lord Osborne said that “the running of time cannot be interrupted by a mental condition short of unsoundness of mind. In particular, it cannot be interrupted by the development of suppressed or impaired memory or induced reticence.” The pursuer in *McE* had made no averments in relation to unsoundness of mind. Indeed, while many adult survivors of abuse have averred that they are afflicted by various mental problems, (with some of them having been hospitalised or sectioned) none of them, to the writer’s knowledge, has sought to invoke the unsound mind provision of section 17(3). Perhaps this is because the term connotes a rather extreme state. In *D v Murray*¹⁵⁷ the pursuer alleged that he had been abused as a child while resident in Nazareth House, Aberdeen. He further averred that he suffered nightmares about the home throughout his teenage and adult life and received a diagnosis of PTSD in 2004. He did not aver however that any medical condition from which he suffered amounted to unsoundness of mind. In *Godfrey v Quarriers*¹⁵⁸ the pursuer alleged that he had developed an obsessive compulsive neurosis

¹⁵⁴ *Whelan v Quarriers and Porteous* [2006] CSOH 159 at [25]. Identical remarks were made in *Godfrey v Quarriers* [2006] CSOH 160 at [29]; *Moir King v Quarriers* [2006] CSOH 156 at [28] and *Jordan v Quarriers and Nicholson* [2006] CSOH 155 at [32]. (Note that as far as the English statutory provisions are concerned, the existence of the statutory discretion to extend the limitation period also appears to have had a bearing on the interpretation of the knowledge provision –see *Forbes v Wandsworth Health Authority* [1997] Q.B. 402 per Evans LJ at 422 and *Adams v Bracknell Forest Borough Council* [2004] UKHL 29; [2005] A.C. 498 per Lord Hoffmann at [45] and Lord Scott at [73]).

¹⁵⁵ See the discussion below.

¹⁵⁶ *McE v de La Salle Brothers; sub nom. M v Hendron* [2007] CSIH 27; 2007 S.C. 556; 2007 S.L.T. 467 at [175].

¹⁵⁷ *D v Murray* [2012] CSOH 109; 2012 G.W.D. 24-503.

¹⁵⁸ *Godfrey v Quarriers* [2006] CSOH 160.

and a post traumatic stress disorder, as a result of institutional child abuse. He was admitted to a psychiatric hospital in 1997 on account of a breakdown. While it was stated¹⁵⁹ that the pursuer suffered from severe mental illness, Lady Smith recorded that it was nowhere suggested that there had been any period during which he had lacked capacity since reaching majority. In *Stephen Findleton v Quarriers*¹⁶⁰ the pursuer sought damages from the defenders in respect of depression and post traumatic stress disorder. It was said that he had attempted suicide and had been sectioned under the mental health legislation for a while. The pursuer admitted to a long history of psychiatric problems for which he had been seen by psychiatric services from the 1970's. He had been diagnosed as having a personality disorder. After leaving the home at Quarrier's Village, he lived with his father, then carried out various forms of employment: Lady Smith observed:¹⁶¹ "It would seem, accordingly, that there is no question of the pursuer having lacked capacity during that period."

The equitable discretion provision in the context of historic abuse

In *Godfrey v Quarriers*,¹⁶² Lady Smith said that "the ordinary rule [of limitation] can operate too harshly so there are statutory provisions to alleviate that hardship."¹⁶³ One of those statutory mechanisms is the equitable discretion for which provision is made in section 19A of the 1973 Act. One commentator has remarked, however, that "the occasions when judges exercise this discretion remain rare."¹⁶⁴ This is particularly true in the realm of historic abuse where pursuers have had little success in invoking section 19A in their favour. This is regrettable, particularly in view of the strict interpretation which is applied to section 17(2)(b) of the 1973 Act. It will be recalled that in *Whelan v Quarriers and Porteous*¹⁶⁵ Lady Smith expressed the view that, owing to the existence of the statutory discretion, there was "no apparent need to interpret section 17(2) widely or liberally to fill any perceived gap on the grounds that justice demands it." Her Ladyship continued: "That is what section 19A is there for."¹⁶⁶ It is clear, however, that, in view of the primacy attached to the issue of evidential prejudice to the defender, the courts are not generally amenable to section 19A applications in the context of historic abuse. Victims of historic abuse are accordingly dealt a double blow as far as the limitation regime is concerned.

It will be remembered from the general discussion of section 19A above, that a full account of the reasons for the delay should be given in the pursuer's pleadings. In the context of historic abuse, such reasons might include repressed memory, induced reticence and a failure by an already damaged abuse victim to turn his mind to litigation. Indeed, there are judicial pronouncements to the effect that such matters may be relevant to the application of section 19A. In *McE v de La Salle Brothers; sub nom. M v Hendron*¹⁶⁷ Lord Osborne expressed the view that averments in relation to suppression of

¹⁵⁹ *Godfrey v Quarriers* [2006] CSOH 160 at [8].

¹⁶⁰ *Stephen Findleton v Quarriers* [2006] CSOH 157.

¹⁶¹ *Stephen Findleton v Quarriers* [2006] CSOH 157 at [7].

¹⁶² *Godfrey v Quarriers* [2006] CSOH 16.

¹⁶³ *Godfrey v Quarriers* [2006] CSOH 16 at [29].

¹⁶⁴ See Brian Pillans, *Delict: Law and Policy*, 5th edn (Edinburgh: W. Green, 2014), para 15-01.

¹⁶⁵ *Whelan v Quarriers and Porteous* [2006] CSOH 159.

¹⁶⁶ *Whelan v Quarriers and Porteous* [2006] CSOH 159 at [25].

¹⁶⁷ *McE v de La Salle Brothers; sub nom. M v Hendron* [2007] CSIH 27; 2007 S.C. 556; 2007 S.L.T. 467.

memory might be relevant to the application of section 19A as furnishing an explanation as to why proceedings had not been raised until a late stage. In *M v O'Neill*¹⁶⁸ Lord Glennie stated:¹⁶⁹

“[I]t would be highly material if the pursuer could show that her failure to bring the action in time was caused by the abuse, in the sense that the abuse resulted in, or contributed to, her reluctance to come forward. In some, perhaps most, historic abuse cases...it may be possible to show this.”

In several of the *Quarriers* cases, Lady Smith said that while the question of whether an already damaged abuse victim would consider resorting to litigation is *not* relevant to section 17, such a question may “properly arise” in relation to the section 19A enquiry.¹⁷⁰ These pronouncements might, at first sight, be thought to provide encouraging signs for historic abuse victims as far as section 19A is concerned. On closer examination, such optimism must be regarded as misplaced. Thus, in *McE*, the pursuer’s averments were said to contradict the contention that memory was suppressed¹⁷¹ while in *M v O'Neill*, Lord Glennie held that the argument that the abuse contributed to the reluctance to come forward could not, in the circumstances, succeed. His Lordship stated:¹⁷²

“The pursuer sought help for her psychological problems, but did not tell the relevant professionals anything about what she thought was the real cause, namely the abuse. I do not accept that that reticence in such circumstances can be said to result from the defenders’ alleged actions.”

The view expressed by Lady Smith (in the *Quarriers* litigation), to the effect that section 19A permitted enquiry as to whether a damaged person suffering ongoing difficulties would reasonably turn his mind to litigation, is not a view that has been universally adopted. Indeed, it is of note that Lord Drummond Young in both *B v Murray (No 2)*¹⁷³ and *D v Murray*¹⁷⁴ took a less generous approach to that issue.

Many victims of historic abuse have averred that they did not become aware of the right to claim compensation until a fairly late stage. Outwith the context of historic abuse, ignorance of the right to a legal remedy has served as a basis for the application of the section 19A discretion. It appears to have been a decisive factor in allowing a time-barred action to proceed in *Comber v Greater Glasgow Health Board*.¹⁷⁵ The nature of the pursuer’s injuries (a disfigured forehead following surgery) had rendered her reclusive and led to a delay in her seeking legal advice. She had thus remained ignorant of the

¹⁶⁸ *M v O'Neill* 2006 S.L.T. 823.

¹⁶⁹ *M v O'Neill* 2006 S.L.T. 823 at [92].

¹⁷⁰ See, for example, *Godfrey v Quarriers* [2006] CSOH 160 at [75].

¹⁷¹ *McE v de La Salle Brothers; sub nom. M v Hendron* [2007] CSIH 27; 2007 S.C. 556; 2007 S.L.T. 467 at [173]. In *A v Hoare* [2008] UKHL 6; [2008] 1 A.C. 844 Lord Carswell at [70] said that suppression of memory of assaults was germane to the discretion and suggested that it “should form a part, and in appropriate cases, a very significant part” of the equitable discretion enquiry.

¹⁷² *M v O'Neill* 2006 S.L.T. 823 at [92].

¹⁷³ *B v Murray (No. 2)* 2005 S.L.T. 982 at [106].

¹⁷⁴ *D v Murray* [2012] CSOH 109; 2012 G.W.D. 24-503 at [19].

¹⁷⁵ *Comber v Greater Glasgow Health Board* 1989 S.L.T. 639. Significantly, there was no suggestion of prejudice to the defender other than the loss of the imitation defence.

potential for legal action. Again, in *McLaren v Harland & Wolff*¹⁷⁶ the deceased's lack of awareness that he had a prospective right of action against the defenders in respect of asbestosis was said to "weigh heavily in favour of the pursuers"¹⁷⁷ and that action, too, was allowed to proceed. When the question of ignorance of a legal remedy came before Lord Drummond Young in *B v Murray (No 2)*¹⁷⁸ (the Nazareth House abuse cases) his Lordship described *Comber* as a "fairly extreme" and "somewhat exceptional" case.¹⁷⁹ While noting that all three pursuers in *B* had experienced considerable difficulties, Lord Drummond Young asserted that "[i]t is clear, however, that none of the present pursuers is anywhere near the situation of the pursuer in *Comber v Greater Glasgow Health Board*."¹⁸⁰

Many historic abuse claims have suffered dismissal on account of inadequacy of the pursuer's pleadings in relation to the section 19A issue while several others have not been allowed to proceed under the discretion owing to the issue of prejudice to the defender. These two issues will now be analysed in turn.

The matter of the adequacy of the pursuer's pleadings arose in *D v Murray*.¹⁸¹ There, the pursuer raised an action in 2000 arising from institutional abuse which was said to have occurred between 1974 and 1979. Following a procedure roll hearing, Lord Drummond Young held the action to be time-barred and refused to exercise his discretion to allow it to proceed. The pursuer had given no cogent explanation for the delay of over 14 years since he had attained the age of majority in 1985. The fact that he did not turn his mind to the possibility of litigation until he saw media reports in 1997 had been rejected as a relevant factor for exercising the discretion in *AS v Poor Sisters of Nazareth*; sub nom *B v Murray*.¹⁸² The pursuer's averments that he could not reasonably have been expected to institute proceedings before he read the newspaper reports, and that the delay was attributable to the pursuer's treatment by a particular nun lacked sufficient specification to permit proof. The pleadings were silent in relation to the psychological processes whereby treatment at the hands of the nun should cause the pursuer not to proceed with his action. Moreover, the likelihood of significant prejudice to the defenders was very clear. Defending the action would be particularly difficult as many years had elapsed

¹⁷⁶ *McLaren v Harland & Wolff* 1991 S.L.T. 85.

¹⁷⁷ *McLaren v Harland & Wolff* 1991 S.L.T. 85 per Lord Milligan at 90.

¹⁷⁸ *B v Murray (No. 2)* 2005 S.L.T. 982 per Lord Drummond Young.

¹⁷⁹ *B v Murray (No. 2)* 2005 S.L.T. 982 per Lord Drummond Young at [30].

¹⁸⁰ *B v Murray (No. 2)* 2005 S.L.T. 982 per Lord Drummond Young at [30]. See, also, the temporary judge's approach in *W v Trustees of the Roman Catholic Archdiocese of St Andrews and Edinburgh* [2013] CSOH 185; 2014 G.W.D. 1-25 at [27]. See, by way of contrast, *A v N* [2013] CSOH 161; 2013 G.W.D. 33-661; 2014 S.C.L.R. 225. (The pursuer's action based on historic sexual abuse was allowed to proceed, Lord Kinclaven observing that the first person to tell the pursuer that she had a possible right of civil action was her solicitor, Cameron Fyfe, in 2003.)

¹⁸¹ *D v Murray* [2012] CSOH 109; 2012 G.W.D. 24-503. The case is discussed in Eleanor J Russell, "Denying the discretion: a trilogy of cases" 2013 J.R. 95.

¹⁸² In *B v Murray (No. 2)* 2005 S.L.T. 982 Lord Drummond Young had stated at [106]: "The law must start from the proposition that everyone is aware of his or her rights, or at least has the means of ascertaining those rights. If people do not apply their minds to the question of whether such rights exist, it is difficult to see that there is any compelling reason for allowing them to bring actions well out of time."

since the occurrence of the events complained of. Moreover, attitudes towards the physical punishment of children had changed dramatically since the 1970s.

In 2006, seven historic abuse cases against Quarriers Homes came to debate before Lady Smith.¹⁸³ In three of those cases, the pursuers' section 19A pleas were repelled on the basis that their pleadings disclosed no adequate explanation for the delay. The actions were accordingly dismissed on grounds of relevancy. This was the result in *Godfrey v Quarriers*,¹⁸⁴ *Whelan v Quarriers and Porteous*¹⁸⁵ and *Jordan v Quarriers and Nicholson*.¹⁸⁶ In all three cases, Lady Smith observed:¹⁸⁷

“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...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 of the circumstances surrounding the delay.”

In *Godfrey v Quarriers*¹⁸⁸ Lady Smith said that a full account was required to explain why more than fifteen years had elapsed between the pursuer reaching the age of majority and his action being raised in November 2005. The averments did not provide such a full account. On the contrary, they were “sketchy and very general” and the seven year gap between 1997 and 2004 was “wholly unexplained.”¹⁸⁹

In *Whelan v Quarriers and Porteous*¹⁹⁰ it was incumbent upon the pursuer to provide a full account as to why more than 29 years had elapsed between his attaining the age of majority and the action being raised. The pursuer failed to do so. In addition, the delay was inordinate and a change of heart in relation to suing did not provide a sound basis for the exercise of the discretion.

In *Jordan v Quarriers and Nicholson*¹⁹¹ a full account was required to explain why more than thirty years had elapsed between the pursuer reaching the age of majority and the action being raised in March 2003. The pursuer's silence as to why it took her until Autumn 2001 to seek legal advice was wholly unsatisfactory, particularly as she was facing up to what had allegedly happened to her when she reported it to the police in

¹⁸³ In four of the cases, a preliminary proof was allowed in respect of the pleas directed to section 19A of the 1973 Act-see *Colin Findleton v Quarriers* [2006] CSOH 161; *Stephen Findleton v Quarriers* [2006] CSOH 157; *George King v Quarriers* [2006] CSOH 158; *Moirra King v Quarriers* [2006] CSOH 156. In the last case, the defenders had accepted that the pursuer had made relevant averments for her section 19A application.

¹⁸⁴ *Godfrey v Quarriers* [2006] CSOH 160.

¹⁸⁵ *Whelan v Quarriers and Porteous* [2006] CSOH 15.

¹⁸⁶ *Jordan v Quarriers and Nicholson* [2006] CSOH 155.

¹⁸⁷ *Jordan v Quarriers and Nicholson* [2006] CSOH 155 at [78]; *Godfrey v Quarriers* [2006] CSOH 160 at [76]; *Whelan v Quarriers and Porteous* [2006] CSOH 159 at [71].

¹⁸⁸ *Godfrey v Quarriers* [2006] CSOH 160.

¹⁸⁹ *Godfrey v Quarriers* [2006] CSOH 160 at [76].

¹⁹⁰ *Whelan v Quarriers and Porteous* [2006] CSOH 159.

¹⁹¹ *Jordan v Quarriers and Nicholson* [2006] CSOH 155.

1999 and had told her children about it before then.

In both *Godfrey* and *Jordan*, it was averred that the delay resulted from the treatment which the pursuer had endured and that it would not be equitable to sustain the time-bar plea in such circumstances. Lady Smith stated however that the question was *not* whether it would be equitable to allow the defender to advance a plea of time-bar but whether, in circumstances where the action is time-barred, it would be equitable to allow it to proceed.¹⁹²

While the cases discussed immediately above were dismissed following debate, in other historic abuse cases, where the test of relevancy is met, a preliminary proof has been allowed in relation to the equitable discretion. The issue of prejudice to the defender has often proved determinative in sealing the pursuer's fate, however.

In *M v O'Neill*¹⁹³ the pursuer raised an action in 2000 in respect of alleged institutional abuse in the late 1960s. The action was held to be time-barred and the court refused to exercise the discretion under section 19A. The action was dismissed. To allow the action to proceed would have resulted in considerable prejudice to the defenders. They would have been required to defend an action in relation to events which were alleged to have occurred some 35 years earlier. Such a lengthy delay leads inevitably to loss of evidence and a diminution in its quality. A fair trial was no longer possible.

In *AS v Poor Sisters of Nazareth; sub nom B v Murray*¹⁹⁴ three individuals raised proceedings in May 2000 in respect of physical abuse which was alleged to have occurred in Nazareth House children's home in the 1960s and 1970s. The matter of the equitable discretion came to preliminary proof before Lord Drummond Young.¹⁹⁵ His Lordship acknowledged that (i) the pursuers had been afflicted with considerable personal and psychological problems which would have inhibited them from initiating proceedings during the limitation period and beyond (ii) the pursuers did not expect that they would be believed if they ventilated their complaints and (iii) until 1997, they did not consciously realise that they could raise proceedings. All of these factors offered some explanation as to why the pursuers failed to initiate proceedings prior to 1997. Ultimately, however, these factors were outweighed by other factors namely the length of time which had elapsed,¹⁹⁶ loss of evidence, a change in attitude to corporal punishment in the intervening period and the emergence of a more liberal approach to the law on

¹⁹² *Godfrey v Quarriers* [2006] CSOH 160 at [77] and *Jordan v Quarriers and Nicholson* [2006] CSOH 155 at [79].

¹⁹³ *M v O'Neill* 2006 S.L.T. 823.

¹⁹⁴ *AS v Poor Sisters of Nazareth; sub nom B v Murray* [2008] UKHL 32; 2008 S.C. (H.L.) 146; 2008 S.L.T. 561.

¹⁹⁵ Lord Drummond Young's opinion is reported as *B v Murray (No. 2)* 2005 S.L.T. 982.

¹⁹⁶ The events complained of were said to have occurred between 1961 and 1979 and the delay beyond the statutory limitation period was at least 10 years. The court observed that the extent of the delay would make it difficult (among other things) to assess the significance of causative factors. It would need to be shown that the pursuers' losses were caused by the abuse rather than by the effects of their home backgrounds or the effects of institutionalisation -see *B v Murray (No 2)* 2005 S.L.T. 982 at [113]-[114].

vicarious liability. The defenders were thus able to establish actual prejudice in various ways. The 21 year delay (since the last allegation) was sufficient in itself to make it inequitable to allow the action to proceed. Lord Drummond Young stated that “actual prejudice, even of a fairly limited nature, will usually be sufficient to preclude any extension of the limitation period”¹⁹⁷ and continued:¹⁹⁸

“It seems to me that the two principal reasons for my decision, the length of time that has elapsed since the events complained of and the actual prejudice that has been demonstrated by the defenders, are both extremely powerful. I would regard either of those reasons by itself as sufficient to refuse to allow the actions to proceed.”

The action was dismissed. Both the Inner House¹⁹⁹ and the House of Lords²⁰⁰ subsequently endorsed Lord Drummond Young’s refusal to exercise the discretion. *AS* remains the only Scottish historic abuse case to have reached the House of Lords.

More recently, in *W v Trustees of the Roman Catholic Archdiocese of St Andrews and Edinburgh*²⁰¹ the Outer House refused to exercise the discretion in circumstances where sexual abuse was said to have been perpetrated by a priest who had died some years before the raising of the action. The issue of prejudice to the defender was pivotal. A crucial witness was dead. The action was dismissed.

*A v N*²⁰² is, to the writer’s knowledge, the only reported case in which a Scottish court has allowed an action arising from historic abuse to proceed albeit that it was time-barred. The case, which Lord Kinclaven described as “exceptional” was allowed to proceed essentially because it concerned allegations of sexual abuse (as opposed to non sexual, physical abuse) and was directed against the actual perpetrator of the abuse. Significantly, Lord Kinclaven was of the view that the defender had not suffered any real prejudice in his ability to defend the action as evidence had been preserved as part of earlier criminal trial processes.

In summary therefore, it is clear that section 17(2)(b) and section 19A, both statutory provisions of the 1973 Act which were designed to alleviate hardship, have done little to assist victims of historic abuse. Arguments based on the date of awareness provision have met with little success in the context of historic abuse.²⁰³ Indeed, the need for a liberal interpretation of section 17(2) has been judicially rejected owing to the existence of section 19A.²⁰⁴ Yet, section 19A has not been operated in a generous fashion in relation

¹⁹⁷ *B v Murray (No. 2)* 2005 S.L.T. 982 at [124].

¹⁹⁸ *B v Murray (No. 2)* 2005 S.L.T. 982 at [143].

¹⁹⁹ *AS v Poor Sisters of Nazareth; sub nom B v Murray (No.2)* 2007 S.C. 688.

²⁰⁰ *AS v Poor Sisters of Nazareth; sub nom B v Murray (No.2)* [2008] UKHL 32; 2008 S.C. (H.L.) 146; 2008 S.L.T. 561.

²⁰¹ *W v Trustees of the Roman Catholic Archdiocese of St Andrews and Edinburgh* [2013] CSOH 185; 2014 G.W.D. 1-25.

²⁰² *A v N* [2013] CSOH 161; 2013 G.W.D. 33-661; 2014 S.C.L.R. 225.

²⁰³ Of course, the legislation specifically provides that the pursuer’s lack of awareness of a legal remedy is irrelevant to the section 17(2)(b) enquiry.

²⁰⁴ See *Whelan v Quarriers and Porteous* [2006] CSOH 159.

to such victims of abuse. In those cases where the pleading requirements have been met, the courts have usually refused to exercise the discretion on the grounds that to do so would occasion prejudice to the defender. Moreover, the courts are generally unwilling to revisit the issue of the discretion on appeal.

Although many victims of childhood abuse appear to have suffered devastating psychological consequences, in none of the cases has it been averred that the pursuer was of unsound mind in terms of section 17(3) of the 1973 Act. There are judicial observations to the effect that suppression of memory and induced reticence (both of which commonly afflict abuse victims) are conditions which “fall short” of unsoundness of mind.²⁰⁵

In addition, developments in case law which were favourable to historic abuse victims (at least to those whose psychiatric problems emerged later in life) have been reversed. Thus, while at one time, a separate triennium was allowed in relation to later emerging injuries (the *Carnegie* approach), that avenue has now been withdrawn following the decision in *Aitchison v Glasgow City Council; sub nom. A v Glasgow City Council; F v Quarriers*.²⁰⁶

The inescapable conclusion is that there has been an abject failure on the part of the law to respond adequately to the claims of those victims of abuse who have been grievously wronged and whose lives have been blighted as a result. It is noteworthy that, in a number of actions against Quarrier’s Homes, the pursuer’s pleadings contained an averment to the effect that “[t]he disabling long term effect of the abuse must be given effect to.”²⁰⁷ Yet, as currently formulated, the law has proved incapable of giving effect to the disabling effect of abuse. Some reform of the law would seem to be urgently necessary.

The need for legislative reform

It has been said that the law of limitation “gives rise to many disputes and many difficult problems of interpretation.”²⁰⁸ It is submitted that nowhere are these disputes and difficult problems of interpretation more evident than in the context of historic abuse litigation. At present, the judiciary is working within the constraints of a legislative regime, the primary provisions of which simply do not address the difficulties which might be experienced by victims of historic abuse. Such difficulties typically include induced reticence and suppression of memory.²⁰⁹ When the legislative framework was

²⁰⁵ *McE v de La Salle Brothers; sub nom. M v Hendron* [2007] CSIH 27; 2007 S.C. 556; 2007 S.L.T. 467 at [175].

²⁰⁶ *Aitchison v Glasgow City Council; sub nom. A v Glasgow City Council; F v Quarriers* [2010] CSIH 9; 2010 S.C. 411; 2010 S.L.T. 358.

²⁰⁷ *Whelan v Quarriers and Porteous* [2006] CSOH 159; *Godfrey v Quarriers* [2006] CSOH 160; *Moir v King v Quarriers* [2006] CSOH 156; *Jordan v Quarriers and Nicholson* [2006] CSOH 155.

²⁰⁸ Walker, *The Law of Prescription and Limitation of Actions in Scotland* (2002), p.10.

²⁰⁹ See Frank Burton “Limitation, Vicarious liability and historic actions for abuse: a changing legal landscape” 2013 J.P.I.L 95 at 95: “Although time does not run against an abused child...due to a plethora of social and psychological factors cases are nearly always brought out of time. Children affected by sexual and physical abuse frequently feel ashamed, embarrassed or too traumatised to disclose the facts of their assaults... Until more recent changes in attitude and understanding children who did disclose were often not believed, frequently because the causes and consequences of being in care created damaged and vulnerable personalities targeted and groomed because of their lack of credibility. In addition, abusers exercised positions of power over children both through fear and favours to silence them. Psychologists and

put in place, such difficulties had not yet been ventilated. In this regard, the words of Lord Clarke are instructive:²¹⁰

“I myself am satisfied that the legislature, in passing the provisions of the 1973 legislation [the Prescription and Limitation (Sc) Act 1973], did not have in contemplation the kind of situation put forward in this case, involving repressed memory and the like, and that it is inappropriate to seek to stretch the statutory language beyond the sense it can bear, to seek to provide for some unforeseen case. If there is seen to be a problem in that respect, it is for the legislature to seek to solve it.”

Other difficulties which have arisen in the past *have* been addressed by way of legislative amendment. Thus, the legislation has been amended to incorporate a date of awareness provision and a judicial discretion to disapply the time-bar in order to address particular problems which had been highlighted in the case law. The hardship brought to notice by historic abuse cases must similarly be addressed. Clearly, no solution has been found within the current statutory framework. To borrow the words of Lord Reid in *Cartledge v E Jopling & Sons Ltd*²¹¹, “the mischief ... can only be prevented by further legislation.”

Proposals for Reform of the Law

The Scottish Law Commission has conducted a review of the provisions of the 1973 Act following which it issued its Report on *Personal Injury Actions: Limitation and Prescribed Claims* (Scot. Law Com. No. 207) (2007). The Report (to which a Draft Bill is appended) follows two references from the Scottish Ministers. The first reference requested, *inter alia*, that sections 17(2)(b) and 19A of the Prescription and Limitation (Sc) Act 1973 be examined. The second reference related to the position of personal injury claims which had been extinguished by the long negative prescription prior to 26 September 1984.

Scottish Law Commission’s Report on *Personal Injury Actions: Limitation and Prescribed Claims* (No. 207 (2007))

Issues arising from the First reference on limitation

The Commission proposes that, in a number of regards, the law of limitation should remain unaltered. It considers, for example, that the law in respect of onus of proof in limitation is satisfactory and that no statutory alteration is required.²¹² A date of knowledge provision should be retained, the term “awareness” continues to be appropriate and the legislation should continue to contain a constructive awareness

psychiatrists have also noted the capacity for victims of abuse to suppress the abuse and create a form of psychological denial only in later years to develop psychiatric problems, often induced by other stressors, but essentially caused by the abusive experience.”

²¹⁰ *McE v de La Salle Brothers; sub nom. M v Hendron* [2007] CSIH 27; 2007 S.C. 556; 2007 S.L.T. 467 at [187].

²¹¹ *Cartledge v E Jopling & Sons Ltd* [1963] A.C. 758 at 772. The problem which was highlighted in *Cartledge* was deemed not to be resolvable through the interpretative route, rather legislative amendment was deemed necessary.

²¹² Scottish Law Commission, *Report on Personal Injury Actions: Limitation and Prescribed Claims*, para 4.5.

test.²¹³ Knowledge that any act or omission was not as a matter of law actionable should continue to be irrelevant in the date of knowledge test.²¹⁴ Judicial discretion to allow a time-barred action to proceed should be retained and its exercise should not be subject to a temporal limit.²¹⁵ However, in a number of important respects, the Commission is convinced of the need for change. It is principally those proposals for change and their potential impact on victims of historic abuse with which the following discussion is concerned.

The Commission recommended an extension to the limitation period from 3 to 5 years.²¹⁶ It recommended reversal of *Carnegie* given that it ran counter to the principle that only one cause of action arises from a delictual act. In other words, if a claim for sufficiently serious injury is not pursued timeously, the subsequent emergence of additional injury, even if distinct, should not give rise to a fresh date of knowledge and a further consequential limitation period for a claim for that additional injury.²¹⁷

The Commission further recommended that the awareness test should contain an element of subjectivity with the result that the limitation period would not run while the pursuer was in the opinion of the court excusably unaware of one or more of the statutory facts.²¹⁸ The current test of reasonable practicability should not be retained.²¹⁹ In relation to the statutory assumptions which currently apply in relation to the first statutory fact (section 17(2)(b)(i)) the Commission took the view that they should be removed²²⁰ in that they create a tension. “On the one hand, the initial phrasing of the provision, with its reference to “sufficiently serious, suggests that one is looking for an injury which is in some sense “serious”; on the other hand, the statutory assumptions of a solvent defender and admission of liability invite the bringing of a claim for minor, “non-serious” injury.”²²¹

²¹³ Scottish Law Commission, *Report on Personal Injury Actions: Limitation and Prescribed Claims*, paras 2.5, 2.34 and 2.37 respectively.

²¹⁴ Scottish Law Commission, *Report on Personal Injury Actions: Limitation and Prescribed Claims*, para 2.30 wherein it is stated that “[i]f knowledge of actionability were to be one of the statutory relevant facts, that would lead to great uncertainty.”

²¹⁵ Scottish Law Commission, *Report on Personal Injury Actions: Limitation and Prescribed Claims*, paras 3.24 and 3.28.

²¹⁶ Scottish Law Commission, *Report on Personal Injury Actions: Limitation and Prescribed Claims*, para 2.59.

²¹⁷ Scottish Law Commission, *Report on Personal Injury Actions: Limitation and Prescribed Claims*, para 2.24. This has now been achieved judicially by virtue of the Inner House decision in *Aitchison v Glasgow City Council*; *sub nom. A v Glasgow City Council*; *F v Quarriers* [2010] CSIH 9; 2010 S.C. 411; 2010 S.L.T. 358.

²¹⁸ Scottish Law Commission, *Report on Personal Injury Actions: Limitation and Prescribed Claims*, para 2.53.

²¹⁹ Scottish Law Commission, *Report on Personal Injury Actions: Limitation and Prescribed Claims*, para 2.42.

²²⁰ Scottish Law Commission, *Report on Personal Injury Actions: Limitation and Prescribed Claims*, para 2.14.

²²¹ Scottish Law Commission, *Report on Personal Injury Actions: Limitation and Prescribed Claims*, para 2.10. It will be remembered that Lord Glennie in *M v O'Neill* 2006 S.L.T. 823 expressed the view at [33] that, as a corollary of the statutory assumptions, there was “very little downside to bringing such an action.”

The Commission recommended that the statutory references to “unsoundness of mind” should be replaced by a reference to the pursuer being incapable for the purposes of the Adults with Incapacity (Scotland) Act 2000 by virtue of section 1(6) of that Act.²²² The Commission also recommended the retention of the section 19A discretion²²³ and the introduction of statutory guidelines in relation to its exercise.²²⁴

Issues arising from the second reference on prescription

The Prescription and Limitation (Scotland) Act 1984 removed obligations to make reparation in respect of personal injuries from the operation of the long negative prescription but this was not done with retrospective effect.²²⁵ Some concern was expressed about the position of victims of physical and sexual abuse whose claims had already prescribed. In its 2007 Report, the Scottish Law Commission took the view²²⁶ that obligations which had been extinguished by the long negative prescription *prior* to the 1984 Act should remain extinguished.²²⁷ That conclusion was reached primarily in the interests of non-retroactivity. Any such legislation recreating obligations might be incompatible with the European Convention on Human Rights. Moreover, the revival of such obligations might not result in any practical benefit to pursuers as many actions would already have suffered limitation. Formidable factual difficulties would arise in any attempt to reconstruct events of 40 or 50 years ago in the much changed conditions of today. The Commission was also reluctant to discriminate between classes of claimants and so recommended against the creation of a special category of claims for institutional child abuse victims. To revive only one category of claim would occasion unfairness to others.²²⁸

Scottish Government’s Consultation and Subsequent Response thereto

The Scottish Government issued a consultation paper on 19 December 2012 “*Civil Law of Damages: Issues in Personal Injury-A Consultation Paper*.”²²⁹ One of the aims of the

²²² Scottish Law Commission, *Report on Personal Injury Actions: Limitation and Prescribed Claims*, para 2.71.

²²³ Scottish Law Commission, *Report on Personal Injury Actions: Limitation and Prescribed Claims*, para 3.24. (In response to the Commission’s earlier Discussion Paper (Scottish Law Commission, *Discussion Paper on Personal Injury Actions: Limitation and Prescribed Claims*) nearly all consultees agreed that the discretion should be retained.)

²²⁴ Scottish Law Commission, *Report on Personal Injury Actions: Limitation and Prescribed Claims*, para 3.37.

²²⁵ Section 5(3) of the 1984 Act. See *K v Gilmartin’s Executrix* 2004 S.C. 784; *M v Hendron* 2005 S.L.T. 1122.

²²⁶ Scottish Law Commission, *Report on Personal Injury Actions: Limitation and Prescribed Claims*, Part 5.

²²⁷ Given that the obligation in question was extinguished by the operation of the twenty-year prescription, the obligation would have become enforceable prior to 26 September 1964.

²²⁸ The Commission discussed the case of adult victims of abuse in the military whose claims relating to events before 1987 would have been met with the defence of Crown immunity. That defence was removed by the Crown Proceedings (Armed Forces) Act 1987 but its removal was not retrospective. Such victims of pre 1987 military abuse might equally argue that a special regime be created for them to allow their actions to proceed now that Crown immunity has been abolished. (See Scottish Law Commission, *Report on Personal Injury Actions: Limitation and Prescribed Claims*, para 5.19).

²²⁹ The consultation paper can be accessed at <http://www.scotland.gov.uk/Publications/2012/12/5980>. [Accessed October 29, 2014].

consultation was to explore the key recommendations made by the Scottish Law Commission in its 2007 Report and to ensure that any Bill taken forward is effective, robust and durable. The consultation ended in March 2013 and the Scottish Government issued its response to the consultation on 19 December 2013, “*Civil Law of Damages: Issues in Personal Injury -Scottish Government Response to the Consultation*” (Scottish Government, 2013).²³⁰

The action which the Government intends to take will be delivered through the Damages Bill. It intends to amend the 1973 Act as follows: by increasing the limitation period for raising an action for damages for personal injury from three to five years; by updating the reference to ‘unsoundness of mind’ in relation to which the limitation period does not run; by replacing the current assessment of ‘reasonably practicable’ in relation to the date of knowledge test with a more subjective awareness assessment of whether or not the pursuer was ‘excusably unaware’ of the statutory facts; and by providing a list of factors to assist the courts with the exercise of their discretion to allow an action to proceed when raised after the expiry of the limitation period.

Will the proposals for reform assist historic abuse victims?

As a preliminary point it should be noted that the Shaw Report revealed that one of the things that former residents of children’s homes want is the removal of the time bar.²³¹ This is recommended neither by the Scottish Law Commission nor by the Scottish Government. Singling out such victims for complete exemption from the limitation provisions is likely to face resistance in some quarters.²³² However, it may nonetheless be possible to remodel the legislative framework in a manner which makes it more sympathetic to the plight of historic abuse victims (in the same way as the date of knowledge provision was introduced in 1963 to deal with the mischief of insidious or latent disease and the equitable extension was introduced in 1980 to deal with other hard cases).

Raising the limitation period from 3 to 5 years

²³⁰ The response is available at <http://www.scotland.gov.uk/Publications/2013/12/7197>. [Accessed October 29, 2014].

²³¹ The Shaw Report, “Historic Abuse Systemic Review: Residential Schools and Children’s Homes in Scotland 1950 to 1995” (2007), Chapter 6. At a consultation event held in Glasgow on 11 April 2013, one view proffered was that there should not be a limitation period under the 1973 Act for historic abuse victims. This is also the position advocated by David Whelan, one of the pursuers in the litigation involving Quarrier’s Homes—see Whelan, *No More Silence* (2010), p277. See, also, *Henry Aitken Response to Scottish Government’s Consultation* available at <http://www.scotland.gov.uk/Resource/0044/00441092.pdf> [Accessed October 29, 2014].

²³² Objections to a special regime for such victims in the realm of *prescription* of obligations were expressed in the commission’s report (see Scottish Law Commission, *Report on Personal Injury Actions: Limitation and Prescribed Claims*, paras 5.17-5.19.) It was said that to revive only one category of prescribed claim would occasion unfairness to others. It is therefore suggested that the removal of historic abuse actions from the limitation regime would be resisted on similar grounds. See, also, Law Commission, *Limitation of Actions* (The Stationery Office, 2001), Law Com No. 270. The Commission recommended at para 4.25 that sexual abuse claims in England and Wales should remain subject to a limitation period (a view supported by 90% of consultees who responded to the question).

This proposal was prompted, in large measure, by the Commission's recognition that nowadays a greater proportion of personal injury litigation requires expert reports in order to establish liability and these reports might not always be capable of production within tight timescales.²³³ The suggested amendment would also remove the anomaly that claims confined to property damage are subject to a five year prescriptive period (in terms of section 6 of the 1973 Act) whereas actions which include a claim for damages for personal injury are subject to a three year limitation period.²³⁴

How then would this proposal impact on historic abuse cases? Given that the scenario which is generally presented in historic abuse cases is one where the victim is reluctant to engage with the legal system until well into adulthood, it is suggested that this proposal is unlikely to have a significant, if indeed any, impact on historic abuse cases which tend to be brought well beyond the limitation period.²³⁵ Indeed, one response to the Scottish Government's Consultation exercise stated:

"The recommendation that the limitation period be extended from 3 to 5 years will have no benefit for historical child abuse cases... The proposed 5 year period will still be an impediment to access to justice for those cases. It would have been far more radical, more equitable and a more just proposition if the Scottish Law Commission had removed historical child abuse cases from the Prescription and Limitation (Scotland) Act 1973."²³⁶

Unsoundness of mind and proposals for reform

The Scottish Law Commission takes the view that the term "unsoundness of mind" is outdated and recommends that it be replaced by a reference to the pursuer's being incapable for the purposes of the Adults with Incapacity (Scotland) Act 2000 by virtue of section 1(6) of the Act.²³⁷ The Scottish Government agrees that the term 'unsoundness of mind' is no longer appropriate and has the potential to be offensive. It proposes to replace it with a reference to the pursuer "being incapable for the purpose of pursuing an action for damages." It will be remembered that existing case law reveals that time cannot be interrupted by a mental condition short of unsoundness of mind (such as suppression of memory or induced reticence) and that, even in those cases where mental illness was averred, in none of them was it suggested the pursuer was of unsound mind. The Government observed that while the term "unsoundness of mind" is undefined "it seems to provide for a test of a high standard"²³⁸ whereas the suggested reformulation "will be a more reasonable and attainable test."²³⁹

²³³ Scottish Law Commission, *Report on Personal Injury Actions: Limitation and Prescribed Claims*, para 2.55.

²³⁴ Scottish Law Commission, *Discussion Paper on Personal Injury Actions: Limitation and Prescribed Claims*, para 2.49; Scottish Law Commission, *Report on Personal Injury Actions: Limitation and Prescribed Claims*, para 2.59.

²³⁵ See, for example, *AS v Poor Sisters of Nazareth*; sub nom *B v Murray* [2008] UKHL 32; 2008 S.C. (H.L.) 146; 2008 S.L.T. 561.; *Jordan v Quarriers and Nicholson* [2006] CSOH 155; *Godfrey v Quarriers* [2006] CSOH 160; *Whelan v Quarriers and Porteous* [2006] CSOH 159.

²³⁶ *Henry Aitken Response to Scottish Government's Consultation* available at <http://www.scotland.gov.uk/Resource/0044/00441092.pdf> [Accessed October 29, 2014].

²³⁷ Scottish Law Commission, *Report on Personal Injury Actions: Limitation and Prescribed Claims*, para 2.71.

²³⁸ *Civil Law of Damages: Issues in Personal Injury - Scottish Government Response to the Consultation* (Scottish Government, 2013), p8. Existing case law would appear to support that conclusion with *Bogan's*

Whether the condition of being “incapable for the purposes of pursuing an action of damages” will allow some historic abuse pursuers to proceed as of right under the primary provisions of the limitation regime will depend upon how the courts interpret the phrase. If it is interpreted liberally to embrace the pursuer who is for practical purposes disabled by the *sequelae* of abuse, it could include matters such as repression of memory, silencing etc. which, as the law stands at present, are not embraced by the term “unsoundness of mind.” The disabling effects of abuse may, as a result, be given recognition in terms of the new regime.

“Reasonably practicable” test in date of awareness provision

The Scottish Law Commission has recommended the retention of a constructive awareness test.²⁴⁰ The commission has observed that “[i]f actual awareness were relied on by itself, a claimant would be permitted to postpone the start of the limitation period by delaying, whether deliberately or through indifference or sloth, the making of reasonable enquiries and investigations. It would likewise be irrelevant that he overlooked facts that should have been apparent to him.”²⁴¹

The commission considered it unsatisfactory, however, that, in the application of the constructive awareness test, the existence of a reasonable excuse for the pursuer’s ignorance is treated as irrelevant.²⁴² In its 2007 review, the commission considered whether the awareness test should incline towards subjectivity rather than objectivity. The distinction between the two approaches was explained in the following terms:²⁴³

“An objective test applies the standard of a reasonable person who has suffered the particular injury in question; a more subjective test would take account of such factors as the pursuer’s mental capacity, state of education, financial resources or special personal features.”

Weighing up the potential unfairness of the two tests, the Commission continued:

“In the case of a pursuer of limited intelligence, however, a purely objective test may be unfair. On the other hand, a wholly subjective approach may be unfair to a defender by greatly extending the time in which he remains unprotected from having to answer a stale claim.”²⁴⁴

Curator Bonis v Graham 1992 S.C.L.R. 920 and *Elliot v J & C Finney* 1989 S.L.T. 208 indicating (respectively) that the severely brain damaged or comatose person would be embraced by the term.

²³⁹ *Civil Law of Damages: Issues in Personal Injury -Scottish Government Response to the Consultation* (Scottish Government, 2013), p8.

²⁴⁰ Scottish Law Commission, *Report on Personal Injury Actions: Limitation and Prescribed Claims*, para 2.37.

²⁴¹ Scottish Law Commission, *Report on Personal Injury Actions: Limitation and Prescribed Claims*, para 2.36.

²⁴² Scottish Law Commission, *Report on Personal Injury Actions: Limitation and Prescribed Claims*, paras 2.41-2.42.

²⁴³ Scottish Law Commission, *Report on Personal Injury Actions: Limitation and Prescribed Claims*, para 2.45.

²⁴⁴ Scottish Law Commission, *Report on Personal Injury Actions: Limitation and Prescribed Claims*, para 2.45.

The commission noted that the position in England and Wales has shifted towards a more objective approach²⁴⁵ but, notwithstanding that, the commission concluded that the test in Scotland ought to include an element of subjectivity. The commission stated:²⁴⁶

“The subjective element should include matters relating to the pursuer's assessment of his injury, such as his occupation or any pre-existing disability. It should also include his general education and intelligence. The critical question, it seems to us, is whether the pursuer's lack of awareness of the statutory facts can be considered excusable. The notion of excusability takes the subjective circumstances of the pursuer into account, but at the same time preserves an underlying objective element. It seems to us that it is undesirable to rely too heavily on the judicial discretion to disapply the time-bar; it is the provisions of sections 17(2) and 18(2), relating to lack of knowledge, that are primary, and the judicial discretion is essentially designed to cater for exceptional or anomalous cases. This seems to us to accord with the fundamental principle of the rule of law. If the pursuer's ignorance of a statutory fact is excusable for someone in his position, that should in our view prevent time from running.”

The Scottish Government has lent its support to the commission's proposal. It is suggested that such a reformulation of the statutory test would be welcome from the point of view of historic abuse victims. This is evident when one examines the existing case law and in particular cases such as *M v O'Neill*²⁴⁷ and *Godfrey v Quarriers*²⁴⁸ in both of which it was said that, in considering constructive awareness, the intelligence or personal characteristics of the pursuer should be disregarded.²⁴⁹ In *M v O'Neill*, Lord Glennie stated:²⁵⁰

“Feelings of inadequacy, embarrassment, reluctance to come forward, fear of being disbelieved...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 issue with which s17(2)(b) is concerned.”

That dictum would appear to suggest that a “reasonable excuse” test would have availed the pursuer, whereas the existing “reasonable practicability” test was incapable of so doing.

Under the proposal for change, the personal circumstances of the pursuer, such as his/ her education, intelligence or occupation *will* be taken into account in the assessment of constructive awareness. Given the psychological *sequelae* which often beset abuse victims (and the feelings to which Lord Glennie makes reference) this proposal must ultimately be to their benefit. Of course, in circumstances where shame, fear, confusion

²⁴⁵ See *Forbes v Wandsworth Health Authority* [1997] Q.B. 402 at 422; *Adams v Bracknell Forest Borough Council* [2005] 1 A.C. 76 at [45]. In both of these cases the adoption of an objective approach to constructive knowledge in England was influenced by the existence of a judicial discretion to disapply time bar. In *Adams* Lord Hoffmann stated (at [45]) that “the date of knowledge is no longer the sole mechanism for avoiding injustice to the plaintiff.”

²⁴⁶ Scottish Law Commission, *Report on Personal Injury Actions: Limitation and Prescribed Claims*, para 2.52.

²⁴⁷ *M v O'Neill* 2006 S.L.T. 823. See the observations of Lord Glennie at [57].

²⁴⁸ *Godfrey v Quarriers* [2006] CSOH 160. See the observations of Lady Smith at [65].

²⁴⁹ See, also, *G v Glasgow City Council* [2010] CSIH 69; 2011 S.C. 1 at [22]-[23].

²⁵⁰ *M v O'Neill* 2006 S.L.T. 823 at [36].

or silence engendered by the abuse are proffered as a “reasonable excuse” for failing to acquire the requisite awareness, they would (unless admitted by the defender) require to be proved by the pursuer.²⁵¹

Retention of Section 19A

The Government intends to retain section 19A within the statutory regime.²⁵² The Scottish Law Commission had identified the benefits of the equitable discretion as including flexibility and the ability to do justice to a pursuer whose failure to sue timeously is excusable.²⁵³ The commission made specific mention of the equitable discretion in the context of historic abuse litigation, stating:²⁵⁴

“[C]hild sexual abuse cases would benefit from the retention of judicial discretion. The awareness test may enable some victims of child sexual abuse to bring an action of damages as of right; that might occur for example, where the victim was aware of having been the subject of sexual activity with an adult during his childhood but reasonably regarded the experience as not inflicting personal injury sufficiently serious to sue until the later emergence of psychiatric illness and advice of its attributability to the childhood sexual activity. These cases nevertheless present a number of difficulties. Obviously the wrongful act will have taken place during childhood, but claims for damages may not be made until many years after the accrual of the cause of action and after the expiry of the limitation period at the age of the attaining legal capacity. Reasons for the delay vary from case to case but include changes in public awareness and attitudes. There are also disputed views among psychologists and psychiatrists of the possible consequences of child sexual abuse for a victim's subsequent ability to recall or recount the abuse. (*B v Murray* (No 2) [2005] CSOH 70; 2005 SLT 982 at paras [59]-[92]; affirmed [2007] CSIH 39; 2007 SLT 605.) A further difficulty is that, particularly in the case of children who have been in institutional care, complaints of sexual abuse may be allied with complaints of non-sexual abuse. The existence of judicial discretion may be a useful and pragmatic way of coping with these difficulties.”

The Commission concluded that the discretion to allow a time-barred action to proceed should be retained, and made the following observations:²⁵⁵

“It provides the flexibility crucial to enabling the courts to deal with hard cases equitably, which we think will inevitably arise even if the knowledge test is framed subjectively. These hard cases may stem from minor mishaps or misunderstandings which cause the

²⁵¹ Such afflictions were said not to be within judicial knowledge by Lady Smith in *Colin Findleton v Quarriers* [2006] CSOH 161 at [12]. See, also, the observations of Lord President Hamilton in *AS v Poor Sisters of Nazareth*; sub nom *B v Murray* [2007] CSIH 39; 2007 S.C. 688 at [35].

²⁵² *Civil Law of Damages: Issues in Personal Injury-A Consultation Paper* (Scottish Government, 2012), para 3.09.

²⁵³ Scottish Law Commission, *Report on Personal Injury Actions: Limitation and Prescribed Claims*, para 3.18.

²⁵⁴ Scottish Law Commission, *Report on Personal Injury Actions: Limitation and Prescribed Claims*, para 3.22.

²⁵⁵ Scottish Law Commission, *Report on Personal Injury Actions: Limitation and Prescribed Claims*, para 3.24.

time-bar to be missed by only a relatively short period, or they may arise for more substantial reasons, especially in the case of child sexual abuse. In this way the essentially arbitrary nature of a time-bar can be mitigated in deserving cases. This is not possible with even the most subjectively framed knowledge test.”

Although there has been little evidence hitherto of the exercise of the discretion in favour of historic abuse victims,²⁵⁶ it does seem to be in their interests that it be retained and the Scottish Law Commission’s proposal is therefore a welcome one.

statutory list of factors

The 1973 Act does not at present contain a list of factors to which the court must have regard in exercising its discretion.²⁵⁷ The Scottish Law Commission has recommended however that a statutory list of factors be introduced to assist in the application of section 19A.²⁵⁸ That recommendation has attracted the support of the Scottish Government which has said that the list of factors “will assist the courts and practitioners in addressing the issues around difficult cases such as actions by survivors of historic child abuse.”²⁵⁹

At a consultation event held in Glasgow on 11 April 2013, one view which was expressed was that judicial discretion in section 19A of the 1973 Act was not working for historic child abuse survivors. It was also said that a list of factors might have a negative effect in so far as it could become limiting with the potential to narrow what is currently a wide discretion.²⁶⁰ However, an opposing view was taken by Henry Aitken in his response to the Scottish Government’s consultation exercise. Aitken stated:²⁶¹

“It is a welcome recommendation by the SLC that the statutory list of factors to be considered by the courts in determining whether or not to allow an action to be brought, should be non- exhaustive, that any other relevant matter should be considered and that there should be no hierarchy among the matters listed. This approach allows for a sensible degree of flexibility and scope in the consideration of such often times, difficult cases.

However, the list of factors in Recommendation 15 could be enhanced, Aitken said, by the following additions:

i) the appropriateness of the actions taken and the measures put in place by management as a result of reports of child abuse by staff and children within the care organisation

²⁵⁶ *A v N* [2013] CSOH 161; 2013 G.W.D. 33-661; 2014 S.C.L.R. 225 is a rare example of its exercise in this context.

²⁵⁷ The English legislation does provide a list of factors to which the court must have regard in the exercise of its discretion (see section 33(3) of the Limitation Act 1980). The list is not exhaustive and the English courts may have regard to any other relevant factor.

²⁵⁸ Scottish Law Commission, *Report on Personal Injury Actions: Limitation and Prescribed Claims*, para 3.37. Interestingly, in *A v N* [2013] CSOH 161; 2013 G.W.D. 33-661; 2014 S.C.L.R. 225, counsel for the pursuer framed his argument for an equitable extension around the factors set out in the Commission’s Report, albeit that the list has not yet been enshrined in legislation.

²⁵⁹ *Civil Law of Damages: Issues in Personal Injury -Scottish Government Response to the Consultation* (Scottish Government, 2013), p.4.

²⁶⁰ Details of the event can be found in *Civil Law of Damages: Issues in Personal Injury -Scottish Government Response to the Consultation* (Scottish Government, 2013), p.22.

²⁶¹ *Henry Aitken Response to Scottish Government’s Consultation* available at <http://www.scotland.gov.uk/Resource/0044/00441092.pdf> [Accessed October 29, 2014].

ii) the completeness and quality of the instructions, guidance and information of their rights, given to children leaving the care organisation in preparation for them going out into the community and in equipping them well for future life.”

The Scottish Government has indicated that “greater detail can be provided than the SLC recommended”²⁶² and has expressed its hope that “a list of factors will help the consideration of hard cases such as those relating to survivors of historic child abuse.”²⁶³ Whether the additional factors proposed by Aitken will form part of that “greater detail” remains to be seen. Certainly, these additional factors are worthy of consideration in the section 19A enquiry (and they are certainly not excluded from consideration if the list is, as is proposed, non exhaustive in nature.) It is suggested, however, that to include them in the legislation would be to make the legislation too context specific. In this writer’s view, it would seem inappropriate to make provision for one special class of case within a general legislative scheme. It remains to be seen whether a statutory list of factors will lead to a more generous approach to section 19A in the context of historic abuse.

Other proposals in relation to the law and their potential impact on historic abuse victims

The Government has made three further announcements in relation to the law on prescription and limitation which are likely to adversely affect the ability of survivors of historic abuse to obtain reparation. These announcements demand some discussion.

(i) The Government has declared its intention to retain the one action rule. Although a majority of respondents supported that view, others argued that the principle had serious consequences for the survivors of historic abuse. Judges of the Court of Session²⁶⁴ agreed that there should be only one limitation period following the discovery of a harmful act and that there should be no exceptions to this principle. They further considered that there was no need to make provision for cases where it was known that the initial harm was actionable but where decisions not to litigate were taken in good faith in reliance on the rule in *Carnegie* before it was overturned by the Court in *Aitchison*. The judges took the view that it would be unsatisfactory to make provision for one special class of cases within a general legislative scheme. It was thought that, if there are problems in individual cases, they can be better addressed in an application for section 19A relief.

(ii) The Government has stated that it will not seek to revive personal injuries claims (including those arising from institutional childhood abuse) which had already prescribed prior to 26 September 1964. The Scottish Law Commission had argued strongly against the revival of such claims and that view was supported by 74% of those who responded in writing to the Scottish Government’s consultation. Among the 26% who disagreed were individual members of the public and, significantly, both of the representative bodies in relation to historic child abuse. The Government noted:

²⁶² *Civil Law of Damages: Issues in Personal Injury -Scottish Government Response to the Consultation* (Scottish Government, 2013), p.9.

²⁶³ *Civil Law of Damages: Issues in Personal Injury -Scottish Government Response to the Consultation* (Scottish Government, 2013), p.10.

²⁶⁴ See *Response by the Judges of the Court of Session to Scottish Government Consultation Paper: Civil Law of Damages: Issues in Personal Injury* available at www.scotland.gov.uk/Resource/0042/00429514.pdf [Accessed October 29, 2014].

“Two respondents who considered that prescribed claims should be revived argued that it can take many years before survivors of historic child abuse are mentally ready to come forward. Two members of the public described the feeling of not being able to revive such claims as being treated as a “non-person”, and being faced once again with people not listening to their story.”²⁶⁵

(iii) The Government does not propose to remove the statutory assumptions of admitted liability and solvency of the defender in relation to the date of knowledge test. It was not persuaded that such a reform would be beneficial and has declared its intention not to adopt the Scottish Law Commission’s recommendation in this regard. From the perspective of historic abuse victims, this is regrettable. It is submitted that the retention of the statutory assumptions is unlikely to operate in the interests of historic abuse victims, particularly when one examines what was said by Lord Glennie in *M v O’Neill*.²⁶⁶

“Once [the pursuer] is taken to be aware of the injuries and their possible attribution, the only other question is when she became aware, or could reasonably practicably have become aware, that they are sufficiently serious to justify bringing an action. In answering this question, it seems to me that the statutory assumptions ...circumscribe the enquiry...a reluctance to come forward for fear of not being believed is effectively excluded by the statutory assumption that the defenders will admit liability, i.e. will accept [the pursuer’s] account of what happened to her at the home as being true. It cannot therefore be considered as relevant to her assessment of whether the injury is serious enough to make it worthwhile bringing an action.”

It is unlikely that these three announcements will be greeted with any enthusiasm by the victims of historic abuse.

Conclusions

“Accounts of child abuse evoke feelings of horror and outrage, and yet it is well documented that adult victims of child abuse have frequently not received adequate compensation due to ...the arbitrary operation of limitation laws.”²⁶⁷ This article has sought to examine the difficulties which victims of historic abuse have faced in their attempts to obtain reparation in the Scottish courts. It is fast becoming evident that the ability of our justice system to impose liability on the perpetrators of abuse or their employers is limited at best, with many of the defenders having been awarded a “get out of jail free card.”²⁶⁸

²⁶⁵ *Civil Law of Damages: Issues in Personal Injury -Scottish Government Response to the Consultation* (Scottish Government, 2013), p.11.

²⁶⁶ *M v O’Neill* 2006 S.L.T. 823 at [38].

²⁶⁷ Paula Case, “Developments in vicarious liability; shifting sands and slippery slopes” 2006 PN 161 at 167.

²⁶⁸ This is how the limitation defence was described by senior counsel in *W v Trustees of the Roman Catholic Archdiocese of St Andrews and Edinburgh* [2013] CSOH 185; 2014 G.W.D. 1-25. The temporary judge summed up counsel’s submission as follows at [25]: “one of the fruits of crimes of sexual violence...was the silence of the victim ...it would be to award a "get out of jail free" card to defenders if the court were to take an approach in terms of which a simple rule of the passage of time was applied to the

Against this background, what will the future hold for the victims? It is clear that statutory reform is urgently required. Of course, certain reforms have been proposed by the Scottish Law Commission and by the Scottish Government. It has been suggested that some of these reforms may be of assistance to victims of historic abuse although the victims would no doubt argue that the proposed reforms do not go far enough. Disappointment is no doubt felt that there is no proposal to remove the time-bar for historic abuse victims, that the one action rule is to be retained, that extinguished obligations arising from abusive treatment are not to be revived and that lack of knowledge of actionability is likely to remain irrelevant to the date of awareness provision.²⁶⁹ It is also suggested that the retention of the statutory assumptions in relation to the date of awareness provision may be detrimental to the interests of historic abuse victims. Nonetheless, it is suggested that there is some cause for optimism and that the combined effects of a longer limitation period, a more subjective constructive awareness test, the replacement of the “unsoundness of mind” provision by a test which is more readily satisfied and the introduction of a statutory list of factors to assist in the application of the equitable discretion may go some way to delivering justice to such victims. They deserve no less.

effect that if a victim was traumatised into silence for 20 years, that claim must fail as stale.”

²⁶⁹ That is the recommendation of the Scottish Law Commission (see Scottish Law Commission, *Report on Personal Injury Actions: Limitation and Prescribed Claims*, para 2.30) which has been accepted by the Scottish Government—see *Civil Law of Damages: Issues in Personal Injury—A Consultation Paper* (Scottish Government, 2012), para 3.09.