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Abstract

This article examines the appropriateness of applying civil limitation laws to adult civil law claims in historical childhood abuse cases, focusing on issues of legal policy attending the use of such laws highlighted in the Australian case of *Brisbane South Regional Health Authority v Taylor*. It is argued that civil limitation laws are inappropriate when applied to such cases and that ultimately such laws often give primacy to the interests of alleged wrongdoers and to the need to protect alleged wrongdoers from civil law redress in a context in which the ordinary justification for such laws is weak when weighed against the enormity of the injury caused by the abuses complained of and the acute difficulties victims often face in pursuing timely enforcement action in respect of the childhood rights allegedly violated. The article also contains a review of recent developments in the law in several jurisdictions.

1 Introduction

In the recent past – in a variety of jurisdictions as geographically removed from one another as Scotland and Queensland, Australia[1] – numerous civil law claims brought by adults in relation to allegations of historical abuse in childhood[2] have been stopped in their tracks by the operation of civil limitation laws. These cases have afforded an opportunity to examine not only the policy objectives underlying civil limitation laws, and the moral basis of those laws, but the specific legal grounds for the rejection of individual claims where limitation laws are applied in the context of relevant claims. Civil limitation laws operate to confer immunity from civil proceedings. Inevitably, this raises the question whether, and the extent to which, the law, having conferred rights – for example, a right to compensation for personal injury – should at the same time create immunity from the enforcement of the same rights, such as where civil proceedings are barred

[1] For an examination of the impact of civil limitation laws on claims arising from allegations of historical childhood abuse under Australian law generally, see B Mathews 'Limitation Periods and Child Sexual Abuse Cases: Law, Psychology, Time and Justice' (2003) 11 *Torts Law Journal* 218. See also Mathews 'Judicial Considerations of Reasonable Conduct by Survivors of Child Sexual Abuse' (2004) 27 *University of New South Wales Law Journal* 631. See also L Hoyano and C Keenan *Child Abuse: Law and Policy Across Boundaries* (Oxford: Oxford University Press, 2007). And see also, generally, J Conaghan 'Tort Litigation in the Context of Intra-Familial Abuse' (1998) 61 *Modern Law Review* 132.

[2] See The Scottish Government *Scottish Government Consultation on the Removal of the 3 Year Limitation Period from Civil Actions for Damages for Personal Injury for in Care Survivors of Historical Child Abuse* (Edinburgh: 2015) available at http://www.gov.scot/Publications/2015/06/5970/6 (accessed 18 July 2017). In chapter 6, paras 6.7 and 6.8, the following useful outline of the scope of child abuse is provided: '[T]he National Guidance for Child Protection in Scotland which was published in 2010 and refreshed in 2014, set out the view that child abuse and child neglect are "forms of maltreatment of a child. Somebody may abuse or neglect a child by inflicting, or by failing to act to prevent, significant harm to the child". The guidance goes on to provide a description of the type of actions that would fall under the headings: physical abuse, sexual abuse, emotional abuse and neglect**. …** The terms of reference which have been agreed for the National Inquiry on Historical Child Abuse defines abuse as "physical abuse (including medical experimentation); sexual abuse; emotional abuse; psychological abuse, unacceptable practices and neglect"'.

after the passage of a defined period of time.[3] This question has a special resonance and immediacy when considering the steps recently taken in the UK by the Scottish Parliament to remove from the scope of civil limitation laws claims centring upon allegations of abuse in childhood.[4] Not only is that a significant development in terms of how it reflects evolving public attitudes towards the handling of such claims, but it hints at the presence of a wider debate enquiring into the appropriateness of applying civil limitation laws to that type of claim, and looking to the possibility of developing other responses to childhood abuse, whether historical or otherwise. The fact that currently there are two statutory enquiries underway in the UK with a remit to investigate historical childhood abuse also serves to draw attention to the wider context in which childhood abuse is now being viewed and responded to at governmental level.[5] The recent developments (particularly in Scotland) have also highlighted a 'disconnect' between judicial decision-making in childhood abuse civil limitation cases (as the case law had been

[3] Some may view the conferment of legal immunity as a legal right to commit a legal wrong; though that arguably distorts (or at least overstates) the position, drawing attention to the need to distinguish carefully between substantive law and adjective law. See OJ Herstein 'A Legal Right to do Legal Wrong' (2014) 34 *Oxford Journal of Legal Studies* 21. Herstein refers to diplomatic immunity as an example of a legal right to do legal wrong. Now while it may seem that a legal immunity, such as diplomatic immunity, confers a legal 'right' to commit a legal wrong on the basis that it can be viewed as a species of a generic Hohfeldian 'right' – like other Hohfeldian fundamental legal conceptions: eg claim-right, power, privilege – diplomatic immunity laws do not directly authorise wrongdoing at the level of substantive rights. Arguably they are best seen as conferring a more limited adjectival right of exclusion from the operation of a legal power (such as, for example, a power of prosecution) which would, in the absence of the exclusion, enable enforcement action to be taken by police and judicial authorities. It would be surprising to find an immunity law that conferred a *direct* substantive right availing between two individuals (for example, akin to a Hohfeldian claim-right or liberty right), to carry out an assault or a rape or a murder, or to rob a bank or drive recklessly or carelessly.

[4] See the Limitation (Childhood Abuse) (Scotland) Act 2017 (discussed below).

[5] For the Independent Inquiry into Child Sexual Abuse in England and Wales, see https://www.iicsa.org.uk (accessed 11 June 2018); and for the Scottish Child Abuse Inquiry, see https://www.childabuseinquiry.scot (accessed 11 June 2018). Northern Ireland's Historical Institutional Abuse Inquiry closed on 30 June 2017. See https://www.hiainquiry.org (accessed 11 June 2018).

developing over at least the last decade) and attitudes to childhood abuse generally as these had been taking shape within the same time frame in the public imagination and in the consciousness of the political community.

In this article it is proposed to examine the appropriateness of applying limitation laws to civil law claims brought by adults in respect of allegations of historical abuse in childhood, focusing on legal policy issues – and at points touching upon moral considerations – attending the use of such laws. The idea that the law – through the conferment of legal immunity – might somehow be 'protecting the wrongdoer' (as the title of this article suggests) necessarily turns on a 'one that got away' hypothesis. Any examination of the use and impact of civil limitation laws must take into account the possibility that in some cases, where limitation laws have been successfully invoked in a court setting, legal protection (in the sense of *immunity*) will in consequence have been extended to individuals who – *if* in relevant circumstances civil proceedings had not actually been effectively halted through the operation of limitation laws – *might or might not* have been found by the court to have committed the wrongdoing alleged by the party pursuing the relevant proceedings. It is the possibility that at least some *actual* wrongdoers – absent a determination of wrongdoing by a court – might walk away 'with impunity' from the judicial process that gives rise to perhaps the most pressing moral and legal policy issues to arise in this context.

In identifying reasons of legal policy justifying the statutory limitation of civil law claims, ordinarily we need look no further than the Australian case of *Brisbane South Regional Health Authority v Taylor*[6] (hereafter, the '*Brisbane* case'). Although the *Brisbane* case concerns a medical negligence claim, it has special relevance in the context of the time-barring of adult civil actions founded on allegations of historical childhood abuse, given that one of the opinions in the case – that of McHugh J – has frequently been cited as the classic statement of reasons of legal policy justifying the statutory limitation of such actions (thereby reinforcing judicial decision-making ordaining the time-barring of those actions).[7] A critical analysis of the four main rationales for civil limitation laws outlined by McHugh J – comprising the main analytical part of the discussion – follows later in this article. And towards the end there is a review of recent key legal developments in the UK and elsewhere and the possible implications of these developments (particularly under Scots law), looking to the future.

But in setting the scene for the later analysis, it is convenient first to highlight some recognised harmful effects on the mature adult of (abusive) physical or psychological trauma suffered in childhood whilst, at the same time, outlining a position on childhood abuse generally, and its harmful impact, aimed at giving the discussion a rudimentary moral perspective.

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[6] (1996) 186 CLR 541. See, in particular, pp 551–553 (McHugh J).

[7] See for example: *B v Murray (No 2)* 2005 SLT 982, especially at [22–28] (Lord Drummond Young); *M v O'Neill* 2006 SLT 823, especially at [96] (Lord Glennie); *AS v Poor Sisters of Nazareth* 2007 SC 688, especially at [41–45] (Lord President Hamilton); *Bowden v Poor Sisters of Nazareth and Others* [2008] UKHL 32, especially at [5] and [23–25] (Lord Hope of Craighead).

2 Impact of abusive experiences suffered in childhood

In seeking to define the scope of certain fundamental children's rights, Neil MacCormick starts with 'a simple and barely contestable assertion', which is that 'every child has a right to be nurtured, cared for, and, if possible, loved, until such time as he or she is capable of caring for himself or herself'. It is the recognition that the denial of these basic needs would be wrong that leads MacCormick to assert that children have a moral right to the fulfilment of such needs. It is implicit in MacCormick's position that such denial could, in normal circumstances, cause a child serious, and in relevant cases life-threatening or lasting, harm.[8] It goes without saying that childhood abuse, in so many of its manifestations, would constitute serious violations of the moral rights (of children) that MacCormick takes to be self-evident.

The moral case for laws that protect children from harm rests not only on the self-evident requirement for fulfilment of a child's most basic needs, but on factors such as a child's intrinsic vulnerability – and (in infancy)

[8] DN MacCormick *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (Oxford: Oxford University Press, 1982) pp 154–155. Following John Finnis and others, I take the view that certain kinds of harm deemed worthy of protection by law are more readily identifiable as *central cases* of harm than as cases more obviously on the periphery, which (latter) cases could, in the result, fall within contestable categories of 'harm', such as offence or negligible harm caused to others. For morally compelling reasons, a variety of forms of harm to children represent central cases of harm in relation to which it is clearly necessary for the law to provide both criminal *and civil* law protection. As Finnis observes: 'I prefer to call the states of affairs referred to by a theoretical concept in its focal meaning the *central case(s)*.' This enables differentiation of '… the mature from the undeveloped in human affairs, the sophisticated from the primitive, the flourishing from the corrupt, the fine specimen from the deviant case … but all without ignoring or banishing to another discipline the undeveloped, primitive, corrupt, deviant, or other … instances of the subject-matter …'. See J Finnis *Natural Law and Natural Rights* (Oxford: Oxford University Press, 2nd edn, 2011) pp 10–11.

helplessness – relative to adults and, in some cases, to other children. Power imbalances in human affairs are inevitable and may not always be a bad thing: for instance, where a powerful state comes to the aid of a weaker state threatened by a hostile neighbour. Yet domination of the weak by the powerful is more often than not corrupting and exploitative. For children, the twin necessities of positive intervention (fulfilling a child's basic needs) and negative constraint (eg prohibiting violations of a child's physical, mental and sexual integrity) are called into play as the moral basis for articulating protective rights enshrined in law. But arguably, beyond those necessities, there are considerations arising from the more general desire to promote human well-being where, ideally, a child's physical, social, cognitive, educational, and emotional development is to be actively fostered as an end in itself.[9]

The consequences of protective failure – especially failure at the level of negative constraint (for instance, the failure of law and its enforcement mechanisms to safeguard a child's physical, mental and sexual integrity) – may be drastic and irreversible. Thus, it is widely recognised in the literature of human and medical sciences – including, in particular, writings in areas such as psychiatry, psychology and sociology – that the psychology and quality of life of mature adults may be detrimentally affected by abusive

[9] The rights in question may be designed to protect *everyone* (eg from assault). But a range of specific rights of the child has been articulated in the recent past. See in general the Convention on the Rights of the Child and reports of the UN Committee on the Rights of the Child available at http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx (accessed 18 July 2017). See also, more generally, Finnis, above n 8.

experiences suffered in childhood. Studies examining the long-term trauma caused by physical and sexual abuse experienced in childhood point to ongoing psychological and behavioural dysfunctionality: depression, anxiety, self-destructive behaviour, substance abuse, impaired sleep patterns, difficulties in trusting others, feelings of isolation, stigma, and guilt, low self-confidence, and the tendency to be revictimised in adulthood. One such study in particular has highlighted significant adult adjustment problems including psychological and personality disorders, relationship and parenting problems, occupational and health difficulties, and a generally diminished quality of life.[10] Symptoms of childhood sexual abuse emerging in adulthood have included sexual maladjustment and dysphoria, impaired sexual self-esteem, and abstention from sexual activity.[11] What is noteworthy about the effects of childhood abuse is that apart from causing immediate injury and misery to the child victim – where the abuse may be as serious a contravention of criminal and civil law prohibitions as child rape, sexual assault, physical assault, or neglect – the recognition that the effects of the abuse may persist into adulthood underlines the seriousness of the abuse in terms of harm, and permanence of harm, caused to the victim.

[10] See Mr Justice Ryan (principal author and Commission chairperson) *Report of the Commission to Inquire into Child Abuse* (Dublin: The Stationery Office, 2009) Vol V, at [3.30] available at http://www.childabusecommission.ie/rpt/pdfs/ (accessed 18 July 2017). This study informs the Ryan Commission's investigation of institutional child abuse in the Irish industrial and reformatory school system.

[11] See in particular A Browne and D Finkelhor 'Impact of Child Sexual Abuse: A Review of the Research' (1986) 99 *Psychological Bulletin* 66. See also H Al-Modallal et al 'Impact of Physical Abuse on Adulthood Depressive Symptoms among Women' (2008) 29 *Issues in Mental Health Nursing* 299; J Spataro et al 'Impact of child sexual abuse on mental health' (2004) 184 *British Journal of Psychiatry* 416; S Bendall et al 'Childhood Trauma and Psychotic Disorders: a Systematic, Critical Review of the Evidence' (2008) 34 *Schizophrenic Bulletin* 568; N Rodriguez et al 'Posttraumatic Stress Disorder in a Clinical Sample of Adult Survivors of Childhood Sexual Abuse' (1996) 20 *Child Abuse and Neglect* 943; F Lindberg and L Distad 'Post-Traumatic Stress Disorders in Women who Experienced Childhood Incest' (1985) 9 *Child Abuse and Neglect* 329 at 332–333.

When an individual violates civil law prohibitions only to (later) take advantage of legal immunities, he or she is given a kind of protection from the laws thus violated.[12] And that raises a key issue for an assessment of the policy objectives underlying civil limitation laws and their moral underpinning. If we hold that civil laws have a protective function over and above their primary restorative and compensatory functions – in operating, in some measure, to disincentivise certain types of wrongdoing – then, one would imagine, any attempt to negate that end, particularly a legally sanctioned one that effectively protects wrongdoers, would call for an equivalently compelling moral and policy justification. In the narrower context of the present discussion, then, we might ask whether the rationale for civil laws in the area of tort (in Scots law, delict) that give some measure of protection to children against the harm caused by childhood abuse is at least commensurate with the rationale for the conferment of immunity from such laws through civil limitation laws. In pursuing this question, the *Brisbane* case, as already indicated, provides a useful repository of reasons of legal policy justifying the statutory limitation of civil law claims. The critical exploration of Justice McHugh's opinion in that case, which now follows, commences with a brief outline of one or two relatively recent cases

[12] Essentially, as has already been noted (see Introduction above), an assumption must be made that the individual has *in fact* violated relevant civil law prohibitions and that, had relevant allegations been tested in civil law proceedings which had not been halted by the operation of civil limitation laws, the truth of the allegations would have been established to the satisfaction of, and standard of proof required by, a court.

(including a House of Lords decision) that have accorded the opinion a striking degree of significance.

3 *Brisbane South Regional Health Authority v Taylor*

What is immediately surprising about judicial reliance on the *Brisbane* case is that, on one hand, the case has nothing specific to say about historical childhood abuse claims while, on the other, the opinion of McHugh J largely summarises general legal policy arguments for the existence of civil limitation laws outlined in earlier case law and other sources without itself necessarily innovating upon, or adding materially to, the sources cited. This makes it perhaps all the more puzzling that judicial reliance on McHugh J's opinion in civil law claims alleging childhood abuse has been so pervasive and, more often than not, uncritical, in relatively recent case law.

For instance, in the Scottish case of *B v Murray (No 2)*[13] – a case concerning allegations of historical physical abuse of children – Lord Drummond Young commented (sweepingly) that *all* of the rationales for civil limitation laws outlined by McHugh J in the *Brisbane* case applied to the case then before the court; though the loss of evidence rationale (see the first rationale discussed below) perhaps precipitated his decision on the basis that, in evidentiary terms, quality of justice is invariably assumed to deteriorate with

[13] Above n 7, at [21–28], but especially at [21] (Lord Drummond Young).

the lapse of time. In the House of Lords decision in *Bowden v Poor Sisters of Nazareth and Others*,[14] Lord Hope endorsed Lord Drummond Young's position (indirectly derived from McHugh J's opinion) that one of the key objectives of civil limitation laws is to avoid the real possibility of significant prejudice befalling the party sued.[15] In the same case, Lord Hope also approved the public interest argument articulated by McHugh J in the *Brisbane* case.[16] (See the fourth rationale discussed below.)

It is important to note that the *Brisbane* case has been cited approvingly not only in childhood abuse cases originating in the Scottish courts but in like cases decided under English law (usually) in the context of judicial discussion of the rationales underpinning civil limitation laws.[17] And, as might be expected of a case originating in the Australian High Court, the case is routinely cited in civil litigation arising in Australia.[18]

[14] Above n 7.
[15] Ibid, at [25].
[16] Ibid, at [5].
[17] See *Vincent Roland Albonetti v Metropolitan Borough of Wirral* [2008] EWHC 3523 (QB), especially at [18] (McKinnon J). See also *F, S v TH* [2016] EWHC 1605 (QB), at [12] (Langstaff J). English case law that does not expressly cite the *Brisbane* case but nonetheless supports or gives credence to McHugh J's primary rationale for such laws, namely his first rationale discussed below – ie deterioration of evidence over time, more often than not expressed as the judicial imperative to resist 'stale claims' – has been taken as a given in leading cases. See, for instance, *A v Hoare* [2008] 1 AC 844, especially Baroness Hale at [54]. See also *Yew Bon Tew v Kenderaan Bas Maria* [1983] 1 AC 553, at 563 (Lord Brightman); *AB v The Catholic Child Welfare Society (Diocese of Middlesbrough) and Others* [2016] EWHC 3334 (QB); and *RE v GE* [2015] EWCA Civ 287. In *Dobbie v Medway* [1994] 1 WLR 1234, Sir Thomas Bingham MR comments at p 1238: '[Civil limitation rules are] no doubt designed in part to encourage potential claimants to prosecute their claims with reasonable expedition on pain of being unable to prosecute them at all. But they are also based on the belief that a time comes when, for better or worse, defendants should be effectively relieved from the risk of having to resist stale claims'.
[18] See, for example, *Carter v Corporation of the Sisters of Mercy of the Diocese of Rockhampton & Ors* [2001] QCA 335, especially at [19] and [34] (McPherson JA); and *Howley v Principal Healthcare Finance Pty Ltd* [2014] NSWCA 447, especially at [46–48] (McColl JA).

So, using the opinion of McHugh J as a convenient springboard, there follows a critical discussion of each of the rationales for civil limitation laws outlined in his opinion – both generally and in terms of the appropriateness of each rationale when viewed in the particular context of historical childhood abuse claims. The first and most frequently cited rationale for civil limitation laws centres on the deterioration in the quality of justice that is said to occur when there is a delay in pursuing appropriate civil law proceedings. That is the rationale to which we now turn our attention.

3.1 *Rationale: deterioration in quality of justice by reason of delay*

At the broadest level the case for civil limitation laws conventionally turns on the idea, highlighted by Lord Hailsham in the context of a criminal appeal, that where there is delay 'the whole quality of justice deteriorates'.[19] Delay is perhaps the most convincing rationale for civil limitation laws out of all of those outlined by McHugh J and has often been uncritically accepted whenever the applicability of civil limitation laws is judicially under discussion.

As time passes, evidence relevant to a case may be entirely lost or become unobtainable, such as where important documents (eg files, papers, notes of meetings or conversations, and so on) have been disposed of or

[19] *R v Lawrence* [1982] AC 510, especially at 517 (Hailsham of St Marylebone LC).

destroyed, or forensic evidence is no longer obtainable, or a key witness has died. Memories of significant events or circumstances may fade and indeed *significance itself* may be called into question, such as where the relationship between an event or circumstance to a cause of action is 'no longer as apparent as it was when the cause of action arose'.[20] At worst, important – even decisive – evidence may disappear without anyone knowing that it ever existed. There is no doubt that these are important qualifications upon the ability of a court or other forum of enquiry even to arrive at the truth, far less to render justice where court proceedings are concerned.

But should it be assumed that passage of time always and necessarily diminishes the quality, or restricts the availability, of the evidence upon which a civil claim or other proceedings might be based? For instance, changes in public attitudes may create a new climate of openness to public debate where activities previously regarded as taboo or 'off-limits' to discussion – incest, for example – come to be discussed and commented upon more freely in the public domain. In appropriate situations, such as where the relevant activities are criminally or civilly wrongful, individuals may be more willing to come forward and report offences to the authorities or give evidence to a court or recount their personal experiences in a public or private setting. It may be that the weight of similar evidence from a variety of witnesses – which, it may be assumed, would not necessarily come

[20] *Brisbane* case, above n 6, p 551 (McHugh J).

to light *but* for the emergence, through the passage of time, of a climate of openness – may be all the more credible the more consistent the evidence of witnesses is across the board.[21]

Furthermore, broad assumptions about the fallibility and unreliability of eyewitness evidence, and evidence based on direct experience – being necessarily reliant upon the vagaries of memory – may need modifying to take account of the uniqueness of individual cases. For instance, in *R v Lawrence*, Lord Hailsham comments as follows:

> Our system depends on the recollection of witnesses, conveyed to a jury by oral testimony. As the months pass, this recollection necessarily dims, and juries who are correctly directed not to convict unless they are assured of the reliability of the evidence for the prosecution, necessarily tend to acquit as this becomes less precise, and sometimes less reliable.[22]

While Lord Hailsham's observation may seem unassailable as a general proposition it remains a fact that certain witness experiences can be so

[21] In recent years the introduction of freedom of information laws in the UK and elsewhere has enabled individuals to gain access to records or information previously inaccessible or protected. Here, key information would not become available *but* for the passage of time towards a new era of openness. See JM Ackerman and IE Sandoval-Ballesteros 'The Global Explosion of Freedom of Information Laws' (2006) 58 *Administrative Law Review* 85–130. Ackerman and Sandoval-Ballesteros comment as follows (at p 99): 'An ideal [freedom of information] law should cover all bodies that receive money, including all branches of government, autonomous agencies, non-profit organizations, individuals, private contractors, and foundations. It would also open up to public scrutiny any 'body' that carries out a function vital to the public interest (for example, private hospitals, schools, prisons), regardless of whether it receives government funding'.

[22] Above n 19, p 517.

traumatising that vivid memories remain with witnesses for a lifetime, particularly if the witness is, at one and the same time, *victim* – at the receiving end of violent, abusive or inhumane treatment. The idea that the memories of this kind of witness would *necessarily* dim is at least questionable, and takes no account of the psychological make-up of individuals who have undergone definingly negative experiences. Thus, in a study of adult women who had experienced incest in childhood, members of the study group affirmed that what they had experienced was 'the most psychologically traumatic and damaging event of their lives'.[23] Moreover reports continue to emerge from different parts of the world of the historical experiences of children – such as residents of educational establishments – who have been subjected to abuse over lengthy periods where the abuser has been the same person. Clearly, in such a situation individual instances of abuse – the precise nature of the abusive acts committed on a particular date and the exact number of times when such acts were committed – may be difficult, if not impossible, to recall in detail. But it is minimally likely that the victim would recall that the abuses in question took the form of a prolonged and sustained course of conduct on the part of a single perpetrator.[24] In some cases that fact alone may serve to make the abuse

[23] See F Lindberg and L Distad, above n 11, at 331.

[24] For example, see Royal Commonwealth of Australia *Royal Commission into Institutional Responses to Child Sexual Abuse*, 'Report of Case Study No 11 – Congregation of Christian Brothers in Western Australia response to child sexual abuse at Castledare Junior Orphanage, St Vincent's Orphanage Clontarf, St Mary's Agricultural School Tardun and Bindoon Farm School' (2014) available at: http://childabuseroyalcommission.gov.au/getattachment/27a80b05-2b21-48ec-bd94-2f3f02522596/Report-of-Case-Study-no-11 (accessed 26 July 2017). Para 2.1 on p 21 reports an adult witness's recollection of prolonged abuse by the same individual: 'Mr Albert McGregor described being psychologically abused by Brother Murphy at Castledare. The abuse first started when he was about eight years old and continued until he was about 12 years old, when he had a nervous breakdown'.

unforgettable, even if the wider factual context of the abuse, and matters of detail not especially relevant to the abuse, are difficult to recollect.[25]

Ultimately, it may seem ironic that the most compelling case for civil limitation laws cited by McHugh J centres on the idea (given expression by Lord Hailsham) that delay in the criminal law setting causes the whole quality of justice to deteriorate. In the civil law context this appears to resolve into a more convincing case, indeed a *plea*, for ensuring that evidence in civil proceedings is the subject of appropriately rigorous methods of testing and evaluation than for ensuring that civil law rights (of purported longevity) are, at least for practical purposes, 'extinguished'.[26] In other words it seems drastic that the preferred solution to the problem of evidentiary deterioration might be found in what amounts to – for most practical purposes – the elimination of civil law rights after the lapse of an arbitrarily determined and usually relatively short period of time,[27] rather than (for

[25] See K Westcott and T de Castella 'The decades-long shadow of abuse' *BBC News Magazine* (London: 25 October 2012) available at http://www.bbc.co.uk/news/magazine-20066508 (accessed 26 July 2017). As Lucy Duckworth, a (now adult) victim of abuse in childhood and child abuse campaigner comments in this article: 'Not fully understanding at the time that the abuse was wrong, the child [who is being subjected to abuse at a given time] is not attempting to absorb detail … . Decades later, being quizzed by a detective, the adult victim can find it hard to recall the colour of a carpet or the orientation of a room. These are the details that can underpin a witness statement'.

[26] Looking at Scots law, technically, civil limitation laws do not operate to extinguish rights. The option to apply limitation laws in the context of a particular claim ordinarily lies with the party sued, so that for all practical and legal purposes when limitation laws are successfully invoked the claimant's substantive rights become unenforceable. (In that situation it may matter little that the underlying substantive rights remain intact.)

[27] Under English law (Limitation Act 1980, s 11) the limitation period applying to an action for damages in respect of personal injury is three years from the date on which the action accrued or the date of knowledge (if later) of the person injured. In Scotland, with the enactment of the Limitation (Childhood Abuse) (Scotland) Act 2017 on 28 July 2017, a three-year limitation period in respect of personal injuries not resulting in death was disapplied in childhood abuse cases. (The Act came into effect on 4 October 2017.) The Scottish position in the light of the 2017 Act (and its likely pitfalls and constraints) and the court's discretionary power under English law (ie the Limitation Act 1980, s 33) to disapply the 1980 Act, s 11 (as interpreted by *A v Hoare*, above n 17) are discussed further below. Previously in Scotland the optimum period within which civil redress had to be commenced lapsed as soon as a (potential) claimant attained the age of 19. Under Scots law it was necessary for a claimant

instance) in attempts to improve techniques of collection, preservation and testing of evidence; or to make suppressed evidence more accessible; or to tighten rules of procedure and evidence (to make the rules more exacting); or to introduce general measures to address delays in the administration of justice. Moreover, the grounding of the key rationale for civil limitation laws in an assumption that passage of time diminishes the quality or availability of evidence appears to preclude the possibility of testing that assumption in actual cases. Thus civil limitation laws largely operate without the party sued being required to demonstrate – eg by way of an appropriately diligent investigation – that relevant evidence, records and witnesses are *in fact* unavailable or inaccessible and that this would prejudice that party's interests in civil proceedings.[28] It is a kind of defeatism to assume that the passage of what is often a relatively short limitation period will necessarily cause evidentiary deterioration including, in Lord Hailsham's words, deterioration in 'the whole quality of justice'. This approach transforms a claimed concern for quality of justice overall – implying justice for the party

to raise an action before reaching that age in order to avoid the action being time-barred. The three-year limitation period started to run when a potential claimant reached 16 – being the age of full legal capacity. This was the position under the Prescription and Limitation (Scotland) Act 1973, s 17(2) and (3), construed with the Age of Legal Capacity (Scotland) Act 1991, s 1(2).

[28] It is noteworthy that, when pressed on the matter, the Archbishop of Dublin, Diarmuid Martin, handed over more than 60,000 previously secret church files to the Commission of Investigation into the Catholic Archdiocese of Dublin – an enquiry into the handling of child abuse cases by the archdiocese between 1975 and 2004, which reported in July 2009. See 'Catholic church in Ireland covered up child abuse, says report' *The Guardian* (London: 26 November 2009) available at http://www.theguardian.com/world/2009/nov/26/catholic-church-ireland-child-abuse (accessed 26 July 2017). The written evidence in the church files had not deteriorated over time; it was simply being held under lock and key. As *The Guardian* article notes: 'Among the files were more than 5,500 Martin's predecessor, the retired cardinal Desmond Connell, tried to keep locked in the archbishop's private vault'. It is also clear that changes through time in the management or culture of an organisation, or a change of local, regional or national government, may encourage a more cooperative attitude towards the sharing or disclosure of information to which access has formerly been restricted or denied. (On the other hand, many organisations have legitimate space-saving file-destruction policies that are not in any way sinister and lead inevitably to loss of potentially important factual information and records.)

suing as well as the party sued – into a concern to give primacy to the interests of only one of the parties: namely, the party sued.

In historical childhood abuse cases the invocation of civil limitation laws often excludes any kind of weighing of the consequences of the claims being time-barred – namely, the loss of opportunity to enforce accrued rights and (if the claim is successful) to secure compensation – against the seriousness of the harm suffered by the claimant. The fact that civil limitation laws may often be relatively straightforward to invoke successfully may lessen any perceived deterrent effect of the substantive civil laws upon which claims are based – in other words, laws that contribute (albeit by way of civil law mechanisms) to the protection of a child's emotional, physical and sexual integrity. The protection afforded to children by the relevant laws is merely contingent if civil law remedies come to be excluded at a later date through the successful invocation of civil limitation laws. Such contingency, of course, holds for a wider range of civil laws than those aimed at protecting children – and correspondingly wider classes of potential claimant – but the fact that childhood abuse often in itself inhibits or delays the pursuit of civil law redress (owing to psychological injury caused to victims) implies that civil limitation laws impact more negatively in historical childhood abuse cases than other types of case unaffected by such inhibiting factors. Obviously at the time when applicable civil laws purport to afford a measure of protection from harm – usually operating in tandem with relevant criminal laws – no one can predict with certainty whether limitation laws will be successfully

invoked at some time in the future, or indeed whether *timely* civil law redress will be pursued. But if we take the view that, for reasons including basic needs fulfilment and special vulnerability, the legal protection of children against harm, viewed as a central case, ought to be given primacy, the availability of limitation laws does little to facilitate that. Seen from the perspective of the wrongdoer, the presence of civil limitation laws potentially giving immunity (ie in effect protection) from the operation of otherwise protective civil laws,[29] may lead wrongdoers to believe that they may act with (civil law if not criminal law) impunity, relying on the not unrealistic possibility that limitation laws may be successfully invoked in future proceedings. This in turn implies the unsettling question whether a perceived 'licence' (under the *civil* law) to commit abusive and harmful acts against children might contribute to progressive 'moral acclimatisation' in terms of the attitudes of those who may be inclined to commit such acts. In other words, what is perceived as 'acceptable' under the civil law might be thought to be morally less reprehensible.

And all of this brings to the fore a puzzling disparity in the treatment of criminal and civil cases by the law. In the recent past numerous serious cases

[29] In Hohfeldian terms a legal immunity is represented as the 'jural opposite' of a legal power (subsisting in a power–liability jural relation). See generally WN Hohfeld, (and WW Cook, ed) *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (New Haven, Connecticut: Yale University Press, 1919). Where a legal immunity is successfully invoked in the context of the purported exercise of a police power of arrest, such as by a diplomat claiming immunity under the Diplomatic Privileges Act 1964, the immunity negates (or constitutes an exemption from) the operation of the power. Likewise, when civil limitation laws are successfully invoked, the party seeking to rely on the laws in civil law proceedings is claiming what is effectively an exemption from those proceedings. The underlying rights upon which the proceedings are founded remain intact, albeit unenforceable.

of historical childhood abuse in the UK have been the subject of criminal prosecutions despite significant lapse of time and the attendant claimed difficulties of obtaining adequate evidence. In the relevant cases the additional hurdle of the higher burden of proof applicable in criminal cases has apparently not stood in the way of successful prosecutions. Yet civil proceedings – in some cases apparently arising directly out of (the success of) the criminal prosecutions[30] – have foundered on the rock of civil limitation laws whose central justification, as we have seen, is to address the concern that the loss or deterioration of evidence through delay may diminish the quality of justice. It seems incongruous that evidence considered convincing enough to achieve convictions before criminal courts – despite the passage of time – might be regarded as necessarily inferior or inadequate in a parallel situation where a civil claim is in prospect and where identical evidence need only be established on balance of probabilities.[31]

[30] For example, a civil claim centring on brutal physical treatment and sexual abuse by adults employed at Kerelaw Residential School, Stevenston, Ayrshire – see *CG v Glasgow City Council* 2011 SC 1 – was held to be time-barred by civil limitation laws despite the civil proceedings being preceded by successful criminal prosecutions. (The prosecutions are reported on in 'Campaigners warn ex-Kerelaw staff of further abuse claims' *The Herald/heraldscotland* (Glasgow: 29 June 2006) available at http://www.heraldscotland.com/sport/spl/aberdeen/campaigners-warn-ex-kerelaw-staff-of-further-abuse-claims-1.16228 (accessed 26 July 2017).)

[31] The frequent inability of adult victims of historical childhood abuse to pursue civil law redress successfully against wrongdoers due to time-barring of claims also sends out a perversely mixed message, to wrongdoers and victims alike, that while the ability to pursue a criminal prosecution in general appears to be relatively unaffected by the passage of time (at least from such evidence as there is in the public domain), the law through the operation of civil limitation laws adopts an approach to civil claims signalling that abusive behaviour can be practised with impunity merely because a defined period of time has elapsed; and usually quite a short period at that. Such behaviour is in effect being 'tolerated' by the civil law.

3.2 *Rationale: cruelty and long dormancy*

The second rationale outlined by McHugh J centres upon the idea that it may be oppressive or even cruel to a defendant to allow a civil action to be brought long after the circumstances which gave rise to it have passed. It is difficult to imagine something that could be thought to be cruel which is not at the same time harmful, even if transiently. It may be, however, that the primary focus of our interest should be on cruelty that causes lasting, rather than merely transient, harm. To that end we have already seen that the harmful effects of certain forms of childhood abuse – which is child cruelty by any definition – can be long-lasting, if not permanent. What is notable about the second rationale, of course, is that it turns on a concern that cruelty may be suffered by the party *sued*, not the party suing. So, in the case of civil law claims brought by adults in respect of allegations of historical abuse in childhood, the 'cruelty' suffered by the perpetrator of the abuse, or by a party (at least in principle) deemed vicariously liable, becomes the central preoccupation underpinning the second rationale, not that suffered by the victim. The key to the second rationale lies in the opinion of Best CJ in *A'Court v Cross*[32] where the point is made that '[l]ong dormant claims have often more of cruelty than of justice in them'. This posits an overly simplistic opposition between what is intrinsically morally wrong (the infliction of

[32] (1825) 3 Bing 329, at 332. (Note that in the *Brisbane* case McHugh J makes reference to *R B Policies at Lloyd's v Butler* [1950] 1 KB 76 at 81–82 in which Streatfeild J in turn (at p 82) refers to the opinion of Best C J in *A'Court v Cross*.)

cruelty) and what is presumptively morally right (acting to address the demands of justice).

There are two, more immediately pressing, issues for consideration here – 'cruelty' and long dormancy. The rationale suggests that the making of a civil law claim is not necessarily 'cruel' if it is timely, but becomes 'cruel' when it is long dormant. Disregarding long dormancy for the moment, it has to be said that at first sight the idea of 'cruelty' and of 'oppressiveness' sit somewhat awkwardly with the notion of a typical claim under the civil law. The making of restitution, or putting right the harm caused by a wrong, or making amends, occupies an obviously different moral universe from one characterised by the infliction of cruel treatment or punishment, particularly where the relevant legal culture, such as one in the democratic, liberal tradition, views restitution, more often than not, in terms of paying compensation in money. In other words, in the modern era such a culture typically outlaws forms of restitution that would insist on the more unsavoury and cruel forms of 'putting things right'. Moreover, some regard must be had to the era in which Chief Justice Best rendered his opinion in *A'Court v Cross*. This was the reign of George IV (1820–1830) when civil imprisonment, as the ultimate civil enforcement mechanism, was prevalent. One legal historian has referred to debtors' prisons as 'mansions of misery'.[33] When Chief Justice Best's 'cruelty' remark is nowadays cited as a

[33] See MC Finn *The Character of Credit: Personal Debt in English Culture, 1740–1914* (Cambridge: Cambridge University Press, 2007) ch 3.

justification for civil limitation laws it would be appropriate for there to be some acknowledgement of the historical context of the remark and the drastic civil enforcement regimes prevalent at the time.

Furthermore, the real or imagined 'cruelties' assigned to civil law redress by advocates of civil limitation laws appear insignificant when reckoned beside the very real cruelties of child abuse whose harmful effects, as we have seen, often cast a long shadow into adulthood or endure for a lifetime. And regardless of impact in adulthood, many forms of child abuse are intrinsically cruel and harmful, and exploit children's vulnerability and relative lack of ability to defend themselves from abuse or to assert and enforce legal rights arising from their mistreatment. There is thus an obviously stronger case for maintaining whatever deterrent effect there is in civil laws rendering child cruelty actionable than to be sensitive to the alleged cruelty of pursuing a legitimate legal process against an alleged wrongdoer who may be undeserving of such concern.

And as soon as the focus moves from a wrongdoer who is an individual – a natural person, in other words – to an impersonal corporate or institutional wrongdoer, where liability for civil wrongs may be vicariously assigned, can one intelligibly speak of being 'cruel' to (for example) a governmental authority, a church, a board of trustees of a school, an insurance company? In particular, is it credible to describe the pursuit of a claim against an organisation such as an insurance company, for instance, as 'cruel' when the

raison d'être of the insurance industry is to recompense policy holders in respect of losses arising from risks voluntarily undertaken? Is it appropriate in other words to designate as 'cruelty' the requirement for an insurance company to meet claims when that is literally what it is in existence to do? Many civil law claims on the part of adults in respect of allegations of historical abuse in childhood are pursued against just such corporate actors where the idea of 'cruelty' is plainly absurd.

If, ultimately, it cannot be said that forms of restitution (civil law redress) are intrinsically cruel or oppressive it would seem to follow that only the idea of long dormancy can supply the otherwise absent element of cruelty and oppressiveness highlighted by Chief Justice Best. In that regard it may be arguable that it is 'cruel' for a claimant deliberately to wait many years before instigating civil law redress against an alleged wrongdoing *individual* (ie a natural person as opposed to a corporate actor) if the motivation for the delay is deliberately calculated (say) to impact on the alleged wrongdoer late in life.[34] Without this element of calculation the idea of a claimant knowingly inflicting 'cruelty' upon an alleged wrongdoer in a modern civil law setting seems unsustainable. Moreover, in the context of adult civil law claims in historical child abuse cases – as we shall consider below – the reason for delayed claims generally has nothing to do with the exploitation of any age-related vulnerabilities of alleged wrongdoers.

[34] For this purpose, of course, it is necessary to 'hypothesise away' civil limitation laws: either to disregard any effect they might happen to have, or to make the assumption that a claim will fall within a recognised exception to the operation of such laws.

3.3 *Rationale: arrangement of affairs such that claims can no longer be made after lapse of time*

The third rationale highlighted by McHugh J in the *Brisbane* case turns on the idea that people should be able to arrange their affairs and utilise their resources such that claims can no longer be made against them once a defined period of time has elapsed. McHugh J mainly focuses this rationale upon the needs of commercial enterprises and other (largely incorporated) entities – ie insurers, public institutions, businesses and limited liability companies – which have a 'significant interest in knowing that they have no liabilities beyond a definite period'.[35] In the same context McHugh J further prioritises the interests of the commercial world, citing the Tasmanian law commissioner's report on limitation of actions:

> The threat of open-ended liability from unforeseen claims may be an unreasonable burden on business. Limitation periods may allow for more accurate and certain assessment of potential liability.[36]

Adopting a standpoint that gives primacy to commercial expediency may be defensible in the context of claims of a certain kind. It can make good commercial sense for certain types of claim – particularly claims arising in

[35] *Brisbane* case, above n 6, p 552.
[36] The Law Reform Commissioner of Tasmania *Limitation of Actions for Latent Personal Injuries*, Report No 69 (1992), 10.

the course of ordinary business activities – to be subject to the guillotining effect of limitation laws. Workplace accidents are an obvious example. An employer will not wish to have a potential claim arising from a workplace injury hanging over its head for an indeterminate time – nor, by extension will the employer's insurer. The presence of civil limitation laws ensures that both employer and insurer are able to rely on the near-certainty of the barring of such claims after the passage of a defined period of time, allowing for some measure of forward planning.

On the other hand, it is difficult to see how this rationale can be viewed completely in isolation from the standpoint of a potential claimant. It is clear that McHugh J views the matter through the eyes of the party sued. As soon as one is committed to identifying 'significant interests', the prioritisation of the interests of the party sued over the party suing seems one-sided in the absence of some discussion and weighing up of both categories of interest. In this context, what is the interest of the party suing – ie the potential claimant? If the party sued – such as a commercial enterprise that is found to be vicariously liable for wrongdoing committed by its employees[37] – has an interest in knowing that it will have no liability beyond a certain period do not victims of civil wrongs in principle have an equivalent interest in the expectation that claims will *continue* to be actionable for at least the foreseeable future, if not indefinitely? These competing interests and

[37] See *Catholic Child Welfare Society and others v The Institute of the Brothers of the Christian Schools* [2012] UKSC 56.

perspectives are not seriously evaluated and reconciled in McHugh J's opinion. Moreover, viewed in terms of the ability, through the operation of civil limitation laws, to predict the certainty of failure of future civil law claims on account of the passage of time, McHugh J's commercial expediency rationale seemingly takes priority over the moral imperative of making restitution for negligent or wrongful behaviour.

Allegations of historical childhood abuse are often made against organisations that are run on a commercial basis or, directly or indirectly, have a commercial aspect to some or all of their activities – for instance, boarding schools, churches, church-run orphanages, and local (governmental) authorities that run or subsidise children's homes. Obviously care and protection of children from harm is a key part of the activities of these organisations. A failure to provide, or shortcomings in, care and protection could be seen as a failure to conduct an important aspect of their everyday activities.[38] Child abuse, looked upon as injury or harm deliberately inflicted on a child, is not only emphatically a failure to discharge relevant responsibilities but – in terms of the seriousness of the breaches of duty and of trust characteristic of such abuse – could be regarded as the negation of those responsibilities; in other words, defective performance writ large. It is difficult to see how something significantly *more* culpable than a bare failure in performance – ie wrongdoing knowingly and deliberately committed –

[38] It is noteworthy that in a commercial setting reward usually follows performance such that a failure to perform, or defective performance, usually results in no reward, or less reward, or compensation. (That is certainly implied by the contractual basis of most commercial activities.)

could engage laws, justified on the basis of commercial expediency, that provide immunity from the civil law (ie tortious or delictual) consequences of such wrongdoing. There is nothing inherently 'commercial' about such wrongdoing – or the actions of its 'hands-on' perpetrators – that would make it appropriate to use a commercial expediency rationale as a justification for laws that can, for all practical purposes, frustrate civil law claims arising from allegations of such wrongdoing. Why should an organisation that is not doing what it should be doing be legally protected from the consequences of its omissions?

Even where the notion of arranging one's affairs is considered in isolation from the idea of commercial expediency – to strengthen the former against the claim that the latter impairs what could otherwise be a defensible rationale for civil limitation laws – the absence of a commercial element arguably does little to 'rescue' this rationale in cases involving allegations of historical childhood abuse. The tactic of arranging one's affairs to avoid a legal liability – whether criminal or civil – is often defensible in a variety of contexts. One need only think of legitimate tax avoidance measures that may be taken in order to mitigate liability to various kinds of tax. Tax *evasion*, of course, is a different matter and, like other criminal activity and wrongdoing, is usually attended by efforts to conceal it or cover it up. Criminally inclined persons invariably arrange their affairs to avoid criminal liability. In the case of conduct falling short of criminal behaviour, wrongdoers may likewise take steps to avoid the censure associated with

their wrongdoing. As Max Weber reminds us, a thief orients his action to the validity of the criminal law in that he acts surreptitiously.[39]

All of this has a special resonance in the context of allegations of historical childhood abuse where it would appear that arranging one's affairs to avoid legal liability or censure or reputational damage is as natural and predictable a concomitant of the wrong as would be the concealment or cover-up of a robbery, a murder or fraud. For obvious reasons, perpetrators of abuse often go to great lengths to conceal their abusive behaviour. But there has also been increased recognition, in cases involving alleged historical childhood abuse in (for example) educational or religious or care-giving environments, that alleged perpetrators have routinely been sheltered and assisted by the very organisations to which they have been attached. Moreover, in the relatively recent past the Supreme Court has recognised that vicarious liability can attach to an organisation whose workers have perpetrated child abuse.[40] Inevitably, claimants will be more inclined to pursue a claim against

[39] Max Weber *The Theory of Social and Economic Organization* (Eng tr of Part I of *Economy and Society*, AM Henderson and T Parsons (trans) and T Parsons (ed); New York: The Free Press, 1947), 125. In the criminal law setting (in the UK and other common law jurisdictions) concealment and cover-up may be an element in the separate offence of perverting the course of justice. This can involve falsifying or disposing of evidence. It seems perverse that the civil law could confer a kind of legal advantage upon wrongdoers in childhood abuse cases – such as child rape, that would be serious enough to constitute a criminal offence – on the supposed basis that wrongdoers have acted somehow 'prudently' in arranging their affairs to avoid a civil law liability when the conferment of a like advantage in the criminal law setting would be inconceivable.

[40] *Catholic Child Welfare Society and others v The Institute of the Brothers of the Christian Schools*, above n 37. That vicarious liability, in the legal context, can be fraught with difficulty in historical childhood abuse cases is illustrated by a recent Supreme Court decision which considers, among other things, whether vicarious liability should extend to a local authority which had placed the claimant (when in childhood) in the care of foster parents. See *Armes v Nottinghamshire County Council* [2017] UKSC 60.

an organisation perceived as having 'deeper pockets' than an alleged 'hands-on' perpetrator of abuse who will be (merely) a private individual. What that means is that an alleged 'hands-on' perpetrator of abuse may be doubly protected from civil law liability even if criminal liability is unaffected. They may be shielded by vicarious liability *and* civil limitation laws, with civil limitation laws also being potentially available for the protection of the organisation being sued. Moreover, we should not rush to assume that organisations that are sued for the alleged historical wrongdoings of their employees or workers are necessarily blameless and therefore undeserving of having the burden of civil liability imposed upon them. Less culpable is the organisation that is found to have been vicariously liable for the abusive acts of an employee or worker where it has had an entirely passive and unwitting involvement in the wrongdoing. Significantly more culpable is the organisation that has in some sense actively perpetuated wrongdoing or wilfully turned a blind eye. There are differing levels and varieties of participation of organisations in wrongdoing corresponding to levels and varieties of culpability.

For instance, it has been reported that by 1990 all Roman Catholic dioceses in Ireland had insured themselves against the risk of potential civil law liability arising from historical clerical childhood abuse claims (despite later Church claims that senior clergy had no knowledge of the fact, or extent, of

abuses perpetrated by errant clergy).[41] Taking out insurance for the purpose of mitigating or offloading the risks of civil law liability was coupled with other patterns of behaviour which – taken as a whole – pointed to a strategy of reputational protectionism and cover-up. This could only have served to perpetuate criminal and civil wrongdoing against children, albeit at constantly changing locations, given the reportedly widespread practice within the Church hierarchy in many parts of the world of dealing with the issue by moving priests suspected of abuse from one location to another.[42]

When the tendency to conceal and cover-up instances of childhood abuse is linked to the idea of arranging one's affairs (viewed as a conventional rationale for civil limitation laws) it is clear that alleged wrongdoers – not

[41] See D McDonald 'How bishops formed strategy to fight claims of child abuse' *Irish Independent* (Dublin: 26 November 2012) available at http://www.independent.ie/irish-news/how-bishops-formed-strategy-to-fight-claims-of-child-abuse-26421418.html (accessed 26 July 2017). The strategy of insuring against the risk of civil law claims arising from allegations of historical childhood abuse is commented on at length in chapter 9 of Judge Y Murphy (principal author and Commission chairperson) *Report by Commission of Investigation into Catholic Archdiocese of Dublin* (Dublin: Government Publications Office, 2009) available at http://www.justice.ie/en/JELR/Pages/PB09000504 (accessed 26 July 2017).

[42] In the case of one notorious perpetrator of child sexual abuse in Ireland, Northern Ireland and the USA (Father Brendan Smyth) '…the cleric, a member of the Norbertine order, was moved between parishes, dioceses and even countries where he preyed on victims who were as young as eight years old'. See 'Profile of Father Brendan Smyth' *BBC News Online* (15 March 2010) available at http://news.bbc.co.uk/1/hi/northern_ireland/8567868.stm (accessed 26 July 2017). This article also mentions the practice within the Catholic Church of obtaining signed 'oaths of secrecy' from victims of clerical abuse. In the context of out-of-court settlement of abuse claims this presumably equates to signed confidentiality agreements which are, of course, only a further means of scandal containment which do nothing for other abuse victims or potential abuse victims. See L Goodstein, N Cumming-Bruce and J Yardley 'UN Panel Criticizes the Vatican over Sexual Abuse' *The New York Times* (New York: 5 February 2014) available at http://www.nytimes.com/2014/02/06/world/europe/un-panel-assails-vatican-over-sex-abuse-by-priests.html?_r=0 (accessed 26 July 2017): 'On the many pressing problems related to child welfare, the [UN CRC] report recommended specific steps it said the Vatican should take: stop obstructing efforts by victims' advocates in some countries to extend statutes of limitations, which now allow most abusers to escape prosecution; stop insisting that victims sign confidentiality agreements swearing them to silence as a condition for receiving compensation …'. (The report referred to in *The New York Times* article is: UN Committee on the Rights of the Child *Concluding observations on the second periodic report of the Holy See* (CRC/C/VAT/CO/2, 25 February 2014) available at: http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/VAT/CRC_C_VAT_CO_2_16302_E.pdf (accessed 26 July 2017).)

only 'hands-on' perpetrators, but organisations that have allegedly sheltered such perpetrators or perpetuated their wrongdoing – may be placed in a uniquely advantageous position to evade civil law redress. When a defined period of time has elapsed any resulting legal protection afforded to alleged wrongdoers by civil limitation laws may be seen as only the final 'nail in the coffin' to the pursuit of civil law redress. Often adult perpetrators of abuse will (at the time when the abuses occurred) have been in a position to exercise an extraordinary measure of control over child victims, determining victims' ability and preparedness to report abuse, and in some cases punishing children for reporting abuse.[43] In cases of institutional abuse the institution will invariably have had physical custody of records and have been in a position to control the availability of (and therefore to suppress or indeed destroy) potentially significant documentary and other evidence. In addition, institutional environments – eg orphanages, children's homes, private schools and so on – invariably have the resources and the resolve to exercise a kind of 'monopoly on the truth' in situations where the child's account of his or her lived experiences is not believed or taken seriously, or is ignored, or is suppressed or misrepresented, for at least as long as the

[43] See *Royal Commission into Institutional Responses to Child Sexual Abuse*, 'Report of Case Study No 11 etc.' above n 24, p 32: 'Mr Delaney gave evidence that in 1954, when Mr Delaney was 15 years old, Brother Parker admitted to Brother Doyle that he had been involved in sexual abuse at Bindoon. … Brother Doyle told Mr Delaney that he would be punished if he told anyone about it'. See also T Shaw (principal author and review leader) The Scottish Government, *Historical Abuse Systemic Review: Residential Schools and Children's Homes in Scotland 1950 to 1995* (2007) available at http://www.scotland.gov.uk/Publications/2007/11/20104729/27 (accessed 26 July 2017), 150: '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 they were punished. As children, they learned to be silent about what they experienced as grave injustices'.

child inhabits that environment.[44] This may ensure that contemporaneous (third party) evidence of ongoing abuse is unavailable or unobtainable.[45] Legally, all of this creates a palpable anomaly. Not only have there often been evidential and practical barriers to the possibility of a child's seeking civil law redress *while still a child* because, among other things, adult perpetrators of abuse, or the organisations to which they are connected, have often in the past presented to the outside world a false or sanitised version of the events complained of; but when, as adults, victims seek civil law redress for alleged violations of their childhood rights they may encounter similar evidential and practical barriers together with (in addition) the 'guillotining' effect of civil limitation laws.

Thus, legally, the dice are more often than not loaded against children and against adults (as grown-up victims of abuse in childhood) when attempting to redress, through the civil law, alleged violations of the right of the child to physical, sexual, emotional and psychological integrity. And this in turn not

[44] As Lord Phillips comments in *Catholic Child Welfare Society and others v The Institute of the Brothers of the Christian Schools*, above n 37, at [92]: 'Living cloistered on the school premises were vulnerable boys. They were triply vulnerable. They were vulnerable because they were children in a school; they were vulnerable because they were virtually prisoners in the school; and they were vulnerable because their personal histories made it even less likely that if they attempted to disclose what was happening to them they would be believed'.

[45] As one former resident of a children's home in Scotland in the 1960s recounts: 'The lines of reporting and communication appeared to deliberately obscure and threats of severe punishment were used by some carers to deter children from making complaints… There was no evidence that management, abusers and the system were accountable to anyone. *They were skilful in concealing or suppressing incidents of malpractice, complaints of cruelty and reports of abuse*'. See T Shaw *Historical Abuse Systemic Review*, above n 43, p 141 (emphasis added). In the same report, at p 134, it is stated that: '[m]any survivors … say that as children they often didn't speak about their abuse or, if they did, they *weren't believed and were punished*. Survivors also have reported that they weren't able to talk about their abuse until they were older adults'. (Emphasis added.) On the difficulties of obtaining documentary evidence, see A Morrison 'Author Alex Wheatle: 'Systematic abuse where I grew up' *BBC News* (London: 14 July 2014) available at http://www.bbc.co.uk/news/uk-28295982 (accessed 26 July 2017).

only reflects a kind of moral disequilibrium but in some way represents a symbolic reimposition of the harm caused by the original wrongdoing. In a sense the harm is reinforced when civil limitation laws and other obstacles to redress operate in effect to absolve the wrongdoer of civil liability. In some cases, it may be undeniable that deterioration of relevant evidence through the passage of time has placed parties to civil proceedings at a disadvantage requiring to be counterbalanced by the operation of civil limitation laws. But when the individuals and organisations in question, whether presently or in the past, have had unprecedented power over child abuse victims (including control and ownership of evidence such as records and files) the case for extending the balancing effect of civil limitation laws to such individuals and organisations seems less compelling. An obvious misuse of power – such as power targeted directly at children in the form of (for example) threats, punishment, discipline, isolation, physical restraint, emotional manipulation – as an explicit means to facilitate sexual exploitation or other abuses is not only inherently wrong and harmful, but the harm is validated and compounded in later life when, as adults, civil law claims are defeated through the successful invocation of civil limitation laws. Alleged wrongdoers may have not only acted deliberately, knowingly and exploitatively (and are to that extent the authors of their own 'misfortune', if civil law redress can be so perceived) but may have, presently or in the past, arranged their affairs very skilfully, including with the assistance of complicit organisations, to evade not only civil liability but moral responsibility for their wrongdoing. Plainly, perpetrators and complicit

organisations do not deserve the protection of civil limitation laws when they have in the past been uniquely placed to keep the truth – the evidence of abusive acts as they have unfolded in the victim's childhood – tightly under control or subject to misrepresentation or distortion. In later life adult claimants may find – and the authority of the *Brisbane* case certainly reinforces the notion – that civil limitation laws and the rationale for such laws have conferred upon perpetrators a kind of retrospective 'licence' to have arranged their affairs in this way. So, in a perverse way, the law has conspired to make it 'right' (legally, if not morally) for perpetrators to have conducted their abusive activities in an atmosphere of secrecy, in some cases threatening victims with punishment if they report abuse. In relevant situations (where there is an institutional or organisational dimension to perpetrators' wrongdoing – such as where they are employees or voluntary workers) individual perpetrators may be able to take advantage of an institutional or organisational culture of reputational protectionism.[46] Against that background, the idea that perpetrators and complicit organisations typically suffer from evidential disadvantage seems questionable. In the final analysis, civil limitation laws – justified, at least in part, on the basis of the freedom one is presumed to enjoy to arrange one's

[46] Integral to the perpetuation of such a culture in childhood abuse cases has been, in some cases, the development of 'repertoires' of techniques of covering-up wrongdoing or impeding civil litigation – for example, maintenance of secret files (as we have seen in the case of the Archdiocese of Dublin); insistence on out-of-court settlements that include obtaining confidentiality undertakings from claimants; and misuse of diplomatic immunity to thwart investigations and legal proceedings that could cause reputational damage. See J Bingham 'UN warns Vatican to hand over sex abuse files to police' *The Telegraph* (London: 23 May 2014) available at http://www.telegraph.co.uk/news/worldnews/europe/vaticancityandholysee/10852617/UN-warns-Vatican-to-hand-over-sex-abuse-files-to-police.html (accessed 26 July 2017).

affairs to avoid legal liability – serve only to reinforce or supplement the artifice, deception and blocking measures (including legal stratagems) in some cases reportedly practised by perpetrators of child abuse and complicit organisations when they seek to escape civil law responsibility for wrongdoing.

3.4 *Rationale: public interest in speedy resolution of disputes*

The fourth rationale outlined by McHugh J in the *Brisbane* case is that it is in the public interest that disputes be settled as quickly as possible.[47] On one hand this may be seen as a broader variant of the idea – already discussed above – that when a dispute is not settled speedily the likelihood of loss or deterioration of evidence may impact adversely upon quality of justice. However, the critical point of difference is the implied focus on the public interest in its own right. So, whilst engaging a public interest rationale envisages recognising the adverse effect on justice of delay, the implication is that the *public* interest transcends the narrower interests of individual disputants. Thus where dispute resolution can often be viewed as being in the interests of the few – notably, the immediate parties to a dispute – an assessment of the public interest shifts the emphasis, so that speedy dispute resolution is taken to be in the interests of the many – ie society as a whole. It can thus be taken to be in the interests of all that civil limitation laws act

[47] *Brisbane* case, above n 6, p 553. Arguably a wider public interest rationale is implied.

either as an incentive to speedy dispute resolution (by imposing deadlines that compel prospective litigants to action), or as a mechanism that ensures that disputes are actually *left unresolved* through the barring – usually after a comparatively short period of time – of rights of action. So while civil limitation laws operate to incentivise speedy dispute resolution they also ensure that disputes remain unresolved (at any rate through litigation) by barring legal action in cases where for one reason or another disputes have not been speedily settled.

It follows that the public interest rationale for such laws promotes the permanent *non*-resolution of disputes as the lesser of two 'evils' when weighed against non-*speedy* resolution of disputes. Thus the public interest rationale, as a rationale distinct from others, encourages the view that it is better that a dispute be left unresolved even after the passage of a relatively short period of time than that there should be an indefinite timescale for resolution. If this analysis is sound, it is not obvious why such a result should necessarily be in the public interest. As soon as more compelling justifications for civil limitation laws are disregarded in order to isolate public interest as a rationale in its own right, that rationale seems to have little merit. Giving primacy to speedy dispute resolution, with the attendant risk of permanent non-resolution, has more than a few obvious drawbacks. For instance, a grievance or claim left permanently unresolved may engender simmering resentment in those who have been wronged but who, for any number of reasons, have simply failed to act swiftly enough to pursue civil

law redress. Likewise, the early barring (eg within three years, say) of a civil law right of action may instil the perception that justice has, with undue haste, been denied or betrayed, not only in the eyes of the wronged but more widely – indeed, *publicly*. A public sense of justice denied can hardly be in the *interest* of the public.

If it is difficult – in the absence of more convincing justifications for civil limitation laws (some of which have already been considered) – to imagine where the public interest lies in generally maintaining the primacy of swift civil law redress over the permanent non-resolution of civil disputes, it is arguably the more difficult in the particular context of wrongdoing involving allegations of historical childhood abuse. In that type of case there is an accumulation of evidence and informed opinion – academic, medical, psychiatric, psychological, juristic, anecdotal – that the practical difficulties and obstacles, including personal psychological inhibitions, faced by many victims in pursuing timely civil law redress can be insurmountable or endure for many years after the abuse.[48] It is widely acknowledged that time is the enemy of such cases; whilst civil limitation laws operate in an especially acute way against the interests of abuse victims as a class of potential claimants, raising the question whether swift dispute resolution for its own sake is necessarily the most pressing issue relevant to a proper assessment

[48] See texts cited above at n 11. As stated in a report from the Law Commission for England and Wales: 'Victims of such abuse frequently need time to recover sufficiently from the trauma consequent upon the abuse to be able to contemplate bringing a claim against their abusers'. See Law Commission for England and Wales *Limitation of Actions*, Report No 270 (2001), at [3.103].

of the public interest in claims centring on historical childhood abuse. The public interest in swift dispute resolution surely cannot outweigh the public interest in ensuring that, by means that are both criminal *and* civil, the law deters and punishes physical, emotional and sexual abuse of children while at the same time providing civil law restitution for victims for as long as it takes for victims to be in a position – psychologically and emotionally – to pursue appropriate forms of civil law redress.[49]

4 Recent developments: two steps forward and one step back?

Lately, in a number of jurisdictions, legislative initiatives have been pursued aimed at mitigating the effects of civil limitation laws in cases involving childhood abuse. For instance, almost all Canadian provinces and territories have abolished civil limitation laws so far as applicable to civil law claims alleging childhood abuse. Queensland, Australia has recently introduced legislation excluding civil limitation laws from applying in cases where childhood sexual abuse has occurred in an *institutional* setting.[50] The

[49] As the Law Commission for England and Wales has commented: 'It could … be argued that the public interest in protecting the defendant from stale claims, and in ensuring that there is an end to litigation, does not apply where the defendant has been guilty of sexual abuse (which could be considered to make the case for exempting such claims from the long-stop limitation period even stronger than is the case for other personal injury claims such as for asbestosis)'. See Law Commission for England and Wales *Limitation of Actions*, above n 48, at [3.103].

[50] Limitation of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Act 2016. The expression 'institution' is defined as an entity that 'provides … activities, facilities, programs or services of any kind that gives … an opportunity for a person to have contact with a child'. The Act is restricted to sexual abuse – so allegations relating solely to physical or emotional abuse or neglect would appear to be excluded.

Australian states of New South Wales[51] and Victoria[52] have also now enacted legislation disapplying civil limitation laws in childhood abuse cases though, unlike Queensland, in neither New South Wales nor Victoria is the disapplication of civil limitation laws restricted to childhood abuse occurring in an 'institutional' context. (Abuse occurring, say, between close family members would therefore fall within the statutory exemption.) But what is noteworthy is that in all three states the legislation specifically empowers the court to dismiss a case if the length of time taken by the claimant to initiate a civil law claim in respect of childhood abuse has a 'burdensome effect on the defendant that is so serious that a fair trial is not possible'.[53]

So far as English law is concerned, civil limitation laws in principle continue to apply to childhood abuse cases, albeit that the House of Lords case of *A v Hoare*[54] and subsequent cases – taken in tandem with the discretion provided for in the Limitation Act 1980, s 33, to override the three-year limitation period – have led to a measure of leniency in the judicial handling of childhood abuse cases when faced with the potential operation of limitation laws. Unlike other jurisdictions, no legislation has been introduced in England and Wales specifically disapplying civil limitation laws in

[51] Limitation Amendment (Child Abuse) Act 2016. The definition of 'abuse' is wider than in the case of Queensland's 2016 Act, extending to sexual abuse and serious physical abuse.
[52] Limitation of Actions Amendment (Child Abuse) Act 2015. This Act extends to sexual abuse, physical abuse and psychological abuse.
[53] See the official statutory notes to the relevant provisions of each enactment.
[54] Above n 17. *A v Hoare* has opened the door to the use of the discretion in the Limitation Act 1980, s 33, to disapply civil limitation laws in cases involving deliberately inflicted injury where, prior to that, the case of *Stubbings v Webb* [1993] AC 498, HL(E) (which *A v Hoare* departs from) had erroneously laid down that the discretion was unavailable in such cases. Given that childhood abuse cases typically involve the deliberate infliction of harm or injury, the decision in *A v Hoare* has resulted in the increased use of the s 33 discretion in civil law claims centring on allegations of childhood abuse.

childhood abuse cases, though arguably the general approach of the courts during the last decade has at least served to lessen the impact of limitation laws in the context of civil law claims alleging childhood abuse.

By contrast, in Scotland, a clear pattern of hardening of judicial attitude in favour of the strict enforcement of civil limitation laws in childhood abuse cases had been developing over more than a decade along with a seeming generalised judicial antipathy towards the substantive merits of claims in such cases.[55] This appears to have been a precipitating factor in the decision of the Scottish Parliament to introduce legislation in 2017 disapplying limitation laws in civil actions in respect of personal injury resulting from alleged childhood abuse. Under the Limitation (Childhood Abuse) (Scotland) Act 2017 civil limitation laws are disapplied across the board in the context of such actions: in other words, the exemption is not restricted to allegations of abuse occurring in institutional environments, though at an earlier point in the life of the legislation – at the consultation stage – that restriction was actively under consideration. Moreover, the expression 'abuse' is in some respects wider than in the corresponding legislation introduced in Queensland, New South Wales and Victoria, extending as it does to sexual abuse, physical abuse, emotional abuse and abuse in the form of neglect.

[55] See E Russell 'Denying the Discretion — A Trilogy of Cases' (2013) *Juridical Review* 95 at 125–126: 'It seems difficult to resist the conclusion that a hardening of judicial approach is discernible in relation to the equitable discretion. The courts are increasingly focussing attention on the fundamental rationale of limitation statutes, namely that the rules serve the public interest, and that any derogation from the basic rule is exceptional and requires a compelling justification. In the absence of a compelling excuse on the pursuer's part, it would appear that the rules of limitation will normally prevail'.

With the seemingly more moderate operation of civil limitation laws in England and Wales (established since *A v Hoare*) and the new legislative regime in Scotland it might have been thought that a rosier future awaits childhood abuse claimants under the civil law in the several jurisdictions of the UK. However, we must pause and reflect carefully upon developments in the recent past. Under English law there are regular reminders of an ever-present possibility of civil limitation laws being strictly applied, particularly in cases where judges have founded upon, or made reference to, the *Brisbane* case or to rationales paralleling those outlined in that case without necessarily engaging critically with those rationales so as to take account of the special position of historical childhood abuse claimants.[56] In the absence of legislation disapplying civil limitation laws in childhood abuse cases in England and Wales the position for the foreseeable future is likely to continue to be dependent on the accident of whether an individual judge happens to adopt a lenient or strict approach to the case in hand or is, or is not, well disposed to the plight of those who have experienced childhood abuse.[57]

In Scotland – despite the significant reform in this area introduced by the 2017 Act – there is a real possibility that the law, going forward, could again

[56] See cases cited above at n 17.

[57] See Richard Scorer 'Time to take time' *New Law Journal* (8 April 2016) available at https://www.newlawjournal.co.uk/content/time-take-time (accessed 13 October 2017). Scorer calls for the introduction of appropriate legislation disapplying civil limitation laws in cases involving historical childhood abuse in England and Wales.

develop to a position where the handling of childhood abuse cases is attended by difficulties that were more than hinted at before the introduction of the Act. The particular difficulty – mirroring the position now established by statute in Queensland, New South Wales and Victoria – arises from provisions of the 2017 Act that empower the court to have regard to the interests of the party sued (the defender) and to disallow a civil action from proceeding in relevant circumstances. In terms of the new s 17D(2) inserted into the primary enactment – ie the Prescription and Limitation (Scotland) Act 1973 – the court may disallow an action 'where the defender satisfies the court that it is not possible for a fair hearing to take place'. *In addition*, in terms of a new s 17D(3), the court may disallow an action if the defender satisfies the court that as a result of the disapplication of civil limitation laws 'the defender would be substantially prejudiced were the action to proceed' *and* 'having had regard to the pursuer's interest in the action proceeding, the court is satisfied that the prejudice is such that the action should not proceed'.

It is beyond the scope of this article to discuss ss 17D(2) and 17D(3) in any depth. Suffice it to say that whilst the 'technical time bar' – the literal, statutorily-defined limitation period – may have been stripped away, a protective statutory regime (protective of the interests of the defender, that is) has been established which could prove to be as effective a barrier to the progress of a childhood abuse claim as the 'numerical' limitation period ever was. The key difficulty is that both provisions give primacy to the interests

of the defender and, while s 17D(3) requires the court to have regard 'to the pursuer's interest in the action proceeding', the imperative to avoid prejudice to the defender appears to be the overriding concern of ss 17D(2) and 17D(3). The need for a fair hearing is already enshrined in principles of natural justice, human rights legislation and rules of evidence – extending to the requirement for sufficiency of evidence in *all* court proceedings, whether criminal or civil – so it is unclear why this has been given special emphasis in s 17D(2) (other than the obvious, which is as a focus for challenging a claimant's civil action). The new statutory regime has in effect erected new, independent and powerful grounds of objection to the progress of a civil action centring upon allegations of childhood abuse.[58]

Perhaps the most pressing concern attending the new statutory regime is that a 'jurisprudence' of 'prejudice to the defender' already exists in Scots law in the context of the use of civil limitation laws in childhood abuse cases;[59] so when this is allied to the obvious persistence and persuasive force

[58] See Scottish Human Rights Commission *Consultation Submission to the Justice Committee of the Scottish Parliament: Limitation (Childhood Abuse) (Scotland) Bill* (Edinburgh: January 2017) available at http://www.scottishhumanrights.com/policy-publications/?page=5 (accessed 12 October 2017), para 6. The Commission, commenting on the Limitation (Childhood Abuse) (Scotland) Bill in its then form (early 2017), argues that the courts already have a duty under the Human Rights Act 1998 to interpret legislation in accordance with the European Convention on Human Rights. This guarantees, among other things, the right to a fair hearing. The Commission therefore questions the need for s 17D(2). The Commission also draws attention to the fact that in terms of the established case law – when the exercise of the 'section 19A discretion' (see below n 59) has been under consideration – 'the court has placed great weight on the prejudice to the respondent and loss of evidence, particularly where the alleged abuser has subsequently died'. Furthermore, the Commission also expresses concern that 'by making such a finding at a preliminary proof stage, survivors are denied the opportunity to present their case'. Overall, the Commission concludes that while the courts would be mindful of the intention of the (proposed) legislation to allow previously limited abuse cases to proceed it is nonetheless concerned that the 'proposed section 17D could have the effect of undermining certainty and limiting the right to a remedy which lies at the heart of this legislation'.

[59] The idea of prejudice to the defender arises most often in the context of the so-called 'section 19A discretion'. Under the Prescription and Limitation (Scotland) Act 1973, s 19A, the court has a discretionary power to allow an otherwise time-barred action to proceed if it deems it 'equitable' to

of the *Brisbane* case, and its seeming uncritical endorsement in some judicial circles, the new statutory provisions – which do little to displace established case law – could be a charter for a reversion to the strictures of the recent past. The new provisions arguably offer too much discretion to a previously unsympathetic judiciary to fall back upon principles already established in case law to justify and explain civil limitation laws. Those principles – which include the rationales outlined in the *Brisbane* case, whose inappropriateness in the context of childhood abuse cases has been examined in some detail above – may now be given a new lease of life by a set of statutory provisions that represent a standing invitation for their revival, albeit in a newly established and independent context free of the 'numerical' time-bar but otherwise intact.[60]

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do so. In civil law claims brought by adults in respect of allegations of historical childhood abuse the courts in Scotland have usually declined to exercise the discretion in favour of the claimant. See, for example, *Whelan v Quarriers* [2006] CSOH 159 and *Godfrey v Quarriers* [2006] CSOH 160. See also Russell, above n 55 and, generally, E Russell 'Historic Abuse: The Hard Reality for Victims' (2015) *Juridical Review* 53. In *D v Murray* [2012] CSOH 109, at [20] Lord Drummond Young links the notion of prejudice to the defender to the conventional rationales underlying limitation laws: ie fading memories, loss of records, unavailability of witnesses, and so on. In this and other cases – such as *M v O'Neill*, above n 7 – the impression is given that lapse of time is almost to be regarded as a peremptory reason for a finding of prejudice to the defender, without the necessity of interrogating the actual circumstances of the defender's position: for instance, has the defender effected insurance cover as indemnity against just this eventuality; ignoring reputational damage, just how 'prejudicial' will paying monetary compensation to a claimant actually be to (an often wealthy) corporate defender; has documentary evidence been deliberately disposed of or concealed by the defender to undermine civil proceedings; has a particular organisation, faced with accusations, moved potential witnesses overseas; how plausible might a witness's denial of events complained of be if weighed against a clear recollection of those events by a claimant (bearing in mind that it is actually in the interest of an abuser to deny any recollection of abuse given that the law favours the position of the party whose memory has allegedly faded)?

[60] There is, of course, the requirement for the court, under s 17D(3), to have regard to 'the pursuer's interest in the action proceeding'. But it should be noted that the idea of prejudice to the *pursuer* has been integral to the operation of the 'section 19A discretion' since the tests formulated by Lord Ross in *Carson v Howard Doris Ltd* 1981 SC 278, at 282. (This has not prevented attempts to rely on the 'section 19A discretion' failing, more often than not, in historical childhood abuse claims.) In any event, it should be interesting to observe how restrictively the requirement to have regard to the pursuer's interest will be interpreted by the courts in Scotland in balancing those interests against the interests of a defender considered to be 'prejudiced'. Moreover, as the spirit and purpose of the new legislation have been clearly established, it may be that the courts will take the view that the fair hearing test (s 17D(2)) and defender prejudice test (s 17D(3)) represent significantly high hurdles for a defender to clear, bearing in mind that the onus will now be on the *defender* to satisfy the court in relation to the position in each case. Hitherto, the onus has been on the *pursuer* to establish the facts

5 Concluding reflections

We have seen that the judicial quest for a proper context within which to consider rationales underlying civil limitation laws has often taken the opinion of McHugh J in the *Brisbane* case as its point of departure. In this article I have sought to explore the appropriateness of applying civil limitation laws to claims of adults arising from allegations of historical childhood abuse through an examination of the wider legal policy issues suggested by Justice McHugh's opinion; and considering, in passing, issues of moral significance. However, it should be clear – even if the matter has not so far been put in such forthright terms – that for the particular reasons outlined in this article I take the view that civil limitation laws (and the rationales summarised in Justice McHugh's opinion) are indeed largely inappropriate when applied to claims in historical childhood abuse cases.

When society occasionally ordains that protections normally afforded by the civil law in the form of rights should be rendered unenforceable – such as by civil limitation laws – that would surely demand as compelling a moral and

and circumstances relevant to the operation of the 'section 19A discretion': see *Nimmo v British Railways Board* 1999 SLT 778, at 783; and *AS v Poor Sisters of Nazareth* 2008 SC (HL) 146, at [25] (Lord Hope of Craighead). See also – for burden of proof, when laid upon the claimant under English Law – A Burrows 'Some Recurring Issues in Relation to Limitation of Actions' in A Dyson, J Goudkamp and F Wilmot-Smith (eds) *Defences in Tort* (Oxford: Hart Publishing, 2015). In the future Scots law potentially has much to learn from the approach of the English judiciary to the exercise of the discretion under the Limitation Act 1980, s 33, in childhood abuse cases who, since *A v Hoare*, appear genuinely to have sought to strike a fair balance between the respective interests of claimant and defendant: see *B and others v Nugent Care Society; R v Wirral Metropolitan Borough Council* [2010] 1 WLR 516, especially at [20–27] (Lord Clarke of Stone-cum-Ebony MR).

policy rationale as any reason there might be for ensuring that the relevant protections and rights remained fully enforceable. What has been maintained in the course of the preceding discussion is that, in historical childhood abuse cases, civil limitation laws tend to give primacy to the interests of alleged wrongdoers (or organisations that have sheltered them or perpetuated their alleged wrongdoing) and to the need to protect them from civil law redress in a context in which the ordinary justification for such laws is weak when weighed (among other things) against the enormity of the injury caused by the abuses complained of and the unique and acute difficulties victims have often faced in pursuing timely enforcement action in respect of the childhood rights allegedly violated. Alleged wrongdoers, or institutions or organisations with which alleged wrongdoers have been closely connected, have in the past reportedly gone to exceptional lengths to shield themselves from civil law redress – for instance, often exercising an extraordinary measure of control over victims in childhood (and sometimes in adulthood); controlling the availability of documentary and other evidence; denying and covering-up possible crimes and other wrongdoing; employing superior financial resources to mount legal challenges; and generally doing everything in their power to circumvent civil liability.[61] The notion that alleged wrongdoers should be protected by law from the civil

[61] For a critique touching (among other things) on a historical political programme aimed at removing Australian Aboriginal children from their families in order to 'assimilate' them with the 'European mainstream' see Honni van Rijswijk 'Stories of the Nation's Continuing Past: Responsibility for Historical Injuries in Australian Law and Alexis Wright's *Carpentaria*' (2012) 35 *University of New South Wales Law Journal* 598. Fascinating and relevant as the wider debate highlighted by van Rijswijk may be – including its implications for a broader critical frame of reference focusing on childhood abuse – it is unfortunately beyond the scope of this article to engage more fully with that debate.

law consequences of knowingly inflicted wrongdoing is incomprehensible. Recent developments in Scots law, and Parliament's failure (to date) to intervene legislatively in English law, have succeeded only in heightening legal uncertainty as to the operation, in the context of historical childhood abuse claims, of both civil limitation laws 'proper' and new prejudice-based statutory grounds of objection to such claims (eg under Scots law and in Australian jurisdictions).

When an alleged wrongdoer is given immunity from civil law redress, in a civil action founded on allegations of historical childhood abuse, victims of such abuse are denied the symbolic power of a public affirmation of the wrong done to them. Such an affirmation could operate at least to mitigate the ongoing harmful effects of the original wrongdoing. It might assist closure and healing for victims towards redressing the harm occasioned by the abuse.[62] The use of civil limitation or related laws conferring immunity exacerbates the harm caused by the wrongdoing not only by seemingly denying civil justice but (in so doing) by promoting the interests of alleged wrongdoers over the interests of the allegedly wronged, or at least treating them as on the same footing, despite the fact that one may have committed deliberate wrongdoing (or, in the case of an organisation, may have been complicit in, or perpetuated such wrongdoing) against the other in

[62] This is, of course, to say nothing of the availability of, and the question of pursuing, compensation for injury, pure and simple. On that subject, see generally P Case *Compensating Child Abuse in England and Wales* (Cambridge: Cambridge University Press, 2007).

circumstances where, as we have seen, the dice are so often loaded against the individual allegedly wronged.

[10,002 words excluding abstract and footnotes]