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Judicial Responses to Violations of the Emotional, Physical, Psychological and Sexual Integrity of the Child

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Key words: tort; delict; personal injury; civil limitation laws; historical childhood abuse.

Abstract

This article examines the use of limitation laws in the context of civil law claims under English law and Scots law brought by adult claimants in relation to allegations of historical abuse in childhood. Using case law as a barometer of judicial attitudes towards such claimants and, by extension, towards the child victims of abuse themselves, differences in judicial approach between the two jurisdictions are critically assessed, entailing some weighing and evaluation of the argumentative coherence and persuasive force of the judicial decision-making in question. Key aspects of the discussion are framed in terms of recurrent issues that have arisen in relevant case law. The overall aim is to inform a wider debate about the success or failure of civil law mechanisms of redress in rendering justice to those whose right to emotional, physical, psychological or sexual integrity has been violated in childhood.

1 Introduction

It is a truism that law, whether of the judicial or legislative kind, often leads or lags behind prevailing climates of public opinion. So, when the judiciary or the legislature is not acting as a corrective to the other, either may, sooner or later, find it necessary to realign the law in a way that represents the best, and most faithfully captured, discernment of the will of the community or of prevailing social policy.

One illustration of the tendency of law to play catch-up in this way has come from a surprising quarter in the recent past. Civil limitation laws may not ordinarily be thought to be a natural context for the development of significant legal rights. Such laws are, rather, normally highly technical and, being adjectival in nature, are removed from the usual arenas in which key substantive rights are contested, restated or refined. Yet, during at least the last decade in the UK, there have been important developments in limitation laws so far as applicable to civil law claims brought by adults in respect of allegations of historical abuse occurring in childhood. This appears to have been in response to growing public awareness of the problem of childhood abuse generally and a steady increase – not only in the UK, but in countries such as Australia, Canada, the Republic of Ireland and the USA – in the volume of adult personal injury claims being pursued in relation to such allegations. Needless to say, the fact that typically such claims take many years to come to court has often ensured that the claims have become time-barred; and this has in turn led to the operation and effect of civil limitation laws frequently taking centre stage in claims of this kind. The resultant case law is often to be regarded as a first port of call in any review of the civil law ramifications of historical childhood abuse.

What is immediately striking when reflecting upon the emergent case law both north and south of the border – including the specifics of judicial opinions and decisions – is that the true nature of civil law claims brought by adults in respect of allegations of historical abuse is not always in plain view. Essentially and fundamentally they are claims centring upon violated *children’s* rights – in other words, rights *of the child* to emotional, physical, psychological and sexual integrity and (secondary) rights of action in relation to violations of those (primary) rights. The fact that *everyone* has comparable rights possibly places violations, whether of rights of children or of adults, on a par with one another, disregarding considerations of whether the special vulnerability of children, and their presumed moral claim to an enhanced level of legal protection, should call for special treatment in the judicial setting. Thus, implicit in the case law is a kind of postponed protestation of (child) victimhood which the status of claimants as adults in some way serves to mask. For, the idea that more often than not in the past – and particularly in the recent past – children have become reliant upon their “adult selves” to seek civil law redress, obscures the fact that relevant rights of redress have originally accrued in childhood, only to be belatedly taken up and pursued, often unsuccessfully, in adulthood. Judges and others typically (and perhaps inevitably) view these claims as, in a sense, live “adult claims” rather than postponed “child claims”.

Yet the tendency for victims or “survivors” of historical childhood abuse¹ to seek civil law redress in adulthood reflects, among other things, the realities of historically abusive environments that, typically, have been too threatening or intimidating or unsupportive for effective action (legal or otherwise) to be taken by, or on behalf

¹Adult victims of historical childhood abuse commonly refer to themselves as “survivors” of abuse. In this article, “victim” and “survivor” (and also “sufferer”) are used interchangeably. On the use of the expression “survivor” see, for example, The Scottish Human Rights Commission (2013, p. 2, n. 1).

of, a child (or even a young adult) at a more appropriate time. At the same time, victims have usually been too disempowered – and often, in sexual abuse cases, too guilt-ridden or “silenced” – to take such timely action.

Over and above all of this is the innate fragility of children’s rights where, even in the context of theoretical or philosophical debates about the nature of rights, there are long-established and still current strands of debate questioning the very existence and possibility of children’s rights, with the result that there is no informed consensus about whether children can possess legal or moral rights *at all* (Campbell, 1992, p. 2; MacCormick, 1982, pp. 154–166). That may in itself contribute to a situation where perceptions of children’s rights take as their point of departure a relatively low baseline in which such rights, or purported rights, cannot simply be presumed before a discussion of their content can ensue; they may need to be “set up” or argued for.

Of course, some may see this as a relatively esoteric debate, and for that reason I shall make the working (and practical) assumption, for purposes of the discussion to follow, that children are indeed possessed of legal and moral rights and that this is to be taken as read in the context of civil law claims brought by adults in respect of allegations of historical childhood abuse. After all, the courts are necessarily involved in *prima facie* engagement with such claims on the basis that, in a given case, a claim proceeds from allegations that established (and usually undisputed) legal rights to emotional or physical or psychological or sexual integrity – for example, a right not to be sexually assaulted – have been violated. But the “charge” of fragility of rights of the child persists if for no other reason than that the exercise and enforcement of such rights – particularly rights of younger children – are often dependent upon the intervention of an

adult representative, such as a parent or guardian or carer. Inevitably, in specific cases, that may serve to weaken or undermine the rights in question even if the converse may also be true in cases where a child's representative is diligent in upholding, maintaining and reinforcing the relevant rights.

The (on the face of it, improbable) fact that civil limitation case law has become a repository of judicial decision-making on some civil law ramifications of historical childhood abuse has meant that it has become possible, when reviewing such case law (as this has been developing over more than a decade under English law and Scots law), to identify judicial attitudes towards adult claimants in historical childhood abuse cases and, by extension, towards child abuse victims themselves. (This is despite jurisdictional differences at the level of the detail of statutory provisions and judicial opinions.) The case law in both jurisdictions has become a kind of barometer, or better, a prism, through which to view legal (including, more narrowly, judicial) policy in this area, and to observe and take stock of relevant developments and associated judicial attitudes and perspectives.

In this article it is intended to focus attention, among other things, upon the relevant case law. This will entail, where appropriate, identifying judicial opinions that afford some insight into contrasting judicial attitudes in both English and Scots law towards adult claimants in historical childhood abuse cases and towards the child victims of abuse. Key aspects of the discussion to follow are framed in terms of recurrent issues that have arisen in the context of relevant judicial opinions. The overall aim is to outline a position that may serve to inform a wider debate about the success or failure of civil law mechanisms of redress in rendering justice, or towards delivering even a *sense* of justice, to those whose right to emotional,

physical, psychological or sexual integrity has been violated in childhood.

2 A Preliminary Overview – English Law and Scots Law

As an essential preliminary to the lines of analysis pursued later in this article, it is necessary to undertake a brief contextual overview of the current position in the UK, considering respectively English law and Scots law, including recent key developments, both in the judicial context and under statute, in and in the use of, civil limitation laws in historical childhood abuse cases.

Turning first to English law, civil limitation laws in principle apply to delayed personal injury claims arising from allegations of childhood abuse, though an English House of Lords case (*A v Hoare* [2008] 1 AC 844) (hereafter, “*Hoare*”) and subsequent cases – when combined with the discretion provided for in section 33 of the Limitation Act 1980 to disapply the three-year limitation period where it is “equitable” to do so – have served to lessen the time-barring impact of the use of limitation laws in such contexts. Lately, *Hoare* has paved the way for the use of the section 33 discretion in cases involving deliberately inflicted injury where, prior to that decision, an earlier House of Lords decision (*Stubbings v Webb* [1993] AC 498 HL(E)) – which *Hoare* departs from – had in error laid down that the discretion was not available in cases of deliberate injury. Given that in childhood abuse cases injuries are frequently deliberately inflicted, the decision in *Hoare* has resulted in an increase in the successful use of the section 33 discretion in relevant civil law claims and correspondingly favourable outcomes for claimants. (Prior to that, the *Stubbings* decision had effectively suppressed many such cases.)

Also, since *Hoare*, the courts appear to have aimed to strike a better

balance between the respective interests of parties suing and parties sued in historical childhood abuse cases.² However, unlike jurisdictions such as Scotland, and Australian states including Queensland, New South Wales and Victoria, which have recently introduced relevant legislation, no legislation has yet been enacted in England and Wales specifically disappling civil limitation laws in childhood abuse personal injury claims; though, since the decision in *Hoare* – and indeed case law that has recognised the availability of vicarious liability in such claims, such as in *Catholic Child Welfare Society and others v The Institute of the Brothers of the Christian Schools* [2012] UKSC 5 – the courts appear to have adopted a generally more lenient approach to the disposal of such claims.

The position under Scots law differs markedly from the English law position. In 2015 the Scottish Government initiated a public consultation on a proposal to remove the 3-year limitation period in personal injury claims initiated by adults in connection with allegations of historical childhood abuse (see The Scottish Government, 2015). The consultation was in response to a growing perception that the civil courts in Scotland were adopting an overly strict approach to applying civil limitation laws in the context of such claims. Hand in hand with this was a perception that judges were generally antipathetic towards the merits of claims in such cases. For instance, under section 19A of the Prescription and Limitation (Scotland) Act 1973, the court is invested with a discretionary power to allow an otherwise time-barred action to proceed if it deems it “equitable” to do so. (The section 19A discretion is broadly equivalent to the English law section 33 discretion.) Commenting on the use of this discretion, and on the fact that in childhood abuse

² For instance, see *B and others v Nugent Care Society/R v Wirral Metropolitan Borough Council* [2010] 1 WLR 516, especially at paras. [20]–[27] (Lord Clarke of Stone-cum-Ebony MR).

cases the discretion had, at the time of writing, rarely been invoked successfully, Eleanor Russell has observed:

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. (Russell, 2013, pp. 125–126)

This was doubtless a case of law – or, at any rate, judicial decision-making – at best, lagging behind public opinion or, at worst arguably denying justice to a seemingly deserving class of litigants.

The Scottish Government consultation has resulted in the enactment of the Limitation (Childhood Abuse) (Scotland) Act 2017 which became effective on 4 October 2017. The Act disapplies civil limitation laws in the context of personal injury claims arising from allegations of childhood sexual abuse, physical abuse, emotional abuse and abuse in the form of neglect. In other words, the 3-year time bar in principle ceases to apply in such claims. However, in order to safeguard the position of the party sued in the context of such claims, the Act also establishes significant new grounds of challenge which have the potential to reanimate the previously established trend for the courts to apply civil limitation laws strictly in the context of childhood abuse claims. In terms of a new section 17D(2) of the Prescription and Limitation (Scotland) Act 1973 – the 1973 Act being the primary legislation modified by the 2017 Act – the court may disallow an action (such as one centring on allegations of abuse in

childhood) ‘where the ... [party sued] satisfies the court that it is not possible for a fair hearing to take place’. Over and above the section 17D(2) ground of challenge, a further provision (a new section 17D(3) of the 1973 Act) empowers the court to disallow (e.g. a historical childhood abuse) action if the party sued satisfies the court that as a result of civil limitation laws (i.e. the 3-year time bar) being disapplied ‘the ... [party sued] would be substantially prejudiced were the action to proceed’ and ‘having had regard to the ... interest [of the suing party] in the action proceeding, the court is satisfied that the prejudice is such that the action should not proceed’. There is a well-established “jurisprudence” in Scots case law of safeguarding, and therefore in effect promoting, the interests of the party sued in this type of case which the courts may fall back on when considering future challenges made under sections 17D(2) or 17D(3) (or both). There is, in other words, a well-trodden judicial path of “looking out for” or “taking care of” the party sued, in terms of fairness of the proceedings and avoidance of prejudice. It is thus clear, as Russell has noted (see above), that the established case law has more often than not resulted in the courts giving primacy to the position and interests of the party sued. It has yet to be seen whether the strict judicial approach established in previous case law will be extended to the construction and application of the new sections 17D(2) and 17D(3) grounds of challenge.

An Australian case has often cited by the Scottish courts in the context of childhood abuse claims where the operation of the 3-year time bar has arisen for discussion (*Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, especially at 551–553). In particular, the opinion of McHugh J has proved highly influential in judicial decision-making under Scots law (and to a lesser extent English law), where, among other rationales for civil limitation laws, emphasis is given to the problem of deterioration of evidence over

time, sometimes expressed as the judicial imperative to resist “stale claims”.³

With the seemingly more lenient operation of civil limitation laws in England and Wales since *Hoare* – including developments in the availability of vicarious liability – and the recently introduced legislative regime in Scotland, it might have been thought that the civil law claims of victims of historical childhood abuse in the UK would be less likely to encounter the time-barring effect of limitation laws. However, despite the altogether more lenient position to have emerged under English law there is an ever-present possibility that civil limitation laws may be strictly applied in the context of relevant claims. In the absence of legislation disapplying civil limitation laws in historical childhood abuse cases this relative lack of certainty is likely to continue for the foreseeable future. Yet, ironically, the position under Scots law might be no less certain going forward despite the evidently more permissive and apparently forgiving legislative regime for adult historical abuse claimants given that the 2017 Act has, in effect as we have seen, created independent new grounds of objection to the progress of relevant claims specifically focused on childhood abuse cases. What this means is that, under English law *and* Scots law, not only is there a continuing risk that relevant claims may be forestalled by limitation laws, but the previously developed case law embodying judicial attitudes towards both adult claimants in historical childhood abuse cases and child abuse victims themselves

³In a variety of key respects, the appropriateness of each of McHugh J’s rationales for civil limitation laws, when viewed in the context of civil law claims brought by adults in respect of allegations of historical abuse occurring in childhood, is questionable (see generally Ross, 2018). Case law – in most cases peremptorily and uncritically – citing *Brisbane* includes: *B v Murray (No 2)* 2005 SLT 982, especially at para. [22]–[28] (Lord Drummond Young); *M v O’Neill* 2006 SLT 823, especially at para. [96] (Lord Glennie); *AS v Poor Sisters of Nazareth* 2007 SC 688, especially at paras. [41]–[45] (Lord President Hamilton); *Bowden v Poor Sisters of Nazareth and Others* [2008] UKHL 32, especially at paras. [5] and [23]–[25] (Lord Hope of Craighead); *Vincent Roland Albonetti v Metropolitan Borough of Wirral* [2008] EWHC 3523 (QB), especially at para. [18] (McKinnon J); and *F, S v TH* [2016] EWHC 1605 (QB), especially at para. [12] (Langstaff J).

(particularly in Scotland) may to some extent serve as an indicator of how relevant claims might be decided by the courts in future.

In the recent past in the UK relevant judicial attitudes have been developing in a context in which judges occasionally have, but frequently have not, factored into account the unique difficulties and complexities arising from the (historical) lived experiences of childhood abuse sufferers which, in adulthood, are often manifested in a range of medically recognised conditions. There is, for instance, no lack of evidence for the psychologically paralysing and incapacitating effects of certain forms of childhood abuse on adult survivors. So it is instructive to examine briefly a few of the recognised effects of childhood abuse at this stage of the discussion.

3 Recognised Effects of Childhood Abuse

The fact that, in general, childhood abuse – and particularly childhood sexual abuse – impacts in a variety of injurious ways upon the psychology and quality of life of victims in adulthood is widely recognised and extensively reported upon in literature in the areas of psychiatry, psychology, sociology and other medical and behavioural sciences. Commenting in the opening paragraph of a study published in 1995 – which focuses on childhood *sexual* abuse – Smucker *et al* point out that, in the previous decade, a growing body of literature had attested to an alarming prevalence of childhood sexual abuse and its deleterious effects on the lives of adult survivors.

Numerous studies have indicated that a history of childhood sexual abuse is associated with psychological difficulties in adulthood, such as increased rates of chronic depression, suicidality and self-destructive behaviors, interpersonal and sexual difficulties, chronic anxiety, and posttraumatic stress

disorder. Feelings of guilt, self-blame, self-disgust, self-hatred, low self-esteem, inferiority and powerlessness, and mistrust of others are frequently cited in the clinical literature as long-term effects of sexual abuse (Smucker *et al.*, 1995, p. 4)

Another study (Cutajar *et al.*, 2010) has maintained that the victims of childhood sexual abuse suffer three times the burden of mental health problems when compared with members of the general community. The authors of the study conclude that such abuse increases the risk of the subsequent development of psychiatric disorders in both childhood and adulthood. Individual studies focusing on childhood abuse in institutional environments – where abusive treatment has often been on a wider spectrum than sexual abuse (i.e. extending to physical and emotional abuse, and also neglect) – have reached broadly similar conclusions. Thus, in a study undertaken in the context of the Ryan Commission’s investigation of child abuse in the Irish industrial and reformatory school system (Ryan, 2009, para. [3.30]), effects of childhood abuse have included, in addition to many of the issues or medical conditions outlined above, relationship and parenting problems, and occupational and health difficulties.

More tellingly – at least so far as the present discussion is concerned – in a number of studies, patterns of behaviour have been observed that are relevant to an assessment of specific *legal* implications of the psychological sequelae of childhood abuse – enabling, in particular, connections to be made between childhood abuse and (subsequent) delays in victims’ seeking civil law redress. Thus, the authors of a study focusing on childhood incest point to the fact that therapists have often encountered adult clients only after the passage of many years since the clients’ experiences of abuse (Lindberg and Distad, 1985, pp. 332–333). A severe trauma such as

childhood incest is typically followed by the emergence of a pattern of repression, denial and emotional avoidance – this being the so-called *latency period* characteristic of childhood abuse. At a later stage, symptoms such as nightmares or guilt may be experienced. Moreover, as Lindberg and Distad note, adult survivors are known to suppress or conceal their childhood victimisation through learned “survival skills” or because they did not know that the difficulties or symptoms with which they presented to therapists were linked to their historical experiences of incest.

These findings have been reinforced in observations made by the Law Commission for England and Wales in a report focusing, among other things, on the legal implications of delay in the context of civil law claims arising from allegations of childhood abuse (Law Commission, 2001, para. 3.103). Commenting on the inhibiting and delaying effects of childhood abuse on the pursuit of civil law redress, the report points to cases where it had taken more than two decades for victims to testify about abuse on account of the traumatic memories that that would revive. The report notes that there is a need for victims to recover sufficiently from the trauma occasioned by childhood abuse to be able to contemplate bringing a claim against alleged abusers.

A case decided in Queensland, Australia (*Carter v Corporation of the Sisters of Mercy of the Diocese of Rockhampton* [2001] QCA 335; BC200104983), is one of a number to have given judicial recognition to the difficulties faced by adult survivors of childhood abuse in pursuing timely civil law redress.⁴ In *Carter* the majority decision of

⁴In a Scottish case (*CG v Glasgow City Council* [2009] CSOH 34, at para. [32]) – a single-judge decision that was subsequently overruled – Lord Malcolm, sitting in the Outer House of the Court of Session, commented that the claimant, despite knowing that in some sense she had suffered abuse, failed to appreciate that her experiences justified seeking advice as to the options available to her for pursuing civil law redress: ‘It is I think widely understood that young people who suffer this form of ill-treatment on a regular basis can come to regard it

the court was that a civil law claim alleging childhood abuse was time-barred. However, in support of the claimant's position, Atkinson J (dissenting) observed that adult survivors of abuse characteristically lack self-esteem and self-confidence, contributing to a situation where the psychologically incapacitating effects of abuse do not emerge until many years into adulthood. She further observed that these severe long-term consequences of abuse have been known to manifest themselves in an inability of victims to recognise the true nature of the abuse.⁵ Inevitably, at least for some adult survivors of historical abuse, the initiation of timely civil law redress may be, and may have been, impossible.

In a similar vein, a consultation paper published by the Scottish Government (The Scottish Government, 2012, para. [3.25]) notes that severe and prolonged abuse of children can have a traumatic and psychologically paralysing effect, inhibiting the pursuit of civil law redress in adulthood. (This was five years before the government's law reform agenda had developed sufficiently to make the introduction of legislation in the form of the Limitation (Childhood Abuse) (Scotland) Act 2017 Act a reality.) The consultation paper emphasises that the practical capacity to initiate legal proceedings may actually be absent in such circumstances, and points out that it would seem "hard" if survivors of abuse, when they emerge from their state of effective incapacity and seek to pursue civil law redress, find that the law no longer provides them with any avenue to take action. However, echoing judicial decisions previously made in the Scottish courts – and in so doing alluding to the primacy more often than not given in those courts to the position of the party sued – the

as almost part and parcel of their way of life, and that it can have devastating consequences thereafter which may make it difficult for them to appreciate or discover the significance of what had been done to them'. For the subsequent Inner House decision, see *CG v Glasgow City Council* 2011 SC 1.

⁵ *Carter* at paras. [86] and [88].

consultation paper also stresses the need for the rights of alleged wrongdoers to be safeguarded, commenting that allegations need to be tested within a reasonable time period rather than many years or decades after the occurrence of the alleged wrongdoing (The Scottish Government, 2012, paras. [3.26] and [3.27]). With the creation of independent grounds of objection to the progress of relevant claims provided for in the 2017 Act (mentioned above), it is clear that the Scottish Government's fundamental position did not change significantly between 2012 and 2017.

4 Judicial Opinions Evidencing Contrasting Judicial Attitudes under English Law and Scots Law

We have seen that not only is there recognition of the psychologically paralysing effects of childhood abuse in clinical and other literature; but relevant findings have been reinforced in specifically legal literature, whether judicial sources (i.e. case law) or reports of bodies involved in developing legal policy, such as governmental and law reform sources. It so happens that none of this has resulted in any kind of general alignment of positions developed by the judiciary separately under, respectively, English law and Scots law though, of course, at appropriate points, as with other areas of the law, the laws of both jurisdictions to some extent influence and impact upon each other. But nothing in the nature of a uniform approach has emerged across the case law of the two jurisdictions. Inevitably, this is accountable to differences in the detail of relevant legislative provisions, and other key variations in the law; but doubtless judicial attitudes and cultures have played a role in this as well.

The discussion to follow takes the form of a review of a selection of leading cases and other sources. The cases in question illustrate key recurrent issues that have arisen for discussion in judicial opinions

deciding upon the applicability of civil limitation laws in adult personal injury claims arising from allegations of historical childhood abuse. In generally considering issues that have featured significantly in the case law – which may be instructive in its own right – some attempt will be made, in passing or implicitly, to assess the argumentative coherence and persuasive force of particular judicial decisions. A few of the cases under discussion consider more than one of the recurrent issues: in other words, discussion of the recurrent issues overlaps in the cases under consideration. The cases to be identified in this article are, in each case, considered to be particularly illustrative of the recurrent issue under discussion.

4.1 Recurrent Issues – “Silencing” Effect of Childhood Abuse

The first recurrent issue for consideration focuses on the generally “silencing” or inhibiting effect of childhood abuse. In that context it has been recognised that adult survivors of abuse are frequently inhibited from pursuing timely civil law redress. This issue, as we have seen, is touched upon in a number of cases, and is given consideration in (for instance) law commission reports and other non-judicial contexts. There has been some divergence of judicial treatment under English law and Scots law of the specific question whether the so-called silencing or inhibiting effect of childhood abuse could be regarded as a precipitating factor in judicial decision-making in terms of whether to enforce, or not to enforce, applicable civil limitation laws in relevant circumstances – for instance, where there might exist a statutory discretion to disapply such laws. The question has been given consideration in a Scottish case (*AS v Poor Sisters of Nazareth* 2007 SC 688). Part of the judgment in that case turns on whether adult claimants, on account of the recognised inhibiting effect of childhood abuse on the pursuit of timely civil law redress, might be regarded as a *special class* – in other words, a class of

claimant worthy of special treatment when considering the application or disapplication of civil limitation laws in the context of a claim. A measure of judicial scepticism and resistance is expressed regarding the possibility that there might exist ‘a special class of abuse victims for whom it is to be taken as a matter of judicial knowledge that ... [the abuse engenders] a “silencing effect”’.⁶ The particular context of this discussion is consideration of the extent of an individual’s awareness or unawareness of seriousness of injury (e.g. psychological injury) caused by historical childhood abuse such as would give him or her grounds, and the necessary stimulus, to initiate timely civil law proceedings.⁷ Judicial recognition of a special class of victim might have placed potential claimants in historical childhood abuse cases in a stronger position to argue that typically they (as a class) were, in terms of symptomology, unaware of the seriousness of injuries sustained by them in consequence of childhood abuse until, owing to the time-barring effect of civil limitation laws, it was too late to pursue a claim.

The court rejected the idea of recognising a special class of victim, taking the view that, for a variety of reasons unique to the circumstances of the claimants in the case before the court, the claimants would not have been in a position to place themselves within such a class even if a class of that kind had already been judicially recognised. That view mainly turned on the fact that on a number of occasions in the past the claimants had spoken about the abuse and accordingly had not been *absolutely* silenced by the abuse.

⁶*AS v Poor Sisters of Nazareth*, at para. [35] (Lord President Hamilton, delivering the opinion of the court). A similarly sceptical position is outlined by Lady Smith in *Colin Findleton v Quarriers* [2006] CSOH 161, at para. [12].

⁷As discussed more fully below, the Prescription and Limitation (Scotland) Act 1973 allows for the running of limitation periods to be postponed to the date of the claimant’s (actual or imputed) awareness that injuries sustained by the claimant are sufficiently serious to justify the pursuit of civil law redress: see sections 17(2) and 17(3).

A further reason for rejecting the idea of a special class of victim is alluded to in the case, which is that there are inevitably differences between cases of this type, as one moves from case to case, and that any given case would always need to be considered on its merits and be informed, in appropriate cases and if required, by expert opinion uniquely adapted to the claimant's circumstances.⁸ Accordingly, there could be no judicially recognised paradigm of the typical "institutional child abuse victim" constructed as a class of victim to which claimants in specific cases could be assigned and ipso facto be accorded advantageous treatment in terms of the application (or disapplication) of civil limitation laws.

There are, of course, precedents in the law for the development of judicial paradigms ranging from the man on the Clapham omnibus at the broadest level of generality (see *Hall v Brooklands Auto-Racing Club* [1933] 1 KB 205, dicta of Greer LJ) to more specific paradigms such as those found in the clinical setting: for example, the standard of competence assigned to the ordinary skilled man or woman exercising, and professing to have, a relevant special skill, such as surgery (see *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582, at p. 586 (McNair J)). It seems remarkable that the factual uniqueness of cases should be seen as a reason not to attempt the *construction* of a judicial paradigm when it is clear that the practical operation of a paradigm in individual cases – involving, inevitably, factually unique circumstances – is a quite separate matter from identifying the assemblage of facts required to inform the construction of the paradigm in the first place. When *AS v Poor Sisters of Nazareth* was decided there was already sufficient evidence pointing to the long-term adverse effects of historical childhood abuse – and recognised patterning of post-abuse symptoms – to

⁸ See *AS v Poor Sisters of Nazareth*, at para. [35]: 'There are differences between individual cases'.

inform the construction of an appropriate paradigm if there had been the will to attempt that. Such a paradigm might have been capable of use in section 19A discretion cases (see above); while its construction might have made the need, and the political will, for legislation in the form that subsequently emerged (namely, the Limitation (Childhood Abuse) (Scotland) Act 2017) less pressing.

The highly limiting interpretation of the idea that childhood abuse has a “silencing effect” in *AS v Poor Sisters of Nazareth* – in the sense of making it, for all intents and purposes, a prerequisite that there had been an absolute silencing of the claimant – at a stroke narrows the scope, and oversimplifies the complexity, of the symptoms, signs and conditions that characteristically manifest as the sequelae of childhood abuse. Viewing the injury caused by abuse in those oversimplifying terms, it would always be possible to point to instances of “breaking the silence” that could be used to cast doubt upon the validity of a claim.⁹ Even a claimant’s taking preliminary medical or legal advice with a view to pursuing a civil action, and the pursuit of the action itself, could be viewed as precisely the “breaking of silence” that disqualifies the claimant from being treated as a “genuine” sufferer of historical childhood abuse. This suggests a vaguely absurd position: namely, that if the so-called “silencing effect” is perceived to be the dominant symptom of childhood abuse – and requires to be absolute and unimpeached – how could anyone who is actively engaged in pursuing civil law redress, albeit late, ever be regarded as having been sufficiently “silenced” to be taken seriously as a claimant?

⁹ Disqualifying “breaches of silence” mentioned in the case include situations where childhood abuse claimants visited and spoke to the mother superior at the institution where historical abuse allegedly took place (i.e. Nazareth House, Cardonald, Glasgow); or sought religious counselling; or wrote to a GP and (in the letter) attributed ongoing mental health problems to childhood experiences at Nazareth House; or made disclosures to a national newspaper. See *AS v Poor Sisters of Nazareth*, at para. [34].

In *AS v Poor Sisters of Nazareth*, the court recognises (especially at para. [22]), yet gives little weight to, the wider range of factors that could inform the development of a judicial paradigm of the typical institutional child abuse victim. These factors include the fact that the typical claimant would be likely to be inhibited (such as through under-confidence, feelings of shame and embarrassment or social isolation) from raising proceedings not only in early adulthood but “for many years thereafter”. A further factor, cited by counsel for the claimants but ultimately accorded little significance in the court’s deliberations, is that, typically, victims have painful memories and invariably put those memories to the back of their minds. Another inhibiting factor mentioned in the pleadings is that the socioeconomic background of the typical claimant may be such that recourse to lawyers, for example, for the purpose of initiating civil law proceedings, might be unusual and, by implication, daunting. This complex of factors – which, as we have seen, are well-recognised beyond the “four corners” of this case – is thus collapsed into a single overriding factor stripped of its many dimensions – i.e. “silencing effect”. Seen in those terms, it would always be a straightforward task for the court, if so minded, to dismiss the contention that a claimant has been (in the narrow sense) “silenced” in a given case.

In cases arising under English law there has not been the same tendency as under Scots law to oversimplify recognised effects of childhood abuse: such as where judicial decision-making is tied to an unnecessarily narrow conception of the idea of being “silenced”. So a question such as “has this claimant *literally* been silenced by adverse childhood experiences?” probably would not be asked. Silence and the silencing effect of childhood abuse are, of course, standardly recognised in English case law as a problematic issue which – seen in the context of the wider range of inhibiting effects of childhood abuse, and mental health problems, to which recognition has been

given – have impacted upon the handling of relevant cases by the courts, sometimes to the advantage of claimants (in terms of successful litigation outcomes). And it may be that for that and other reasons it has not been thought necessary to attempt to construct a judicial paradigm of the (typical) childhood abuse victim. Thus, Sedley LJ in an unreported case (*Ablett and others v Devon County Council*, 21 September 2000) when considering a civil law claim arising from allegations of sexual abuse at Forde Park Approved School in Newton Abbot, comments that:

[i]nvariably there is a problem with limitation I say “inevitably” because it is in the nature of abuse of children by adults that it creates shame, fear and confusion and these in turn produce silence. Silence is known to be one of the most pernicious fruits of abuse. It means that allegations commonly surface, if they do, only many years after the abuse has ceased.

Under English law there has been an altogether more accommodating judicial attitude towards the range of recognised effects of childhood abuse that inhibit potential claimants from pursuing timely civil law redress. In particular, the courts have not attempted to construct an artificially narrow and reductive conception of the “silencing” effect of abuse. The idea that instances of breaking of silence – for instance, characteristic of an adult’s seeking medical help or counselling – might result in a potential claimant’s being disqualified from pursuing relevant civil law proceedings is apparently alien to decision-making in the English courts. This seemingly more open-minded approach to the handling of relevant claims is quite well illustrated in *Hoare* where (for example) Baroness Hale looks beyond the position of the typical claimant to the typical behaviour of an alleged perpetrator of abuse,

describing him or her (at para. 60) as someone ‘whose deliberate and brutal actions towards a vulnerable person in his care may have resulted in immediate physical harm and much later serious psychiatric sequelae’. As she points out, authority figures who have perpetrated abuse have often exploited their position by acting in ways calculated to prevent abusive behaviour being reported. The suggestion is that victims’ silence and inaction in relation to the pursuit of civil law proceedings, is forced upon them by perpetrators of abuse; and this may, in itself, be viewed as an integral part of a course of abusive behaviour:

[T]he perpetrators [of child sexual abuse] are so often people in authority over the victims, sometimes people whom the victims love and trust. These perpetrators have many ways, some subtle and some not so subtle, of making their victims keep quiet about what they have suffered. The abuse itself is the reason why so many victims do not come forward until years after the event. This presents a challenge to a legal system which resists stale claims. (*Hoare*, at para. 54)

English law historical childhood abuse cases in which the section 33 discretion has been invoked – the discretion allowing for the 3-year time bar to be disapplied where that is “equitable” (see above) – have come to represent a useful barometer of judicial attitudes, given that lately, in handling such cases, a relatively straightforward dichotomy has emerged between (respectively) cases applying, and cases disapplying, relevant civil limitation laws. In situations where the section 33 discretion has been successfully invoked by historical childhood abuse claimants the courts have tended to emphasise, rather than to deny, downplay or oversimplify, the recognised

inhibiting effects of childhood abuse mentioned above.¹⁰ (A common feature of these cases is a finding of no, or negligible, delay-induced defendant prejudice.) In contrast, in cases where the courts have declined to exercise the discretion, the approach has not been to minimise or underrate recognised effects of childhood abuse given that that might subvert relevant civil law claims where precisely those effects are found to be a predisposing factor in judicial decision-making. Rather, the approach has been to emphasise seriousness of defendant prejudice and potential unfairness of the trial process as predisposing factors – in other words, prejudice, or potential prejudice, arising from the claimant’s delay (which may occasionally be exceptionally lengthy delay) in initiating proceedings and the related possibility of evidence being lost or becoming unavailable, or key witnesses dying (and so on).¹¹

¹⁰ For example, in *CD v Catholic Child Welfare Society (Diocese of Middlesbrough)* [2016] EWHC 3335 (QB), the claimant made allegations of historical physical and sexual abuse (including rape) against members of staff at a reformatory school. There was a seven-year delay in bringing the claim. The court’s assessment of the reliability of the claimant as a witness turned on what was taken to be an accepted fact that a ‘rape allegation was unlikely to be affected by the passage of time in terms of cogency. It was not something that [a victim] ... should have forgotten’. In addition, the court found that the claimant ‘...had been too embarrassed and ashamed to report the abuse and that he had wished to put his experiences to the back of his mind’. (See HHJ Gosnell, at para. (2).) The section 33 discretion was successfully invoked in that case. In *A v The Trustees of the Watchtower Bible and Tract Society and Others* [2015] EWHC 1722 (QB) there was recognition that a claimant ‘might have been disabled from commencing proceedings by any psychiatric injury that might have been suffered’. An expert report had conceded (and the court accepted) that post traumatic stress disorder suffered by the claimant justifiably explained why the claimant was ‘unable to focus upon the prospect of commencing [timely] proceedings ...’. (Globe J, at para. 53) See also dicta of Males J in *NA v Nottinghamshire County Council* [2014] EWHC 4005 (QB) (at para. 82): ‘The troubled background of many claimants complaining of child abuse must be taken into account. ... The law must also recognise the inhibitions which abuse will often cause, making it difficult or impossible for claimants to describe what has happened to them, sometimes until well after they reach adulthood. Such considerations may provide a good reason for delay in commencing proceedings.’ (Note that in this case the section 33 discretion was successfully invoked even though the substantive claim was ultimately rejected as the claimant failed in her attempt to assign vicarious liability to a local authority.)

¹¹ It should be noted that section 33(1)(b) of the Limitation Act 1980 specifically requires any exercise of judicial discretion disapplying the 3-year time bar to take account of the extent to which such an exercise would prejudice the defendant; while section 33(1)(a) requires the court to have similar regard to the possibility of prejudice to the plaintiff. Relevant case law normally emphasises the impact, on a party defending a claim, of the possibility of evidence deteriorating over time. This is more often than not expressed as the judicial imperative to “resist stale claims”. As we have seen, a leading case supportive of the rationales justifying civil limitation laws is the Australian *Brisbane* case. See, in particular, pp. 551–553 (McHugh J). Cases that do not expressly cite *Brisbane* but nonetheless give credence to the judicial imperative to resist stale claims as a justification for civil limitation laws include *Hoare*

In the final analysis, the complex of factors and symptoms inhibiting the pursuit of civil litigation in childhood abuse cases is perhaps more “paralysing” than it is “silencing”: implying that an unduly narrow and literal focus on the “silencing” effect of childhood abuse in judicial decision-making (as seen in relevant Scots law cases) can only be seen as inappropriately reductive and distorting. In only one reported case under Scots law has the court exercised the section 19A discretion in favour of a historical childhood abuse claimant (*EA (AP) v GN (AP)* [2013] CSOH 161).¹² By contrast, under English law, there appears to have been a more balanced distribution of successful, as against unsuccessful, instances of the corresponding English law section 33 discretion being invoked in the context of relevant civil law claims.

4.2 Recurrent Issues – Claimants’ Awareness of (Seriousness of) Injury

The second recurrent issue for discussion touches upon the practical and legal difficulties that adult claimants in childhood abuse cases

(especially Baroness Hale at para. 54). See also *Yew Bon Tew v Kenderaan Bas Maria* [1983] 1 AC 553, at p. 563 (Lord Brightman); and *Dobbie v Medway* [1994] 1 WLR 1234, at p. 1238 (Sir Thomas Bingham MR). In *RE v GE* [2015] EWCA Civ 287 part of the delay in bringing a claim was due to unexplained inaction on the part of the claimant in pursuing the claim. (Straightforward tardiness is implied in the judgment.) In *Ms Michelle Wilde v Coventry City Council* 2017 WL 01946928 there was a 29-year delay and an almost complete absence of documentary evidence relating to the time the claimant spent in Newfield House, Coventry, where she was allegedly raped and sexually abused. As a result, a fair trial was considered impossible. A complicating factor was that the claimant gave an inadequate explanation for delaying commencing proceedings or seeking legal advice so as to make it (in the opinion of the court) equitable to exclude the time limit after a period as lengthy as 29 years.

¹² Lord Kinclaven exercised the section 19A discretion to override limitation laws in favour of an adult survivor of childhood abuse, resulting in an award against the claimant’s uncle who had sexually abused the claimant in childhood. The decision appears to have turned on the fact that the claim lay directly against an individual rather than against an institution or organisation, such as a church or local authority; the implication being that reliance on the section 19A discretion would more readily be successfully upheld in the former case than the latter. This seems remiss given the well-documented capabilities of institutions and organisations to utilise all the (often considerable) resources at their disposal to defeat claims relating to, or to hamper investigations into, historical childhood abuse allegations. In this regard for instance, the UN (among others) has been highly critical of the Catholic Church (see UN Committee on the Rights of the Child, 2014).

have encountered in situations where civil limitation laws typically provide that an applicable limitation period is to run from the time when the person wronged actually became – or was deemed by the court to have become – aware of the injury suffered. Under English law, date of knowledge is governed by section 14 of the Limitation Act 1980. Under Scots law, date of knowledge (or of “awareness”) – extending to awareness of both the intrinsic seriousness of the injury suffered and the fact that the injury was sufficiently serious to justify pursuing civil law redress – is governed by section 17(2)(b) of the Prescription and Limitation (Scotland) Act 1973. Statutory provisions framed in this way are intended to mitigate the perceived severity of civil limitation laws that might otherwise operate against a claimant who may, for some time, be unaware that he or she has sustained a particular injury, or is at any rate unaware of its significance or seriousness or its connection to historical events in the claimant’s life. The running of the applicable limitation period is typically postponed to (in effect) the date of the claimant’s knowledge or awareness of statutorily defined facts relevant to the injury complained of. So, for instance, a limitation period may in a given case only begin to run from the date when the claimant first became aware that a significant injury had been caused to him or her. And, in appropriate cases, this may be many years after a 3-year limitation period has run its course. In considering this recurrent issue, the emphasis will be on Scots law.

A case already mentioned which provides a convenient focus for discussion of this recurrent issue is *CG v Glasgow City Council*.¹³ In that case consideration was given to the claim of a former resident of a children's home operated by Glasgow City Council: Kerelaw

¹³ The case is first reported following a preliminary procedural debate before Lord Malcolm in the Outer House of the Court of Session ([2009] CSOH 34) and is followed by a report of a later procedural hearing before an Extra Division of the Inner House comprising Lord Eassie, Lord Bannatyne and Lord Wheatley (2011 SC 1).

Residential School in Stevenston, Ayrshire. (See, for background information, the report commissioned jointly by the Scottish Government and Glasgow City Council enquiring into abuses committed at this facility (The Scottish Government, 2009).)

The claimant in the case sought civil law redress in respect of “brutal physical treatment and sexual abuse” (*CG v Glasgow City Council* 2011 SC 1, at para. [5]) to which she had been subjected by staff employed at the residential school. The abuse took place over a 3-year period between 1992 and 1995, beginning when the claimant was 13 years of age. By statute the claimant would have had to raise the action before her nineteenth birthday (29 June 1997) – in other words, when she was still 18, having (by any reckoning) barely entered adulthood¹⁴ – in order to avoid the action being time-barred.¹⁵ This is because Scots law allows for periods of “nonage” (broadly, minority) to be disregarded in calculating the running of the limitation period. On that basis, the 3-year limitation period only starts to run when a potential claimant reaches an age at which he or she enjoys full legal capacity: under Scots law at the time the age in question was 16. The entire period from birth to sixteen (the period of so-called “nonage”) is thus to be disregarded for this purpose. (But note that, in this case, it was legally competent for the limitation period to be *further extended* so as to run from an even later date – namely, the date of the claimant’s awareness of seriousness of the injuries complained of.)

¹⁴ Being designated an adult by law is by no means an indication of maturity. The definition of “child” for purposes of Art. 1 of the Convention on the Rights of the Child (United Nations, Treaty Series, Vol. 1577, p. 3) is a human being below the age of 18. Thus 18 is a standard reference point for purposes of the rights conferred by the Convention and other international legal instruments. In Art 1. of the Convention allowance is made for the possibility of individual states parties to the Convention legally establishing different thresholds between childhood and adulthood.

¹⁵ This position arises from the operation of the Prescription and Limitation (Scotland) Act 1973, section 17(2) and (3), construed with the Age of Legal Capacity (Scotland) Act 1991, section 1(2).

The action was not in fact raised by the claimant until 2007, around a decade after the expiry of the limitation period established under the applicable statutory regime (which had already allowed for a disregard of a period of “nonage”, as mentioned above). It was therefore necessary for the claimant to seek to rely, among other things, on statutory provisions allowing for the further postponement of the running of the limitation period – i.e. not only during her “nonage” but during a supervening period when – the claimant contended – she had lacked the necessary awareness of the fact that the injuries she sustained in childhood were sufficiently significant and serious to justify initiating civil law proceedings.

Ultimately the court took the view that the statutory time-bar *should* operate against the claimant. Lord Eassie – delivering the opinion of the court – observed that the court was unable to see any basis upon which the claim could ‘properly and objectively be judged of insufficient worth to warrant [civil] proceedings’:

In our view, it cannot be said that the catalogue of physical and serious sexual abuse of which the pursuer now complains would not have furnished, *on her leaving the school*, a claim of damages of sufficient magnitude to make worthwhile the raising of proceedings In other words, it cannot be said that the damages which would be awarded to the pursuer in respect of that abuse would be so small as not to justify the taking of steps by way of litigation. (*CG v Glasgow City Council* 2011 SC 1, at para. [31], emphasis added)

Leaving aside for the moment the question of the “objectivity” of a claimant’s awareness (discussed under the third recurrent issue, below), what is remarkable about this key passage is that there is at least an implicit judicial expectation that on leaving Kerelaw

Residential School the claimant not only should have recognised the scale of the wrongdoing committed against her *and viewed it as a civil wrong* but should have taken steps to initiate civil law proceedings in response. The case report notes that the claimant was born in June 1978 and that she left the school sometime in 1995, suggesting that, at the relevant time, she was aged either 16 or 17. There thus appears to be an expectation that the claimant at the age of 16 or 17 – presumably extending generally to claimants of that age in the same circumstances – would typically recognise the potential for the abuses committed against them to found a claim under the civil law. In other words, persons of that age and (im)maturity would be expected to have the necessary forensic insight – or knowledge of the workings of the civil justice system – to make a connection between abuse suffered in childhood and the availability of civil law redress.

If the relevant judicial expectations centred upon assumptions made about a mid-teenager's perception of the criminality of relevant abusive behaviour, then they would not seem especially unrealistic. Indeed, the case report mentions that the claimant had little difficulty viewing the abuses in terms of *criminal* wrongdoing (*CG v Glasgow City Council* 2011 SC 1, at para. [5]: '[The claimant] ... regarded the physical assaults as a matter for the police rather than civil lawyers ...'). But the key judicial expectations appear to go further than even assumptions of the criminal and civil law dimensions of abusive behaviour. There appears to be an expectation that the claimant in her mid-teens was expected to have the strength of purpose and financial resources (even disregarding limitations there may be on the availability of legal aid) actually *to follow through* with a claim under the civil law. Taking such a decisive step suggests a level of engagement with law and legal processes that would probably be beyond the capability of the average teenager, to

say nothing of teenagers who have endured (and have only just emerged from) years of abuse.

It should furthermore be questioned whether a potential claimant would have the foresight to predict that initially transient physically abusive behaviour (to which the court appears to be referring in the above passage) could potentially lead to persistent and ineradicable psychological injury in later life, as frequently happens in childhood abuse cases. As we have seen, this type of injury, resulting from childhood abuse, has been given judicial recognition in the Supreme Court by Baroness Hale when she refers to “serious psychiatric sequelae” (*Hoare*, at para. 60). There is a resonance in *CG v Glasgow City Council* of Lord Griffiths’s observation in the *Stubbings* case that he had the greatest difficulty in accepting that a woman who knows that she has been raped does not know that she has suffered a significant injury (*Stubbings v Webb* [1993] AC 498 HL(E), at p. 506). Of course, the *extent* of the injury sustained is an issue in that a rape victim – though undoubtedly aware of the significance of the immediate physical violation – cannot possibly know anything of possible psychological injury that may (or may not) emerge in the months and years following the assault. Likewise, if Lord Griffiths’s viewpoint is transposed to childhood rape or other serious abuse, in circumstances where the claimant has a restricted timescale within which to pursue civil law redress, an allegation of significant (physical) injury upon which timely civil law redress is actually pursued (i.e. without falling foul of civil limitation laws) cannot possibly take account of psychological injury which may (or may not) emerge at some unknown future time. Indeed, the later-emerging psychological injury may prove more significant, lasting and incapacitating than the physical injury that preceded it. As a purely

practical proposition, how does one make “tomorrow’s injuries” (which have not yet emerged) the subject of “today’s claim”?¹⁶

There is also the difficulty which potential claimants encounter of recognising a *causal connection* between emerging or ongoing psychological injury and historical abuse. As we have seen, relevant clinical literature establishes that adult survivors may often be unaware that there is necessarily any link between psychological problems experienced during adulthood and physical or sexual abuse suffered in childhood (Lindberg and Distad, 1985, pp. 332–333).¹⁷ In a Scottish case which centred on allegations of historical institutional childhood abuse (*M v O’Neill*, 2006 SLT 823, at para. [92]), Lord Glennie commented that:

... it would be highly material if the [claimant] ... could show that her failure to bring the action in time was caused by the abuse, in the sense that the abuse resulted in, or contributed to, her reluctance to come forward.

On the face of it, this observation appears perceptive in terms of resonating with observations made in relevant literature concerning the psychological sequelae of childhood abuse. However, in the same opinion, Lord Glennie comments that the claimant in the case failed to convince the court that the childhood abuse she had suffered

¹⁶ The position of the claimant is evidently less intractable in situations where a (timely) claim is defended by an insurance company or a public authority or a public corporation. Under the Administration of Justice Act 1982, section 12, the court can make a provisional award of damages to a person who has sustained injury as a result of the fault of another person in circumstances where there is a risk that at some time in the future the injured person will, as a result of the injury, suffer some serious deterioration in his or her physical or mental condition.

¹⁷ Essentially the same point has been made in non-clinical (i.e. specifically legal) literature (see Mathews, 2003, p. 232): ‘As demonstrated, in most cases the plaintiff will neither know of, nor be reasonably able to know of, their rights until well after the expiry of the limitation period, if at all. The acts, the situation and the coping strategies adopted mean that survivors often will not know of the nature and the extent of the psychological injury experienced, or of the causal link between the acts perpetrated and those problems; and they will avoid ascertainment of these facts until they are psychologically able to do so’.

caused the delay in pursuing civil law redress that activated the statutory time-bar because, in the course of seeking help for her psychological problems, she 'did not tell the relevant professionals anything about what she thought was the real cause, namely the abuse' (2006 SLT 823, at paras. [76] and [92]). This appears to point to a surprising judicial assumption that adult victims of childhood abuse are ordinarily in a position to self-diagnose; the implication being that the onus is on victims to apprise therapists or psychiatrists of experiences in their past life which might have contributed to present-day dysfunctionality. More specifically, it implies – contrary to what is suggested in the literature – that relevant claimants, without necessarily having the benefit of professional intervention, are instilled with an awareness of the origins in childhood abuse of psychological injury experienced in adulthood.

Thus in *O'Neill* the claimant appears to have been expected to identify and inform medical professionals of, a causal connection between childhood historical abuse and psychological injury suffered in adulthood. She would then, in Lord Glennie's words, have successfully demonstrated 'that her failure to bring the action in time was caused by the abuse, in the sense that the abuse resulted in, or contributed to, her reluctance to come forward'. But, assuming she had had the requisite awareness, would she have secured any legal advantage by informing medical professionals of that? Had she in fact so informed them, the court might have treated her awareness as a reason for disqualifying her from relying on provisions of civil limitation laws postponing the operation of the statutory time-bar during periods in which there is a claimed lack of awareness of any connection between psychological injury experienced in adulthood and earlier childhood abuse. Moreover – recalling discussion of the first recurrent issue (above) – would the claimant have been regarded by the court as having broken her silence in a way that

disqualified her from being treated as a “genuine” sufferer of historical childhood abuse? It would seem that, judicially, the claimant in *O’Neill* was “damned if she did” (so inform the medical professionals) and “damned if she didn’t”.

We have seen that, in the context of civil law redress under Scots law, the judicial expectations and assumptions considered under this (second) recurrent issue have created intractable difficulties for claimants in situations where the courts have had the task of deciding whether the running of an applicable limitation period is to be suspended by reason of the claimants’ unawareness that injury caused by abuse suffered in childhood was sufficiently serious to justify pursuing civil law redress. On further examination of the case law it becomes clear that yet another layer of difficulty has been added to the legal position of such claimants where the courts, in terms of the applicable statutory provisions, have had to decide upon a claimant’s awareness of relevant facts (including the fact that an injury may be considered sufficiently serious to justify civil law proceedings). The further question for consideration in this context is whether the court’s determination is to be on the basis of the claimant’s *actual* awareness or on the basis of an “objective” judicial attribution of awareness which either disregards, or only partly takes account of, the claimant’s actual awareness. This is the third recurrent issue flagged for discussion, and there is relevant Scots case law and English case law – the latter demonstrating a contrasting judicial position – that it is useful to review in this connection.

4.3 Recurrent Issues – “Objectivity” of Claimants’ Awareness of (Seriousness of) Injury

Both the single-judge decision and the three-judge decision in *CG v Glasgow City Council* (the latter of which overrules important aspects of the former)¹⁸ concern issues of principle which also arose for consideration in the House of Lords decision in *Hoare* under comparable English law civil limitation legislation. One key issue – where, at the level of the specific statutory provisions there are important similarities and differences in Scots law and English law – is that of whether a claimant’s awareness of facts, which include the fact that an injury was significant enough to justify initiating civil law proceedings, is *subjective* in terms of the claimant’s actual awareness or *objective* in the sense that awareness is judicially ascribed or imputed to the claimant, or indeed *both* – i.e. partly subjective and partly objective.¹⁹

The core issue is that it may not even occur to a potential claimant to pursue a civil law claim if, at a given time, he or she is unaware, or unable to become aware, of significant information that could establish a basis for a claim, such as the presence, or perceived seriousness, of an injury, illness or medical condition causally connected to a prior injury or event where, in the present context, the prior injury or event involves the abuse of the claimant when he

¹⁸ See above, n. 13.

¹⁹ The objectivity–subjectivity “debate” arises in the context of comparable statutory provisions in other jurisdictions, although the precise framing and emphasis of issues arising for consideration differ from jurisdiction to jurisdiction. In Queensland, Australia, for instance, provisions of the Limitation of Actions Act 1974 (Qld) allow for extensions of the time within which personal injury cases may be brought to court without being time-barred. (See especially section 31(2) construed with sections 30(1)(b)(i) and 30(1)(c)(ii).) The legislation calls for prospective claimants in personal injury cases to take reasonable steps to discover material facts that could be of relevance to their knowledge or awareness of injuries that they have sustained. This extends to obtaining appropriate advice. Claimants are also expected to assess the prospects of success of relevant civil proceedings in terms of whether any future award of damages might be sufficient to justify raising the action in the first place. The assessment is based on the hypothesised perception of a reasonable person.

or she was a child. Scots law and English law both recognise the need to postpone the running of limitation periods to the date of the claimant's (actual or imputed) awareness that civil law redress might be pursued in respect of the injuries sustained. (For this purpose, elements of the (Scots law) Prescription and Limitation (Scotland) Act 1973, section 17(2)(b) are comparable to the (English law) Limitation Act 1980, section 14.)

In the particular context of the Scots law statutory provisions under discussion in *CG v Glasgow City Council* a key decision in the case turned on the interpretation of section 17(2)(b) of the Prescription and Limitation (Scotland) Act 1973 which allows for the postponement of the running of the applicable limitation period in defined circumstances (but centring on claimant "awareness"). Section 17(2)(b) provides that no personal injury action may be brought unless it is commenced within a period of three years after the date on which the claimant became, or on which, in the opinion of the court, it would have been reasonably practicable for the claimant to become, aware of certain facts.

The first of these "statutory facts" is that the injuries were sufficiently serious to justify bringing an action of damages, and for this purpose it is to be *assumed* that the person defending the (hypothetical) action has admitted liability and that he or she is capable of meeting an award of damages made by the court. (See 1973 Act, section 17(2)(b)(i).) The two further "statutory facts" are, first, that the injuries were attributable in whole or in part to an act or omission and, secondly, that the defender was a person to whose act or omission the injuries were attributable in whole or in part (or the employer or principal of such a person). (See, for this purpose, 1973 Act, section 17(2)(b)(ii) and (iii).) Section 22(3) of the Act additionally requires that knowledge that any act or omission was or was not, as a

matter of law, actionable, is to be treated as irrelevant. The rationale behind sections 17(2)(b) and 22(3) is the establishment of a framework within which the court can assess a particular claimant's state of awareness, in a context in which the "limitation clock" does not run during claimant unawareness but does run during claimant awareness.

Difficult as these statutory provisions are, in summary the legislation requires consideration to be given to whether a potential claimant was aware – or whether it would have been reasonably practicable for a claimant to be aware – that injuries sustained are serious enough to justify a hypothetical damages action: (A) which has not been contested, (B) where the defender is financially capable of meeting any award of damages made by the court, and (C) where there are no legal barriers to a successful outcome for the pursuer, such as a lack of "actionability" – for example, by reason of the operation of civil limitation laws.²⁰ In addition a judgment is to be made as to whether a potential claimant was aware – or whether it would have been reasonably practicable for a claimant to be aware – that a causal connection could be made between the injuries complained of in the instant action and: (A) historical acts or omissions experienced by the claimant that are (B) specifically attributable to a person who is either the defender in the instant action or the employer or principal of such person (where, for example, vicarious liability is envisaged).

²⁰The first "statutory fact", combined with the section 22(3) disregard, appear to be aimed at creating a hypothesis of the "ideal" action of damages (from the standpoint of the claimant) where anything that could impede a successful outcome for the claimant is to be imagined away. This allows the focus of this "statutory fact" to be on whether the *injury per se* is sufficiently serious to found the imaginary "ideal" action of damages where factors may be disregarded that might in the "real world" make the action not worth pursuing in terms of causing the claimant to believe that the likely "value" of the action is diminished by such factors – e.g. costs and risks of pursuing a contested action and the risk of a defender's proving to be impecunious or insolvent. It therefore helps to establish an imaginary minimum threshold for pursuit of a claim below which a claim could be seen as (financially, at least) pointless.

Taking a step back for the moment, it is in fact possible to focus on key aspects of the judicial decision-making around the detail of these (complex) provisions which appear to point quite revealingly to underlying judicial attitudes even if, at best, we may be able to find nothing more overt than an apparent judicial lack of sympathy with the position that claimants have found themselves to be in (whether as claimants in the here and now, or as historical sufferers of abuse in childhood). Significantly, what is striking about section 17(2)(b) is that the question of the date of a claimant's awareness of the "statutory facts" is clearly framed in the legislation as a *choice* between, on one hand, the claimant's actual awareness and, on the other, awareness determined by the court having regard to what is reasonably practicable:

... the date ... on which the pursuer in the action became, *or on which*, in the opinion of the court, it would have been reasonably practicable for him in all the circumstances to become, aware (1973 Act, preamble to section 17(2)(b); emphasis added)

On an entirely natural reading of the legislation the date of awareness is *either* the date 'on which the pursuer ... became aware' *or* the date 'on which, in the opinion of the court, it would have been reasonably practicable for ... [the pursuer] in all the circumstances to become, aware' of the so-called "statutory facts". Thus on the face of it a choice is to be made between court-determined actual awareness and court-attributed deemed awareness with apparently nothing in the legislation to guide or inform that choice. It is not clear why, if the provision is properly disjunctive, the court would need to make a choice that commits it definitively to one or other of these alternatives. It would seem sensible, for instance, for a determination

to be made as to what it may have been reasonably practicable for a pursuer to become aware of if for any reason actual awareness could not be determined: for example, if the court had difficulty establishing key facts. Alternatively, in providing for *some* consideration of what it may be reasonably practicable for a claimant to be aware of, the legislation appears to allow for the possibility that a particular claimant in a given case may for some reason be unable to develop an awareness of matters that for other claimants might be conspicuously obvious – hence the need for some degree of objectivity.

Unaccountably, the courts in Scotland have adopted an extremely narrow approach to the interpretation of the provisions in question in the context of historical childhood abuse claims. It is clear from cases such as the three-judge decision in *CG v Glasgow City Council* that the judicial approach to the alternatives under discussion has little, if anything, to do with the need to address evidentiary lacunae or similar difficulties. In fact, the wider case law confirms that the weight of judicial opinion has been towards the assertion of a *blanket objective* test – in the sense of a purely court-ascribed test – of awareness, with almost nothing of the subjective awareness of the claimant being thought to be of any relevance (contrary to what is suggested by the applicable statutory provisions). Thus the question whether awareness is subjective or objective or a combination of both, was made clear under Scots law when the single-judge decision in *CG v Glasgow City Council* was overruled by the subsequent three-judge decision. Lord Eassie, delivering the opinion of the court, refers to an earlier case that had settled the matter,²¹ and in taking the view that a purely objective test of awareness was to be applied held

²¹ Lord Eassie's reference is to *AS v Poor Sisters of Nazareth* 2007 SC 688.

Lord Malcolm's position (in the single-judge decision in the Outer House) to be in error.²²

These, and reference to other averments in a similar vein, indicate the Lord Ordinary's [Lord Malcolm's] view that the test whether injuries were sufficiently serious was to be viewed subjectively through the eyes of the pursuer. ...

In our view, what was necessary was to consider the nature and consequences of the wrongs averred by the pursuer to have been inflicted upon her and taking the averments respecting those matters *pro veritate* to decide whether, viewed objectively, they would have warranted taking proceedings on the statutory assumptions of admitted liability and guaranteed solvency of the defender. (*CG v Glasgow City Council* 2011 SC 1, at paras. [17] and [21])

Moreover, if there was to be any scope for taking account of subjective considerations it was to be restricted to mere "individual personal features" that entered into the assessment of quantum. In that context, Lord Eassie approved the position adopted in the *Carnegie* case (*Carnegie v Lord Advocate* 2001 SC 802) where Lord Johnston (at para. [16]) expressed the view that, in assessing quantum, 'injury to a finger may be of much greater consequence to a concert pianist than to someone whose work and hobbies do not involve fine finger movements' (see Lord Eassie, *CG v Glasgow City Council* 2011 SC 1, at para. [26]). Ironically, whilst the English law

²²Initially the court rejects the idea that awareness of the "statutory facts" is a matter to be viewed from the (subjective) viewpoint of the claimant: 'Again, put shortly, the Lord Ordinary [Lord Malcolm] appears to come to the conclusion that the Scottish legislation admits of a subjective view of the seriousness of the injury test. ... These, and reference to other averments in a similar vein, indicate the Lord Ordinary's view that the test whether injuries were sufficiently serious was to be viewed subjectively through the eyes of the pursuer'. See Lord Eassie, *CG v Glasgow City Council* 2011 SC 1, at paras. [11] and [17], referring to the opinion of Lord Malcolm in *CG v Glasgow City Council* [2009] CSOH 34.

statutory provisions point more definitively to an objective judicial determination of a claimant's knowledge or awareness than the comparable Scots law provisions,²³ Lord Hoffmann in *Hoare* nonetheless accepts the need to have regard – to a not insignificant degree – to the actual knowledge of the claimant. Thus:

[The] test itself is an entirely impersonal standard: not whether the claimant himself would have considered the injury sufficiently serious to justify proceedings but whether he would “reasonably” have done so. You ask what the claimant knew about the injury he had suffered, you add any knowledge about the injury which may be imputed to him under section 14(3) and you then ask whether a reasonable person with that knowledge would have considered the injury sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment. ([2008] 1 AC 844, at para. [34])

The case law in Scotland seems to point to an approach that has been resolutely uninterested in asking – to use Lord Hoffmann's words – ‘what the claimant knew about the injury he had suffered’. It is furthermore and in any event difficult to see how the relevant case law can be reconciled with the clear terms of the applicable statutory provisions (viz. 1973 Act, preamble to section 17(2)(b)). As we have seen, the legislation looks to the identification of the date on which the pursuer (actually) became aware of the “statutory facts” or, failing that for any (unspecified) reason, identification of the date on which, in the opinion of the court, it would have been reasonably

²³The English law provisions – unlike the Scots law provisions – are not framed as a choice between court-determined actual knowledge and court-attributed deemed knowledge – see the Limitation Act 1980, section 14(2): ‘For the purposes of this section an injury is significant if the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment’.

practicable for the pursuer in all the circumstances to become aware of the “statutory facts”. The three-judge decision in *CG v Glasgow City Council* appears to have collapsed these alternatives into a single exercise which, crucially, erases virtually anything that could count as an indication of the pursuer’s actual awareness.

Even the part of section 17(2)(b) – the “objective” part – that calls upon the court to identify the date on which ‘in the opinion of the court, it would have been reasonably practicable for ... [the pursuer] in all the circumstances to become, aware’ of the “statutory facts” arguably does not necessitate so drastic an erasure of subjective factors attending a claimant’s awareness. In asking the court to consider when it would have been *reasonably practicable* for the pursuer *in all the circumstances* to have become aware of the “statutory facts” the legislation appears to require, not to inhibit, interrogation of factors relevant to the claimant’s awareness that may be unique to the circumstances of the claimant (and are thus not insubstantially “subjective”). What the court appears to be asked, in other words, is the question when would the practical realities of a claimant’s situation – taking into account *all* of his or her unique circumstances – have made it more or less reasonable for that particular claimant in that situation to have become aware of the “statutory facts”?

There is a key difficulty with an objective or imputed judicial assessment of awareness that for all practical purposes renders irrelevant any element of the actual awareness of the claimant. It is that the further one moves from a claimant’s actual awareness to an objective, judicially determined, awareness the greater the risk that the decision will fail to reflect anything of the reality of a claimant’s (historical) situation and will simply represent what a judge thinks that that reality ought to be. Such an approach also creates a

palpable caesura between judicial consciousness and claimant consciousness, making it entirely reasonable for a claimant to ask whether key particulars of his or her lived experiences count for anything at all or are simply to be “airbrushed” away. The danger there, of course, is that important rights may, in the result, suffer the same fate. On the narrower question of judicial attitudes, H. L. A. Hart has observed:

Judges talk much of the judgments of the “ordinary reasonable man” and claim to be able to discover what he thinks. But the method used is usually introspection and this is because the judgment of the reasonable man very often is a mere projected shadow, cast by the judge’s own moral views or those of his own social class. (Hart, 1968, p. 171)

5 Concluding Reflections

This article has sought to take stock of a few key aspects of legal and judicial policy in the application of civil limitation laws in the area of adult personal injury claims arising from allegations of historical childhood abuse. This has uncovered not only differences in principle in judicial approaches to such claims as between English law and Scots law – partly accountable to legislative differences – but apparent divergences in judicial attitudes towards adult claimants and towards the child or adolescent sufferers of abuse themselves. It thus seems appropriate, in our concluding reflections, to revisit two particularly resonant issues that have emerged from the preceding discussion. The first centres on identifying what could be described as the “true nature” of relevant claims and the “true identity” of claimants. This was touched upon briefly at the outset. The second issue – focusing on the contrasting attitudes that have emerged within recent English law and Scots law judicial decision-making –

necessitates a few brief and final remarks on what may be inferred from relevant case reports.

5.1 Nature of Claims and Identity of Claimants

In their approach to adult civil law claims arising from allegations of historical child abuse – where claims are more often than not treated as live “adult claims” rather than postponed “child claims” – the Scottish courts in particular have tended to engage with claimants in a way that has given little recognition to the underlying nature of the claims and the identity and position of claimants. Given that claimants actually *were* adults in the cases in question it is perhaps unsurprising that they were treated as such by the courts. However, we have seen evidence of what might be described as “attributes of adulthood” – for example, implying maturity, experience of the world, conversance with legal and judicial processes, and so on – being assigned to claimants at times when they had scarcely entered adulthood, implying the construction of a false boundary between childhood and adulthood, at least so far as the presumed psychological makeup of relevant individuals (or individuals of that class) is concerned. This has been manifested in, among other things, unrealistic judicial expectations of the steps that a young adult might be expected to take in order to secure timely civil law redress in appropriate circumstances. (See, especially, *CG v Glasgow City Council* 2011 SC 1, as discussed in section 4.2 above.) Yet the key difficulty with the pursuit of civil law redress is in truth even more acute than suggested in relevant judicial opinions because, as we have seen, young adults are rarely in a position to take the steps necessary to secure such redress precisely because decisive action of that kind is typically inhibited for as long as so-called latency periods run their course. For a range of reasons, considered in section 3

above and elsewhere, decisive action may be postponed for many years into adulthood.

The idea that civil law historical abuse claims may best be seen, at a more fundamental level, as postponed “child claims” – namely, claims that centre on historical violations of the emotional, physical, psychological or sexual integrity of the child – may cause us to consider carefully, or to reconsider, any view we may have formed regarding conventional rationales for civil limitation laws. As argued elsewhere (Ross, 2018), 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. For this and other reasons, it may not be productive to view the civil law claims of adult survivors of childhood abuse exclusively in terms of attempts to enforce, or give effect to, some concept of “adult rights”. For, as also observed in a different context:

[i]t may ... appear trivially true to assert that rights of action which have accrued to children when they are children are rights “of the child” and that claimants who have taken up these rights in later life, as adults, are seeking to enforce and give effect to such children’s rights. It is important to view the matter in terms of this shift of perspective otherwise we may misconstrue the denial of such rights as something other than the denial of children’s rights. (Ross, 2013, p. 258)

Children’s rights – especially those (whether derivable from civil or criminal laws) that afford some level of protection to children from

physical and psychological violations – may be thought to be qualitatively different from “adult rights”, given (in particular) that children’s rights are often dependent on adult agency for their fullest realisation. For some, however, this may be a false dichotomy or an over-simplification as equivalences in the positions of the very young (i.e. infants) and the very old (i.e. elderly adults) provide test cases for the identification, at a deeper level of engagement, of meaningful frames of reference for understanding such matters as the apparent antinomy of children’s rights versus “adult rights” (see, for example, Campbell, 1992; and Goodin and Gibson, 1997, p. 186). To that end, the concepts of agency, autonomy and choice have often provided credible points of departure (see, on autonomy in particular, Freeman, 1992; Lowy, 1992; and Brighouse and Swift, 2006, p. 83); while other, or overlapping, frames of reference turn on specifically identified children’s rights – such as rights of provision, protection and participation (see, for example, Thomas 2007; and Quennerstedt, 2010).

At a more practical level, however – particularly in the context of the present discussion – judges may be faced with quite challenging questions, such as ‘what is an appropriate exercise of judicial discretion involving individuals at this or that stage in their development?’; or ‘what is an appropriate judicial decision involving someone beset by this or that handicap’ (e.g. those mentioned in section 3, above). The problematic or unique nature of children’s rights, coupled with the special vulnerability of children, surely necessitate a difference in judicial approach which recognises, reflects and responds to relevant qualitative and other differences in rights.

Thus, in critical situations such as where an exercise of judicial discretion may be called for – for example, in the context of exercises

of the so-called section 19A discretion under Scots limitation law (discussed above) and other judicial decision-making involving the possibility of disapplying civil limitation laws in historical childhood abuse cases – it is surely inappropriate, and could even be regarded as representing a denial of justice, if civil law claims are disposed of by treating claimants as if *at all times* they had been possessed of adult invulnerabilities and resiliencies (judicially imputed to them) that entirely fail to reflect the existential and historical realities of the experiences undergone by the claimants concerned (where directly relevant to the case in hand), and at the same time misinterpret or misrepresent the psychological and emotional makeup of those claimants (where that too is relevant).

5.2 Contrasting Attitudes: English Law and Scots Law Judicial Decision-Making

The case law reviewed in this article appears to point to a relatively accommodating and sympathetic approach towards adult personal injury claims brought by adults in relation to allegations of historical childhood abuse when made under English law, especially in more recent cases relying on the so-called section 33 discretion. In contrast, under Scots law a more uncompromising and casuistic approach to judicial decision-making has been discernible: not only in cases relying on the so-called section 19A discretion; but more generally. In the recent past, the often intractable difficulties faced by adult survivors of childhood abuse in pursuing timely civil law redress have only rarely been given appropriate judicial recognition by the courts in Scotland. For instance, as we have seen, in a leading case the courts retreated from the task of constructing a workable judicial paradigm embodying some of the core characteristics and vulnerabilities of typical claimants whose fragile psychological or emotional makeup (often shaped by injurious childhood

experiences), adverse life circumstances and insecure financial position (among other factors) ordinarily prevent them from pursuing timely civil law redress.

The courts in the UK have also at times had the task of deciding on the postponement of the running of an applicable limitation period based on a claimant's unawareness that injury caused by historical childhood abuse was sufficiently serious to justify pursuing civil law redress. When relevant claims have come before the courts in Scotland, acute and arguably unnecessary difficulties have been created for claimants. We have seen that judicial assumptions have been made that are unrealistic or unworkable for many claimants; and this has gone hand in hand with judicial expectations that most claimants, from any practical standpoint, would find impossible to meet: for instance, the idea that abuse victims might pursue civil law redress while still in adolescence. On the question of whether the court's determination of awareness is to be on the basis of a claimant's *actual* awareness or an "objective" judicial attribution of awareness, arguably English law has struck a realistic balance between the respective domains of the subjective and the objective. The dominant approach of the Scottish courts has been the adoption of an entirely objective or imputed judicial assessment of awareness that for all practical purposes erases and renders irrelevant any element of the actual awareness of the claimant.

As we have seen, the perception, in the public consciousness, of a certain hardness of judicial attitude and approach to relevant claims in Scotland necessitated the introduction of legislation by the Scottish Parliament in 2017: the Limitation (Childhood Abuse) (Scotland) Act 2017. But – as also mentioned above – the legislation, while removing the literal time-bar from operating in historical childhood abuse civil law claims appears to give scope for

reawakening (indeed, possibly reinvigorating) previous case law by establishing grounds of challenge that are specific to childhood abuse claims under sections 17D(2) and 17D(3) of the Prescription and Limitation (Scotland) Act 1973: respectively, a fair hearing test and a substantial prejudice test. At the time of writing of this article, no cases have been reported where these challenges have been invoked, so it remains to be seen whether the courts will adopt an approach where, more often than not, the interests of the challenging party (the party sued) are given primacy over those of the party suing.

Although there have been calls for legislation similar to Scotland's 2017 Act to be introduced south of the border (Scorer, 2016) not only has this not yet happened but it is arguable whether it is actually necessary given that in several landmark decisions such as *Hoare* and cases following thereon – including separate key developments in vicarious liability (such as *Catholic Child Welfare Society and others v The Institute of the Brothers of the Christian Schools*) – the position of adult claimants in historical childhood abuse cases has markedly improved; while, in general, the operation of civil limitation laws in relevant cases seems fair and not disproportionately weighted in favour of alleged wrongdoers.

5.3 *Looking ahead*

Ultimately, a right conferred by law that is for all practical purposes incapable of being exercised or enforced is on a par with a law that – according to Lon L. Fuller's principles of the "internal morality" of law – is beyond the power of anyone to observe or comply with (Fuller, 1969, pp. 33–38). It so happens that the rights under discussion in this article centre upon violations of the emotional, physical, psychological and sexual integrity of the most vulnerable members of

society. The case for maintaining such rights – and related compensatory rights – beyond the reach of civil limitation laws for as long as it takes for potential claimants to overcome inhibitions around the pursuit of civil law redress therefore represents not only a practical and logistical necessity but arguably a moral imperative. Without doubt that position appears to have been embraced under English law in decisions emerging at the highest level of the judicial system. So far as Scots law is concerned, it remains to be seen how the courts will respond to the 2017 Act. But if, going forward, reliance on the new grounds of challenge now enshrined in the Prescription and Limitation (Scotland) Act 1973 simply leads to a continuation of the hardline approach already established by the courts in Scotland over a number of years, that will indeed be a retrograde step, and (particularly if the spirit of the 2017 Act is suppressed) will represent something of a retreat from the judicial responsibility to uphold and take seriously very significant rights of the child.

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