

SHERIFFDOM OF LoTHIAN AND BORDERS AT EDINBURGH
IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2020] SCEDIN13

PIC-PN2600-18

JUDGMENT OF SHERIFF KENNETH J McGOWAN

in the cause

T

Pursuer

against

THE ENGLISH PROVINCE OF THE CONGREGATION OF CHRISTIAN BROTHERS

Defenders

Pursuer: di Rollo, QC, Ross, Advocate; Digby Brown LLP
Defenders: MacKenzie, QC; Clyde & Co

Edinburgh, 30 January 2020

Note

Introduction

[1] In this case, the pursuer seeks damages in respect of physical and sexual abuse which he is said to have suffered at the hands of three individuals while he was placed at a residential school during his early teens.

[2] Given the nature of the allegations made and evidence heard this judgment has been anonymised.

[3] I heard evidence from the pursuer, T; his wife, W; a police officer, DC Andrew Gilmour; a psychiatrist, Dr Jacqueline Scott; two vocational experts, Gordon Cameron and Douglas Govan; and Mr Harry Harrington a former member of the defenders' congregation.

[4] Certain other factual and evidential matters were agreed in two joint minutes.

[5] I was provided with comprehensive written submissions for both parties, which were supplemented by oral submissions. Full account has been taken of these in the preparation of this judgment. The submissions are summarised below rather than being reproduced in full.

[6] I was referred to the following authorities/sources:

- i. *A v N* 2014 SCLR 26;
- ii. *A v B & C* 2018 SLT 1194;
- iii. *B v Murray (No 2)* 2005 SLT 982
- iv. *British Transport Commissioners v Gourlay* [1956] AC 186;
- v. *Dingley v Chief Constable, Strathclyde Police*; 2000 SC (HL) 77;
- vi. *Forey v London Buses* [1993] PIQR Q48;
- vii. *FZO v Adams* [2019] EWHC 1286 (QB);
- viii. *Gestmin SGPS SA v Credit Suisse UK Ltd* [2013] EWHC 3560
- ix. *In Re H (Minors)* 1996 AC (HL) 563;
- x. *J v Fife Council* 2007 SLT 85;
- xi. *JM v Fife Council* 2009 SC 163;
- xii. *Joyce v O'Brien* [2012] PIQR P18;
- xiii. *Joyce v O'Brien* [2014] 1 WLR 70;
- xiv. *KD v Gaisford* [2019] EWHC 339 (QB);
- xv. *Kennedy v Cordia (Services) LLP* [2016] UKSC 59;
- xvi. *JXL & SXC v Winston Britton* [2014] EWHC 2571 (QB);
- xvii. *LXA v Willcox* [2018] EWHC 2256 (QB);
- xviii. *McCain v Redpath Dorman Long* 1972 SLT (Notes) 42;

- xix. *Martin v Kogan* [2020] EMLR 4;
- xx. *RAR v GGC* [2012] EWHC 2338 (QB);
- xxi. *Moeliker v A. Reyrolle & Co Ltd* [1977] 1 WLR 132;
- xxii. *Paterson v Paterson* 2013 Rep. LR 13;
- xxiii. *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153;
- xxiv. *Smith v Manchester* [1974] EWCA Civ 6;
- xxv. *Williams v Bermuda Hospitals Board* [2016] AC 888;
- xxvi. *Judicial College Guidelines* 15th ed, Chapter 4;
- xxvii. *The Quantum of Damages, Kemp & Kemp*;
- xxviii. *McEwan & Paton*, ch 3-10.

[7] Having heard the evidence and submissions, I found the following facts to be admitted or proved.

Findings in fact

Early life

[8] The pursuer was born in 1967. He has an older sister and younger brother. His father left the family home when the pursuer was very young and died when the pursuer was about 18. The pursuer had no relationship with him.

[9] The pursuer was brought up by his mother. She was an alcoholic and had mental health issues. This had an impact on her ability to care properly for the pursuer. On occasions, she was violent towards him. He suffered significant deprivation. The pursuer was in and out of foster care during his childhood. His education was significantly disrupted.

[10] The pursuer's behaviour led to him having contact with social services and the Children's Hearing system.

[11] In 1979, he underwent a formal psychiatric assessment. He was not felt to be suffering from any mental illness. The pursuer did not want to return home. His relationship with his mother was very poor. It was recommended that he did not return home and should instead be accommodated in a residential school. At that stage, he appeared to be remarkably unaffected by the deprivation he had suffered, but this may have been a reflection of bravado on his part.

[12] It is likely that his early experiences would have had a long term adverse effect on his ability to form attachments.

[13] On 30 January 1979, after a period in a remand home, the pursuer was sent to reside in a residential school operated by the defenders ("the residential school"). He resided there until 19 December 1980, when he returned home.

Period at the residential home

[14] The residential school was an old, large building with its own grounds. On his arrival there, the pursuer found it daunting. When the pursuer was placed in the school, he came into contact with Brother Ryan, the headmaster; Brother Farrell and another individual, Timothy Foxall. Brothers Ryan and Farrell were members of the defenders' congregation. Mr Foxhall was a teacher employed by the defenders' congregation.

[15] At that time, Brother Ryan was in his 50s. Brother Farrell was younger, possibly around 30 years of age. Mr Foxall had a beard and long hair. The staff of the residential school included a number of other Brothers.

[16] The pursuer was not a quiet child and could be “smart mouthed” on occasions. He was small for his age, being 5’2” tall and weighing 6st 8lbs.

[17] On the day of his arrival, he ran away, hitchhiking to a nearby town. He was apprehended by the police. He was collected by Brother Ryan.

[18] On being placed into the vehicle in which he was to be transported back to the residential school, the pursuer was assaulted by Brother Ryan striking him on the head with the knuckle of his middle finger, the hand having been formed into a fist with the knuckle protruding. The blow was sufficiently hard to make the pursuer think that his head had been split open although that was not in fact the case.

[19] Brother Ryan used this form of punishment on the pursuer on many occasions during his period at the residential home.

[20] Within a number of weeks of the pursuer arriving at the residential school, Brother Ryan began to abuse him sexually. On several occasions, he penetrated the pursuer’s anus with his penis. These events took place in Brother Ryan’s room, mainly at weekends. They appeared to occur when Brother Ryan had been drinking.

[21] On various occasions (more than 10) between 30 January 1979 and 19 December 1980, the pursuer was indecently assaulted by Brother Farrell by touching his penis, masturbating him and compelling the pursuer to touch his (Brother Farrell’s) penis and masturbate him. These events took place in the pursuer’s room at the residential school at weekends when nobody else was there. The pursuer could smell drink on Brother Farrell.

[22] On one occasion, Brother Farrell pinned the pursuer against a wall using his arm while searching him for cigarettes.

[23] On another occasion, the pursuer was to be picked up in a minibus by Brother Farrell from a nearby town to return to the residential home. Either the train or the minibus was

late in arriving at the station. The pursuer made a cheeky remark about it not being his fault. An argument ensued which got heated. Brother Farrell began pushing the pursuer about and pushed him off the minibus, leaving him to walk from the town to the residential school in the dark.

[24] Brother Farrell assaulted the pursuer on numerous occasions by grabbing his arm and twisting it up his back and by grabbing his face with his hand.

[25] Mr Foxhall taught music, art and physical education. There were a few incidents involving the pursuer and Mr Foxhall. If the pursuer "got mouthy" he was put on the "long stand" which involved being told to stand still in the main hall, sometimes from 9 AM until 7 or 8 PM.

[26] On one occasion, the pursuer got "mouthy" with Mr Foxhall and told him that he had punctured the tyre on his car. Mr Foxhall went "ballistic" and chased the pursuer upstairs through the canteen. Mr Foxhall finally got a hold of the pursuer on the top landing. He pushed him into a cabinet and then dragged the pursuer downstairs. The pursuer was injured.

[27] On another occasion, the pursuer sought to intervene when Mr Foxhall was assaulting another boy who was at the residential school. Mr Foxhall "lost the rag" with the pursuer and while restraining pushed his head down onto the gravel path. As a result of that, the pursuer got a stone stuck in his ear which had to be removed by an operation.

[28] Whilst in the residential school, T experienced violence and aggression and little respect for himself as a person. He felt he had been dominated because he was weak.

Personal and family life

[29] After the pursuer returned home to live with his mother when he was about 16, he had a good relationship with her. He came to terms with what had happened during his childhood. In due course, his own children visited his mother, who died in 2011.

[30] The pursuer met W when he was 18. The pursuer told W that he had been in care. She came to learn that things had happened to the pursuer whilst he was in care but did not know any details, as the pursuer did not share these with her. It took the pursuer a long time to form a physical relationship with his wife.

[31] During this period, the pursuer hated people for no good reason. He had a temper. He had some run-ins with the police. He was aggressive and tended to look for trouble. He was antisocial. He vowed to himself that nobody would lift their hands to him.

[32] When the pursuer first met his wife he was living in Dundee and she was living in East Kilbride. He was getting into trouble. He was drinking a lot. He was violent and had no fear. He began to get a reputation. He moved to East Kilbride to get away from the lifestyle that he was living in Dundee.

[33] His wife noticed that the pursuer was not good around other people and was very aware of his own surroundings, needing to sit with his back to a wall and facing the door if they were out together.

[34] They married when he was 20 years old. This and the arrival of children in about 1990 changed the pursuer's life. Working and providing for his family became very important to him. Working has also helped take his mind off abuse related trauma.

[35] The pursuer is not good around other people. He does not have 'best friends'. He is very aware of his own surroundings at all times. The pursuer does not trust other people, apart from his wife.

[36] He has a close relationship with W who works as a carer. She provides him with a lot of support. The couple have five surviving children, currently aged between 30 and 18. All of the children are in employment and pursuing meaningful careers.

[37] While his children were growing up, T was untrusting and overprotective. He would not allow other children into the house because it did not feel right to him. His children were not allowed to have or attend "sleepovers". His children always had to be back in by a certain time and he found it difficult if they were out. Visitors to the pursuer's home were not allowed to go upstairs.

Education and employment

[38] The pursuer's early education was disrupted. By early 1979 he had, and was conscious of, a lack of ability in schoolwork. The pursuer has always struggled with literacy and numeracy. His wife has helped him where writing has been required.

[39] The pursuer left the residential school with no qualifications. There was no focus on teaching at the residential school and it was not academic.

[40] The pursuer would have liked to have pursued a career in a skilled trade, such as engineering.

[41] The early 1980's was a time of relatively high unemployment, especially for those without qualifications. The job prospects for school leavers were difficult. The number of school leavers whose first destination after school was unemployment rose sharply between 1979 and 1981 and would have been more dramatic still had there not been government funded schemes for unemployed young people. Likewise, male unemployment generally increased substantially between 1979 and 1981 and the ratio of school leaver recruitment to total employment declined in most industries – and most of all in manufacturing.

[42] Children who have been in care are less likely than those who have not been in care to be in education, employment or training when they leave school; and those who do secure ongoing education, employment or training are less likely to sustain this.

[43] As a child whose early family life had been unstable, whose education had been disrupted and who had been in care, the pursuer was one of the more disadvantaged of his school leaver cohort and it is likely that he would have faced significant difficulty in making the transition from school to regular employment and had periods of unemployment in his early working life, even if he had not been abused whilst in care.

[44] It took the pursuer some time before he started to work steadily and full time. From 1980 to 1982, the pursuer sought and obtained employment on training schemes (Youth Opportunities Programme and Youth Training Scheme), obtaining an introduction to joinery, plumbing and bricklaying.

[45] He was then unemployed until he was placed into a job creation programme with the local council in about 1983/84.

[46] From 1984 to 1987, he obtained seasonal work (about six months per year) packing fruit.

[47] A move into a skilled trade would have been difficult for the pursuer without any academic qualifications. The appropriate type of qualifications would have been subjects such as metalwork, woodwork and technical drawing. The pursuer's difficulties with literacy and numeracy would have been a further impediment.

[48] T was unemployed from about late 1987 until 1988, when he obtained a job as a hygiene operative (cleaner). He remained in that job full time until obtaining work in a bakery for a short time.

[49] In 1992, the pursuer began working as a warehouse operative. The pursuer resigned from this job due to a build-up of pressure and stress related to relationships with one particular colleague.

[50] In about 1995, the pursuer's mental health deteriorated. He was unemployed for about 2 years, during which time he was drinking heavily. W tried to support the pursuer during this time, but it appeared to her that he had suffered some form of breakdown.

[51] In about 1997, the pursuer's health improved and he gained employment in a company which assembled and repaired wheelchairs, a job which he enjoyed greatly. The pursuer enjoyed working with his hands. This job came to an end because the employer went into liquidation and the pursuer was made redundant in 1998. He was then unemployed for several months.

[52] In 1999, the pursuer returned to his previous employment as a hygiene operator. He was promoted to supervisor and then manager, responsible for around 40 hygiene operators. After a period of time, new management came in. The new management gave him a hard time because he was not then very computer literate and his hours were increased. In 2007, he moved to a new job as a hygiene manager with the employers. He has worked as a hygiene manager for a variety of employers since then.

[53] Prior to the trial of Brother Farrell (see below), the pursuer learned that a work colleague was the brother of another person who had attended the residential school and was going to be called as a witness at the trial; and that that work colleague was planning to attend the trial. The pursuer was concerned that his involvement in events at the residential school and at the trial would become known at the workplace and accordingly the pursuer left that job.

[54] The pursuer's net earnings for the tax years since 1980 were:

- i. 1980/81 – £186.48;
- ii. 1981/82 – £1,243.87;
- iii. 1982/83 – nil;
- iv. 1983/84 – £1,798.85;
- v. 1984/85 – £539.90;
- vi. 1985/86 – £1,461.10;
- vii. 1986/87 – £1,605.15;
- viii. 1987/88 – nil;
- ix. 1988/89 – £3,701.80;
- x. 1989/90 – £6,470.45;
- xi. 1990/91 – £7,162.41;
- xii. 1991/92 – £4,493.35;
- xiii. 1992/93 – £6,614.50;
- xiv. 1993/94 – £9,270.69;
- xv. 1994/95 – £5,879.16;
- xvi. 1995/96 – nil;
- xvii. 1996/97 – nil;
- xviii. 1997/98 – £5,617.74;
- xix. 1998/99 – £11,715.67;
- xx. 1999/00 – £10,293.46;
- xxi. 2000/01 – £10,372.53;
- xxii. 2001/02 – £12,896.46;
- xxiii. 2002/03 – £14,881.13;
- xxiv. 2003/04 – £18,122.44;

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| xxv. | 2004/05 – £19,481.21; |
| xxvi. | 2005/06 – £21,752.43; |
| xxvii. | 2006/07 – £22,214.46; |
| xxviii. | 2007/08 – £21,699.47; |
| xxix. | 2008/09 – £26,945.74; |
| xxx. | 2009/10 – £22,184.39; |
| xxxi. | 2010/11 – £22,642.23; |
| xxxii. | 2011/12 – £22,510.56; |
| xxxiii. | 2012/13 – £24,541.70; |
| xxxiv. | 2013/14 – £27,776.20; |
| xxxv. | 2014/15 – £27,259.46; |
| xxxvi. | 2015/16 – £26,672.52; |
| xxxvii. | 2016/17 – £28,838.28; and |
| xxxviii. | 2017/18 – £31,163.92. |

[55] The pursuer has worked as a hygiene manager for his present employer since 2016. He is responsible for two team leaders and 18 hygiene operators.

[56] The pursuer is a hard worker. Despite the effects on him of the abuse he suffered and ongoing limitations in his literacy and numeracy (which means that he has to seek help from his wife and daughter in relation to work related tasks of that type) has a good employment record and has obtained and held down a managerial post.

[57] Had the pursuer been able to move into a skilled trade but not on to a managerial role, any difference between his actual and potential would have been eliminated or minimised.

[58] If the pursuer were to lose his present employment, he would find it difficult to obtain another managerial role due to the limitations in his written and numerical skills. If the pursuer were to lose his present employment and his mental health were to deteriorate, he would face significant barriers in finding other employment.

Disclosure, investigation and criminal proceedings

[59] Throughout his adolescence and for most of his adult life, the pursuer did not tell anybody about the abuse which he suffered at the residential school.

[60] He told his wife he had been in care and she knew that something had happened but not any detail.

[61] Around the 1990's, the police embarked on enquiries into events at the residential school. The pursuer was contacted by the police, but did not wish to become involved and actively avoided engaging with them.

[62] Brother Ryan died on 6 July 2013. The same year, the police contacted the pursuer once again by leaving a card through his door. He wrongly assumed that they wished to speak to him in connection with another matter. He contacted the police and agreed to meet with them.

[63] The pursuer met with DC Gilmour and a DS McGuinness in November 2013. The police explained in general terms what they wished to speak to him about, namely his time at the residential school. They did not provide him with any names. He provided a statement. While being interviewed, the pursuer was upset and distressed and began crying.

[64] The pursuer was reluctant to disclose details of what he said had happened to him. He became very upset and did not want to say any more.

[65] Until he provided that statement, the pursuer had tried to hide what had happened to him at the residential school. He did not tell his doctor about it until 2016.

[66] He was subsequently called as a witness at the trial of Brother Farrell in 2016.

[67] The pursuer gave evidence at the trial over a period of two days. He found that to be a very difficult experience. He felt under attack and did not attend the verdict or the sentencing diet.

[68] In due course, Brother Farrell was convicted in the High Court of Justiciary of sexually assaulting the pursuer.

Health

[69] Although it was not diagnosed at the time, the pursuer developed Post-Traumatic Stress Disorder ("PTSD") shortly after leaving the residential school as a result of the abuse he was subjected to while there. That condition has persisted to the present day. The pursuer's mental health has been affected by his PTSD throughout his adult life. He has suffered from emotional instability, difficulty with trust and establishing relationships, low mood and anxiety, flashbacks of the abuse, nightmares, behavioural problems, abuse of alcohol to cope with problems, sleep problems, recurring feelings of hopelessness and worthlessness and hyper-vigilance and avoidance behaviours.

[70] These symptoms have varied in severity over the years. At times the symptoms of PTSD have been moderate to severe. At other times the symptoms have moderated when the pursuer did (or was able to) use work and avoidance to deal with his condition. When he had stability in his life, the symptoms were lower grade. They have been exacerbated by the criminal trial (see above) and the present case. Currently the pursuer's symptoms are moderate to severe, but this should improve with the conclusion of the present proceedings.

[71] In the early years of his marriage to W, the pursuer had problems with nightmares and flashbacks. He would regularly wake up, thrashing about sweating and in a panic. This was a regular occurrence.

[72] At times, the pursuer has tried to deal with his symptoms with alcohol as a coping mechanism, drinking in order to be able to sleep.

[73] There have been periods when he felt useless. He feels exhausted. His self-confidence goes up and down. He struggles to keep going. He has attempted suicide on more than one occasion.

[74] The pursuer has always been a heavy smoker. For many years he was a heavy drinker but is now largely abstinent. He felt he needed to drink to 'calm his demons' which he felt were his temper and the things that had happened at the residential school. He felt he had not deserved the things that had happened to him there.

[75] The pursuer was diagnosed with a duodenal ulcer in 1987.

[76] The pursuer's mental health deteriorated in about 1995 when he took a 'nervous breakdown'. During this time, the pursuer would sit and stare into blank spaces. He refused to tell his wife what was on his mind. He was unable to work and refused to apply for state benefits. He began drinking heavily. He was unemployed for about 2 years.

[77] In 2006, the pursuer was investigated for chest pains. He was having problems at work.

[78] In 2007, the pursuer had continued chest discomfort; his self-confidence was down; and he was diagnosed with mild depression.

[79] In 2010, the pursuer attempted suicide by hanging.

[80] The pursuer has become calmer as he has got older, but he does not deal well with stress. He can feel it building up. This can happen at work or if he feels under threat or pressure. He used to try and deal with it to by drinking alcohol.

[81] When he feels under stress, he feels useless and that he goes into a “zone”. He can snap and become angry. He feels that he has to fight against it and has to avoid triggers. When he is suffering from anxiety, the pursuer feels tired all the time.

[82] The pursuer tends to avoid physical contact with other people. His mood was adversely affected by the prospect of giving evidence in this case. His sleep was also affected in the days beforehand.

[83] The pursuer has not sought or received any assistance or treatment from a psychologist. Appropriate therapy would be likely to bring about greater stability in his psychiatric and psychological symptoms, but there would not be a full remission or resolution thereof. If he was offered such treatment, he would refuse it as he does not consider that it would do him any good.

[84] The pursuer’s employment is indicative of resilience but is also a distraction technique. Should the pursuer be unable to work for any reason, his psychological and psychiatric symptoms may worsen.

Submissions for pursuer

Pursuer’s motion

[85] The court should pronounce decree for payment by the defenders jointly and severally to the pursuer by the defenders in the sum of £1,055,399.00 with interest thereon at the rate of 8% per annum until payment.

Liability

[86] The starting point was the summary decree pronounced on 29 November 2019. The pursuer said that this conduct occurred on more than 10 occasions.

[87] Beyond that, the Court should find the following to be proved:

- i. from in or around 30 January 1979 to 19 December 1980 the pursuer was resident at the residential school;
- ii. throughout his residence at the residential school the pursuer was abused by Brother William Gerard Ryan (deceased), Brother John Bernard Farrell and Mr Timothy Foxhall;
- iii. Brothers Ryan (deceased) and Farrell were Brothers within the defenders' Congregation and Mr Foxhall was a teacher employed by the defenders' Congregation;
- iv. on various occasions between 30 January 1979 and 19 December 1980 at the residential school, Brother Ryan sexually assaulted the pursuer.
- v. on several occasions, Brother Ryan penetrated the pursuer's anus with his penis;
- vi. Brother Ryan also assaulted the pursuer by seizing him by the neck and throwing him to the ground;
- vii. on numerous occasions, Brother Ryan struck the pursuer to the head;
- viii. Brother Farrell violently assaulted the pursuer by throwing him to the floor of a bus and punching him to the head and body and on numerous occasions by punching and kicking him to the head and body;
- ix. Mr Foxhall repeatedly carried out violent assaults against the pursuer;

- x. on one occasion, Mr Foxhall assaulted the pursuer, pushed him against a cabinet causing him to fall and then took hold of the pursuer and dragged him down two flights of stairs to his injury;
- xi. on another occasion, Mr Foxhall threw the pursuer to the ground in a gravel area of the school grounds, as a result, the pursuer sustained permanent injury to his ear.

[88] The pursuer's evidence about his relationship with his mother; the abuse suffered; his reluctance to disclose the abuse; and the impact on his life should be accepted as credible and reliable.

Quantum

[89] The pursuer claims damages for:

- i. solatium;
- ii. past loss of earnings;
- iii. disadvantage in the labour market;
- iv. loss of pension rights; and
- v. cost of treatment.

Impact of the abuse

[90] The abuse has resulted in life-changing injuries and life-long damage to the pursuer. The abuse was very serious in nature and extent. The pursuer presented as a deeply damaged individual, seriously traumatised by the abuse. His evidence about the effects that the abuse has had upon him was supported by the evidence of his wife and the expert

psychiatric evidence from Dr Scott, which clearly demonstrated that the abuse had caused a psychiatric illness.

Diagnosis of PTSD

[91] The Court should accept the evidence of Dr Scott that the pursuer had developed Post-Traumatic Stress Disorder (“PTSD”) as defined in ICD-10, F43.1 as a result of the abuse. Dr Scott’s opinion was that the psychiatric disorder started at the time of the abuse and persists to this day. The symptoms of the disorder have had a profound impact on the pursuer’s quality of life and wellbeing throughout this period.

[92] The pursuer’s symptoms have varied in severity over the years. In the initial period after the abuse, it was moderate to severe. Later on, the symptoms moderated when the pursuer used family, work and avoidance to deal with his condition.

[93] They have been exacerbated by the court cases. Currently the pursuer’s symptoms are moderate to severe.

Impact on pursuer’s quality of life

[94] There was a correlation between the symptoms identified by Dr Scott and the descriptions given by the pursuer and his wife in evidence. The pursuer’s psychiatric symptoms were very long-standing.

[95] W spoke to the pursuer’s personality and behaviour, including his unwillingness to discuss his experiences.

[96] The pursuer gave evidence at Farrell’s trial in 2016. The experience was traumatic. The effect of the present proceedings has also taken its toll on the pursuer.

Impact on employment

[97] Notwithstanding the effects of the abuse, the pursuer has been able to hold down employment for most of his adult life. He has always worked hard. He now holds a position as a manager, He is responsible for 18 workers and two team leaders.

[98] The pursuer's psychiatric disorder restricted his employment options. His career development was retarded. He had periods out of work. These are due to the effects of the abuse.

[99] The pursuer spoke about his employment history, including difficulties he had experienced at work due to his symptoms and periods of unemployment.

[100] During the 1980s when his symptoms were particularly severe he had long periods of unemployment interspersed with seasonal work in the fruit picking industry.

[101] The pursuer liked working with his hands and would have liked to pursue a career in engineering or the like. His preference would have been to have left school and undertake a formal apprenticeship leading towards a skilled trade in that field. However, his lack of qualifications meant that such an opportunity was closed to him.

[102] Standing his subsequent achievements in his career, it is reasonable to suppose that such a career ought to have been well within the pursuer's potential.

[103] He left the residential school with no academic qualifications and a serious mental illness in the form of PTSD.

[104] The pursuer's subsequent employment history is summarised in the HMRC Employment History Schedule lodged in process.

[105] There was a clear correlation between the periods of unemployment and the worst spells of the pursuer's illness when his symptoms were at their most acute.

[106] The pursuer was also unemployed between 1995 and 1997. Dr Scott confirmed that this episode could be related to psychological symptoms including any psychiatric condition. It was reasonable to hold that the pursuer's unemployment during this period was a direct result of the injuries caused by the abuse.

Prognosis

[107] Dr Scott said that whilst his employment may in any event have been impacted by the consequences of early childhood, the pursuer appeared to be resilient and insightful in relation to these. If the pursuer were to lose his employment "he would struggle." His emotional wellbeing would suffer because he would be deprived of his distraction mechanism.

[108] The pursuer has received no treatment for his condition. Dr Scott explained that T does not want treatment is owing to his aversion to discussing the abuse.

Causation

[109] Dr Scott's opinion was that the pursuer's PTSD and its symptoms were caused by the abuse at the residential school.

[110] Dr Scott accepted that there was an absence of secure attachment as a result of his experience with his mother prior to the residential school. She also accepted in the absence of abuse there could have been some long term difficulties associated with attachment. However, she distinguished these from the symptoms caused by PTSD which she ascribes to the abuse.

[111] The available evidence does not support the proposition that the pursuer's psychological difficulties have been caused by the neglect by his mother rather than the abuse at the residential school.

[112] First, the pursuer said he loved his mother and had come to terms with what had happened.

[113] Second, the Court has the benefit of a psychiatric assessment of the pursuer carried out by Dr Christopher Lewis, Senior registrar in Child Psychiatry on 22 January 1979 shortly before T was sent to the residential school.

[114] This evidence points away from any suggestion that the pursuer suffered significant psychological injury as a result of his early childhood. On the contrary, the pursuer was not suffering from any mental illness when he went into the residential school – but had PTSD when he left.

Solatium

[115] The damages for solatium should be in the highest band of awards relative to cases of this nature.

[116] A total award of £140,000 is justified in the circumstances. Of that total 80% (£112,000) should be allocated to the past, of which £70,000 should be allocated to the period when the abuse was carried out; and £42,000 to the period from the end of the abuse to date: *Judicial College Guidelines* 15th ed, Chapter 4; *FZO v Adams*, Mrs Justice Cuts, para 7.

[117] There were three discrete aspects, namely:

- i. the pain, affront and humiliation experienced by the pursuer while he was resident at the school;
- ii. the emotional, social and psychiatric consequences which he experienced after leaving the school; and
- iii. damages for the future consequences of the abuse: *JM v Fife Council*; *A v N*; and *A v B & C*.

J v Fife Council

[118] The Lord Ordinary awarded £75,000 for solatium (£105,000 in today's money), with 100% referable to the past.

[119] On appeal, the Lord President emphasised that (unlike in the present case) existence of psychiatric and psychological damage and its causal relationship to the abuse had not been proved. The Lord Ordinary's award, although on the low side, was upheld.

[120] Lord Menzies had identified several factors relevant to the assessment of damages, including:

- i. the nature and severity of the abuse, and its character whether sexual, non-sexual but violent, or mental / emotional;
- ii. the frequency of the abuse;
- iii. the duration of the abuse;
- iv. the age of the pursuer at the time of the abuse;
- v. the immediate effects of the abuse on the pursuer;
- vi. whether any apportionment is required to reflect abuse by others, or other causes of the pursuer's problems;
- vii. the emotional and social consequences of the abuse for the pursuer;
- viii. any psychiatric illness or psychological condition suffered by the pursuer as a consequence of the abuse.

[121] The Lord Ordinary had expressed the view that if there had been evidence of psychiatric and/or psychological injury, and if the pursuer had not coped so remarkably

well with his life he should have considered making an award of solatium in excess of £100,000 which if uprated for inflation would be approximately £140,000 in today's money.

[122] The starting point in this case should be an award of £140,000.

A & B v C

[123] The circumstances of the present case are worse than in *A & B* in terms of both the nature of the abuse and its consequences.

A v N

[124] The present case may be distinguished from *A v N*. In this case all of the violent and sexual abuse for which the pursuer claims was delictual; there were three abusers compared to one; there is a clear connection between the pursuer's injuries and defender's delictual acts; the pursuer has a clear and long-standing diagnosis of PTSD.

Conclusions in relation to solatium

[125] The severity of the abuse in this case and the damage suffered by the pursuer justify an award near the top of the scale for cases of this nature.

[126] A number of seriously aggravating features were present. The damage caused by the abuse had resulted in life-long psychiatric injury in the form of PTSD which T will suffer for the rest of his life; he had suffered a profound and permanent effect in his well-being and quality of life; major aspects of his life had suffered impact; he had specific problems with anger-management, stress, depression, low-self-worth, problems with sleeping and nightmares, hyper vigilance, lack of trust and had attempted suicide; on repeated occasions; the pursuer was unable to disclose the abuse for many years; suffered the ordeal of giving

evidence at Farrell's trial and in this action; and his employment options had been restricted and his career progression hampered and delayed.

Loss of earnings/employability

[127] Quantifying loss of earnings sustained over a period of almost 40 years is not straightforward. A precise calculation is likely to be difficult: *FZO v Adams & Haringey LBC*.

[128] The principle described in *British Transport Commissioners v Gourlay* by Lord Reid at p212 applies with equal force in cases where past loss of earnings occurred over many years and it is difficult to say with certainty how the pursuer's career would have unfolded if the abuse had not occurred. In England the courts have made significant awards for loss of earnings in claims arising from historical child sexual abuse: *JXL & SXC v Winston Britton*; *RAR v GGC*; *FZO v Adams*; and *LXA v Willcox*.

[129] The HM Revenue & Customs Employment History Schedule contained an accurate record of his employment history, annual gross earnings from employment, income tax liability and National Insurance contributions from the period from 1980/81 to 2017/18. The Court also has available to it evidence in relation to the effect of the abuse on the pursuer's employment and career and opinions of two Vocational Consultants. The court need not proceed on a "broad brush" basis, though there are a number of different ways in which the Court can approach the question of the pursuer's past loss of earnings.

[130] The pursuer's primary position in relation to past loss of earnings proceeds on the basis of the opinion of Mr Cameron at 5/2/8 para 2.2.1.

[131] In view of the pursuer's demonstrated ability and capacity for responsible employment in managerial roles, the hypothesis was a modest one, albeit it has to be accepted that Mr Cameron described his projections as an "optimal scenario."

[132] The comparison in earnings is that the pursuer has earned £479,880.70 net during his career whereas he would have earned £776,335.67 net had he progressed to a career in a skilled trade, with a resulting loss of earnings is in the sum of £296,455 to date.

[133] Loss of earnings should be assessed on the basis of his optimum potential.

[134] If a discount to this approach is appropriate, it is accepted that it would be open to the Court to make some modification to the amount of damages as it deems necessary to take account of any uncertainties in relation to predicting the pursuer's career trajectory, but for the abuse.

[135] An alternative method of calculation would be to proceed on the hypothesis that the pursuer would have been employed in an unskilled manual role but for the abuse. In his report, Govan provides data showing that the expected net annual earnings from an unskilled occupation amount to approximately 75% of earnings in a skilled engineering or construction trade: 6/2/12 para 4.6.

[136] If the Court is to proceed on the basis that the pursuer would have entered an unskilled occupation, Cameron's figures can be adjusted by deducting 25% to show the likely earnings in such an occupation. Between tax years 1981/82 and 2002/03 (after which he was promoted to management) he earned a total of £116,080. From an adjustment to Cameron's figures, we see that had the pursuer been working full time in an unskilled trade he would have earned £181,047 ($£241,395.78 \times 0.75$) over the same period. The difference between the hypothetical scenario and the pursuer's actual earnings is a total of £64,967. This would understate what was lost as a result of the abuse committed against him.

[137] A further alternative approach would be to compensate the pursuer only for the periods when he was unemployed due to the abuse. This approach fails to take account of the delay in career progression caused by those periods of unemployment. If that approach

were to be taken, the pursuer could be awarded damages commensurate to the £7,162.41 for each of the 4.5 years of unemployment; and £9,270.69 for his earnings in the last full year prior to his “nervous breakdown” in 1995. That approach would result in a total award of £50,772. This would under-compensate the pursuer for what he has lost.

Future disadvantage

[138] The Court should also make an award for disadvantage on the labour market: *Smith v Manchester; Moeliker*.

[139] The calculation of such damages is not an exact science: *Forey*, Taylor LJ.

[140] Relevant factors identified in *Moeliker* include:

- i. the pursuer’s net annual income;
- ii. the length of the remainder of his working life;
- iii. the level of risk that the pursuer will be on the labour market and the number of times; and
- iv. the effect of the pursuer’s disability on his work capacity.

[141] The pursuer is currently 54 years old. His state pension age is 67. He currently earns £37,333.59 net of income tax and NI. He is in stable employment. Standing the pursuer’s psychiatric condition, the risk of relapse and his previous difficulties in maintaining continuous employment as evidenced by his employment history schedule it is clear that the risk of the pursuer losing his employment is a realistic one that is more than fanciful or speculative: *Paterson*, para 32 – 41.

[142] The pursuer is at a significant disadvantage as a result of his condition. An award equivalent to 2.5 years’ net earnings (£93,333) would be appropriate.

Pension loss

[143] It was accepted on behalf of the pursuer that an award under this heading involved speculation as to the extent to which the pursuer would have taken up the opportunity to invest in pension provision. It was unrealistic to think that the Court would make an award based upon the sort of figures which Mr Pollock has produced. A lump sum award assessed on a broad view of the matter would be appropriate: *Kemp & Kemp*, para 11-066. £10,000 would be appropriate.

Cost of treatment

[144] Psychological therapy was recommended at a cost of £80 - £120 per hour for at least 30 sessions. It is uncertain whether the pursuer will ever be able to have such therapy. The Court should make an award of £3,000 for the costs of future treatment.

Interest

[145] The correct approach to interest on the past element of the solatium award is as authoritatively stated in *JM*. The past element of the solatium award requires to be apportioned between (i) the period when the pursuer was abused at the school and (ii) the period after his departure from the school.

[146] Interest should be awarded on the past solatium attributable to period (i) at (a) 2% for the period from 30 January 1979 (the day the abuse began) and 19 December 1980 (the date of the pursuer's departure from the school); and (b) at 4% per annum from 19 December 1980 to date of decree.

[147] Interest should be awarded on the past solatium attributable to period (ii) at 2% per annum from 19 December 1980 to date: *JM* paras 25 and 35; *A & B v C* para 40.

[148] Interest on past loss of earnings to date should be awarded at half the judicial rate i.e. 4% from 16 January 1981 to date: *A & B v C*, para 43; *McCain v Redpath Dorman Long*; *McEwan & Paton*, 3-10.

[149] If the Court finds that past loss of earnings ended prior to the present date, interest should be awarded at 4% for the period during which the loss was sustained and at 8% from the date of terminus of the loss until payment: *JM* para 24; *McEwan & Paton* ch 3 – 10.

Submissions for defender

Introduction

[150] Decree should be granted against the defenders for £74,775, being solatium in the sum of £30,000 to reflect the abuse, and the likely physical assaults (going beyond reasonable chastisement) by Brothers Farrell and Ryan and by Timothy Foxall plus interest from 30th January 1979 to 17th December 2019.

[151] The sexual abuse of which Brother Farrell was convicted was both a serious crime and a gross breach of trust. The allegation that Brother Ryan raped the pursuer ought not to be found to be proved. The pursuer has not proved his claim for loss of earnings or pension loss. If he has a claim for loss of earning capacity and/or disadvantage on the labour market, it ought to be on the basis of a lump sum. The pursuer has not proved his claim for rehabilitation costs.

The issues to be determined

[152] The defenders submit that the following issues require to be determined:

- i. Did Brother Ryan rape the pursuer and if so, how often?

- ii. To what extent, if any, was the pursuer physically (i.e. non-sexually) assaulted by Brothers Ryan and Farrell, and by Timothy Foxall?
- iii. Does the pursuer suffer from PTSD?
- iv. If the diagnosis is found to be proved, did the deliberate actions of Brothers Ryan and Farrell, and of Timothy Foxall, materially contribute to the pursuer's PTSD?
- v. What ought to be awarded for solatium?
- vi. To what extent, if any, has the pursuer suffered loss of earnings and/or disadvantage in the labour market as a result of the deliberate actions of Brothers Ryan and Farrell, and of Timothy Foxall?
- vii. To what extent, if any, has the pursuer suffered pension loss as a result of the deliberate actions of Brothers Ryan and Farrell, and of Timothy Foxall?
- viii. To what extent, if any, ought the pursuer to be awarded damages for psychological therapy?
- ix. What sums of interest ought to be awarded on the past components of damages?

Witness evidence

Inherent probability, memory, the passage of time, and prejudice

[153] The present case concerns events around 40 years ago. Due to the inherent probabilities, the workings of memory, the passage of time, and the material prejudice to the defender, the allegation of rape ought not to be found proved and a broad general approach ought to be taken to causation.

Inherent probability

[154] The more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. The preponderance of evidence about the alleged rape was not cogent:

- i. the pursuer did not make the allegation when the pursuer first interviewed him in 2013;
- ii. his memory is unlikely to be better now than it was in 2013;
- iii. the pursuer is the only source of the allegation, which arises in the context of a claim for damages; and
- iv. Brother Ryan, who still enjoys the presumption of innocence, is dead and did not have the opportunity to refute the allegations.

[155] See *Secretary of State for the Home Department v Rehman*, pp193-4; *In Re H and Other (Minors)*, pp 586-7; *Joyce*, paragraph 26.

Memory

[156] The pursuer's allegation of rape ought not to be taken at face value. The events alleged by the pursuer occurred around 39 years ago. The pursuer has, for understandable reasons, forgotten or minimised the adversity he faced before he went to the residential school and its impact upon him.

[157] Lord Drummond Young's comments in *B v Murray* at paragraphs 21-24 about the decline in the quality of evidence remain pertinent. See also Leggatt J's observations in *Gestmin* at paras 16 -21 and *Martin v Kogan* at paragraph 88.

The passage of time and prejudice

[158] Account ought to be taken of the marked deterioration in the amount and quality of the evidence, to the defenders' prejudice, due to the passage of time.

[159] Brother Ryan died on 6th July 2013 before the allegations by the pursuer were put to him. He died with the presumption of innocence intact. There was a lack of other contemporaneous records.

*The pursuer's evidence*Early life

[160] The pursuer described his early life in examination in chief: his mother had a problem with drink. She could be violent. Even so, he stated that he didn't have "issues" with her. He had been in foster care, in a lot of places. He spent his birthday in a "remand centre". In cross examination, when Dr Lewis' report dated 22nd January 1979 (Production 5/1, pp173-4) was put to him, he had little or no memory of what was described there. He accepted he might have blocked it out.

His first experience of the residential school

[161] In examination in chief he vividly described his first impression: "It was scary. I mean, I was frightened right away and I didn't want to be there." He confirmed that this was despite nothing having happened to him at this point.

The alleged rape by Brother Ryan

[162] In cross examination, the pursuer accepted that he knew why he was giving a police statement: Production 5/4. He knew he was helping with their inquiries. He knew he was

making serious allegations against the men who worked there, including Brother Ryan. He agreed that he did not mention to the police having been raped by Brother Ryan. He volunteered that

“There was nothing asked about Brother Ryan. What was the point in talking about him? I was struggling to come out with stuff. I didn’t want it to go any further. I didn’t know if I could. I didn’t know if I would be able to go to court.”

[163] The pursuer had not told his wife about this allegation.

Psychological health

[164] While the pursuer stated in examination in chief that he does not cope well with stress and anxiety, he had learned to cope by putting “bad things in a box”.

Alcohol

[165] The pursuer gave evidence that he used to drink too much. He accepted in examination in chief and in cross examination that he had not sought medical help for his drinking. He stopped drinking too much by abstaining.

Work

[166] The pursuer stated in cross examination that he looked for work when he was 16. That is why he ended up on the government schemes of the day. He agreed that there was not a lot of work around in the 1980’s. The pursuer has a stressful job in management. His work had been affected by, for example, a former employer going out of business, a lack of computer literacy, physical ill health, stress at work, an inability to trust colleagues, and conflict with colleagues due to that colleague’s double-standards.

Psychological therapy

[167] When asked in cross examination whether he would refuse to see a psychologist, if offered, the pursuer advised that he did not think psychological therapy would do him any good.

The evidence of W

[168] W was obviously a caring, supportive wife to T. She appeared to be a credible and reliable witness. She described her first meeting with the pursuer. He stated that he had been in care, "I just need you to know, as if it would put me off. Doesn't matter to me."

[169] W did not appear to know any more than that the pursuer had been in care. W appears to know nothing, or very little, about any abuse suffered by the pursuer.

[170] She described the pursuer as being quiet; not good with people; previously a heavy drinker; that before the twins arrived, his sleep was regularly interrupted by panic; he has slept a lot recently. She stated that, other than her, he trusts no-one. He needs a lot of reassurance.

[171] While she described the pursuer as suffering from a nervous breakdown in the mid 1990's, she was not describing this in a technical way; further, she did not and could not speak to its cause. This episode was broadly contemporaneous with the arrival of the twins; by this stage, the pursuer and W had 4 young children.

[172] She spoke to the pursuer's strong work ethic.

[173] The pursuer has found the criminal trial and this court case stressful.

The evidence of DC Gilmour

[174] In cross examination, DC Gilmour accepted that, had the pursuer alleged that he had been raped by Brother Ryan, the allegation would have been recorded in Production 5/4.

The evidence of Dr Scott

[175] Dr Scott was to a large extent an unsatisfactory witness. She did not clearly describe the factors that she relied on in her diagnosis of PTSD. Rather, she asserted that she *felt* that the diagnostic criteria were fulfilled for PTSD. She tended to describe what generally happens, rather than giving a reasoned opinion about the pursuer.

[176] When asked about what the pursuer described as a “nervous breakdown” in the mid-1990s, she said that:

“All you can say, when he's not able to work, or as wife's described as breakdown, can just say psychiatric difficulties. In the absence of knowing exact difficulties, you can't say it's A, B or C. You can say, I suspect it reflects his manner of coping, his psychological defence mechanism of being in denial. It's difficult to say what he's experiencing, in terms of diagnosis and prominent symptoms. Need to know what was happening. Could say, experiencing emotional difficulties. Certainly, based on history, certainly had evidence previously of low mood, anxiety, and PTSD anxiety disorder. Used alcohol. Couldn't tell you what he's presenting with at that time.”

[177] Dr Scott suspected that the pursuer's symptoms reduced in a low grade/chronic way: when he reduced his drinking he dealt with them in a less dysfunctional way using distraction, by keeping busy and being with his family.

[178] The pursuer confirmed the position Dr Scott stated in her report at paragraph 109, Production 5/2.

[179] Dr Scott struggled to answer simple questions in cross-examination in a straightforward way. She was defensive about her role: in cross-examination she initially

stated that her position was only to give evidence about diagnosis; she conceded eventually that part of her role was to give an opinion about causation.

[180] Dr Scott confirmed in cross examination that:

“... from a psychiatric perspective, and when we've done training, what determined an individual's long-term well-being is early life, early deprivation, early care and quality of that, genetic predisposition and trauma. All of these factors affect individuals. People are placed in care, for a variety of reasons. The majority of people I see haven't been in care and have significant psych ill health, a lot of them have suffered trauma. Not all have been in care. A variety of reasons determine someone's ability to cope in adulthood.”

[181] Further

“... look pragmatically at what the research says. The impact of early childhood neglect, deprivation, absolutely can have an effect on individuals, they may be anxious, struggle with relationships, but will not develop trauma related, ICD10 of PTSD, that's the definition. They may have had emotional difficulties, but in the absence of trauma, they would not have developed PTSD.”

[182] In response to questions from the Court, Dr Scott accepted that a failure in the early attachment of a child to his mother can in a large number of cases have long term consequences. She accepted that, when interviewed by Dr Lewis on 22nd January 1979, he was likely to have displayed a degree of bravado and there was no doubt that he would have had anxiety and difficulties with trust.

The evidence of Gordon Cameron

[183] Mr Cameron's evidence was of little, if any assistance. His opinion was based on a combination of the alleged abuse and “if the care and educational support that the Christian Brothers ought to have provided at the residential school... had been made available to him” (Production 5/8, paragraph 2.1.12); the figures in the table at paragraph 2.2.5 were based on the pursuer's “optimum career path”, rather than a realistic one; although he had not dealt with the pursuer's likely career but for the alleged abuse, he agreed with the

observations made by Douglas Govan in Production 6/2, paragraphs 3.2 to 3.6; and he deferred to Dr Scott on the employment effects of the alleged abuse.

The evidence of Douglas Govan

[184] Mr Govan spoke to his report, Production 6/2. His conclusion, particularly for the reasons given in paragraphs 3.1-3.7, was that it was not possible to determine the extent to which the alleged abuse was likely to have impacted on T's education and employment. As stated at paragraph 4.7, there is insufficient information to say why the pursuer was unemployed earlier in his working life.

The evidence of Harry Harrington

[185] No reliance was placed on the evidence of Mr Harrington.

Liability

Brother Farrell

[186] The pursuer has a Summary Decree against the defenders for the sexual assaults described in Brother Farrell's conviction in 2016.

[187] The pursuer described a particular incident with Brother Farrell in which Farrell pinned the pursuer against a wall and threw him about because he had tobacco on him. He referred to being grabbed, pulled and Brother Farrell putting his hand on the pursuer's face.

[188] There is no basis in the Record for any case about Brother Farrell's use of the belt or tawse.

Brother Ryan

[189] Consistently with the averments on Record and his police statement, the pursuer described being knuckled on the top of the head by Brother Ryan.

[190] The pursuer's allegation of rape by Brother Ryan ought not to be found proved.

[191] In response to leading questions, he referred to being given the belt and being grabbed on the arm and by the throat. He referred to the "long stand". There was no Record for these allegations.

Timothy Foxall

[192] Consistently with the averments on Record and his police statement, the pursuer described two particular assaults by Timothy Foxall.

[193] There was no basis on Record for the allegation that Timothy Foxall put him on the "long stand".

Diagnosis

[194] The pursuer undertakes to prove that he suffers from PTSD. The defenders submit that the court should not find that the pursuer suffers from PTSD. He has attended his GP for symptoms of depression, and been treated for depression. The pursuer has not, however, been diagnosed with PTSD by those treating him. The evidence from Dr Scott was profoundly unsatisfactory. Not only did she fail to explain to the court clearly what the criteria for assessing PTSD were, she failed to explain how she arrived at the diagnosis, or arrived at an opinion on causation.

[195] An expert must explain the basis of his or her evidence when it is not personal observation or sensation: *Kennedy*, per Lords Reed and Hodge paras [48] *et seq.*

Causation

[196] The defenders are liable in solatium for the direct actions, and the immediate consequences of the direct actions, of Brothers Ryan and Farrell, and of Timothy Foxall.

[197] Beyond the immediate consequences the effect, if any, of their direct actions is more complicated. The evidence of Dr Scott was so unsatisfactory that it should not be relied on in the assessment of causation. Further, insofar as any psychiatric condition and the pursuer's working life are concerned, the actions for which they are liable are only one of a number of disparate factors, which include the economic conditions of the early 1980's, the pursuer's family and personal history before January 1979, and the pursuer's educational background.

[198] The law on the circumstances in which, and how, to apply the test of material contribution is summarised in *Williams*, paras 40 – 42.

Quantum

[199] It may be difficult to assess damages in cases of this nature: *FZO*, Mrs Justice Cutts, paragraph 7.

Solatium

[200] The best that can be done is to give examples, such as *J v Fife Council*, *A v N*, *A&B v C* and *KD*.

[201] In respect of the sexual abuse described in the criminal conviction and the physical abuse described, a figure of £30,000 is appropriate. If T has psychiatric symptoms related to the abuse then for much of the pursuer's adult life his symptoms have been low

grade/chronic and able to be managed by distraction. If the pursuer is found also to have proved that he was raped by Brother Ryan, a figure of £70,000 would be appropriate.

Interest

[202] In terms of *J v Fife Council*, interest ought to run at 4% on that part of solatium attributable to the abuse (running from 30th January 1979) and at 2% on that part of solatium attributable to its past consequences (running from 19th December 1980).

[203] If solatium is £30,000, it might be divided up into £20,000 to reflect the insult and £5,000 the past sequelae.

[204] If solatium is £70,000, it might be divided up into £50,000 to reflect the insult and £10,000 the past sequelae.

Loss of earnings/ disadvantage in the labour market

[205] With so many imponderables a multiplier/multiplicand approach ought not to be taken to the pursuer's claim for patrimonial loss. The pursuer takes great pride in his work. Despite its stresses, he uses work as a distraction and as a coping mechanism. His work is not under threat. If anything is to be awarded under this head, as Lord Doherty did in *A & B v C* (see paragraph 41), a lump sum ought to be awarded. It is contended that this figure ought to be no more than £20,000.

Pension loss

[206] No award ought to be made for the claimed loss of pension. There is no evidence that the pursuer has ever contributed to a pension scheme. He is in the same position as he

would have been, but for the actions for which the defenders are liable. This head of claim is so speculative that nothing should be awarded for it.

Psychological treatment

[207] The pursuer stated in evidence that he would not cooperate with psychological treatment.

Total

[208] The defenders submit that solatium ought to be awarded at £30,000 with interest at £44,775. These figures total £74,775.

Grounds of decision

The matters not in dispute

The joint minutes

[209] In terms of two joint minutes, certain evidence and facts were agreed, which for present purposes can be summarised thus:

- i. 5/1 of process is the pursuer's GP records;
- ii. 5/6 of process is an Employment History Schedule relative to the pursuer produced by Her Majesty's Revenue & Customs and contains a true and accurate record of the pursuer's employment history, annual gross earnings from employment, income tax liability and National Insurance contributions for the period from tax years 1980/81 to 2017/18;

- iii. 5/9 of process is a report by Dr John Pollock, Consulting Actuary and Fellow of the Institute and Faculty of Actuaries dated 24 June 2019; and the said document is the equivalent of the author's oral evidence in the cause.

The summary decree

[210] The summary decree granted in this case establishes liability for the defenders to make reparation to the pursuer for the loss, injury and damage sustained as a result of the indecent assaults committed on him on various dates between 30 January 1979 and 19 December 1980, both dates inclusive, whereby Brother Farrell did touch the pursuer's penis, masturbate him and compel the pursuer to touch his (Brother Farrell's) penis and masturbate him.

[211] It can be said that that narrative provides the baseline for an award of damages to the pursuer.

The pursuer's case beyond the summary decree

The pleadings

[212] For the sake of brevity, leaving aside what may be called the allegations of sexual abuse by Brother Farrell deriving from the summary decree, the pursuer offers to prove certain other acts of abuse, *viz.*:

- i. general averments to the effect that that throughout his residence at the residential school, the pursuer was abused by Brother Ryan, Brother Farrell and Mr Foxhall and that the abuse perpetrated against him formed part of a course of criminal conduct persistently pursued by Bros Farrell and Ryan against children;

- ii. that on various occasions between 30 January 1979 and 19 December 1980, he was sexually assaulted by Brother Ryan, by Brother Ryan penetrating the pursuer's anus with his penis;
- iii. that Brother Ryan physically assaulted the pursuer by seizing him by the neck and throwing him to the ground and on numerous occasions striking him to the head;
- iv. that he was violently (physically) assaulted by Brother Farrell by being thrown to the floor of a bus on one occasion and punched and kicked to the head and body on numerous occasions; and
- v. that Mr Foxall repeatedly violently assaulted the pursuer; on one occasion pushing him against a cabinet and causing him to fall and then dragging him down two flights of stairs to his injury; and on another occasion throwing the pursuer to the ground in a part of the school grounds where there was gravel, as a result of which the pursuer sustained a permanent injury to his ear.

[213] I shall examine these elements in turn.

The nature and extent of the abuse

Sexual assault by Brother Ryan

[214] Where the court is being asked to determine whether serious allegations about events which happened a long time ago have been established, matters such as inherent probability, the risk that memory has been affected by the passage of time, the loss of other possible sources of evidence and prejudice are all relevant factors to be taken into account. There may be, as was said in *B v Murray*, a marked deterioration in the quality of justice.

[215] But the court must make decisions on the basis of the evidence available to it and the assessment of the pursuer's evidence ultimately comes down to my view on his credibility and reliability.

[216] In terms of the pursuer's own evidence, I found T to be an honest witness doing his best to tell the truth. I accepted as genuine his description of the abuse he said he suffered; his reluctance (over a period of many years) to disclose or discuss it; and the effects which it has had on him. He may have forgotten details or have been unreliable in relation to certain aspects of them. That would not be surprising. But in relation to his allegation that he had been sexually assaulted by Brother Ryan, I found the pursuer to be credible and reliable.

[217] There was an issue between the parties as to the relevance of section 228DA of the Criminal Procedure (Scotland) Act 1995. The starting point is that the section has no application to civil proceedings. And as Mr Mackenzie put it, the defenders' position was not that *nothing* had been reported to the police but that what the pursuer had said to them was *different* to that which he had said in court and was limited to alleging that Brother Ryan had "touched" him. Accordingly, I agree that the section has no bearing on the assessment which the court must undertake in the present case.

[218] There was evidence of the pursuer's reluctance to speak about his experiences at the residential school over a long number of years and his active avoidance of becoming involved in an earlier police investigation into events at the school because of what that would entail. That was spoken to by the pursuer. His wife also gave evidence about his reluctance to discuss events at the residential school, both with her and in relation to his engagement with the police. In particular, her account of his reaction to the initial approach by the police supported the pursuer's account of the same events.

[219] It is not surprising that the pursuer was reluctant to recall or speak about matters from his personal history which were painful to him. DC Gilmour gave evidence as to the pursuer's reluctance to go into detail when being interviewed.

[220] In addition, it was clear from the evidence of DC Gilmour that although by the time the police were interviewing the pursuer they were already in possession of information about other allegations, they did not share these with the pursuer. In other words, it cannot be said that the police in some sense unwittingly prompted the pursuer to make allegations of sexual abuse against Brother Ryan.

[221] It is true that the pursuer did not make allegations of rape to the police but he did say that he had been sexually abused by Brother Ryan. Given the other evidence available about the pursuer's reluctance to share information about his time at the residential school generally and go into specifics about the treatment which he had received in particular, the criticisms of the weight which might be attached to his evidence diminish in significance. The foregoing points, allied with my impression on the pursuer as an honest witness, lead me to conclude that his evidence about more serious sexual assaults in the form of rape should be accepted.

[222] I hold it proved that the pursuer was raped on numerous occasions - probably between 10 and 20 times - by Brother Ryan.

Physical assaults by Brother Ryan

[223] I accepted the pursuer's account of the physical treatment which he received from Brother Ryan to the extent of being struck on the head with a knuckle, grabbed by the arm and throat and being given 'burns' by being gripped on the wrist.

[224] Times have changed since the early 1980's but these types of treatment could not have been considered as reasonable chastisement even then, particularly if carried out forcefully and frequently, as I believe they were.

[225] It was suggested on behalf of the defenders of the evidence about physical mistreatment by Brother Ryan had been elicited by leading questions and was not foreshadowed in the pleadings. But even if that is correct, the evidence was elicited without objection and accordingly any criticism based on the use of leading questions and/or lack of fair notice in the pleadings comes too late.

Physical assaults by Brother Farrell

[226] I accepted the pursuer's evidence about the assaults perpetrated by Brother Farrell. But although no objection was taken to the evidence about the use of the belt (tawse) I do not attach any weight to this as the use of corporal punishment in schools did not become illegal until some years later and the use of the tawse as described was not self-evidently so excessive as to go beyond reasonable chastisement.

Physical assaults by Mr Foxhall

[227] I accepted the pursuer's evidence that Mr Foxhall repeatedly assaulted him; on one occasion pushing him against a cabinet and causing him to fall and then dragging him down two flights of stairs to his injury; and on another occasion throwing the pursuer to the ground in a part of the school grounds where there was gravel, as a result of which the pursuer sustained a permanent injury to his ear.

Other averments

[228] There are also more general averments to the effect that that throughout his residence at the residential school, T was abused by Brother Ryan, Brother Farrell and Mr Foxhall and that the abuse perpetrated against him formed part of a course of criminal conduct persistently pursued against children resident at the school. I do not find this averment proved.

*The effects of the abuse**PTSD*Diagnosis

[229] The question as to whether the pursuer has PTSD depends primarily on the opinion evidence of Dr Scott (though the factual evidence underlying that opinion, such as – for example – that pertaining to the nature and extent of the abuse suffered by the pursuer, would also have to be accepted).

[230] Dr Scott is a psychiatrist. She has experience of treating those who have suffered trauma and sexual abuse.

[231] I was invited to reject the evidence of Dr Scott as to the diagnosis of PTSD. I decline to do so. Dr Scott has relevant qualifications and experience to provide a diagnosis. There was no contrary evidence. Although the pursuer has not been diagnosed with PTSD by those treating him, his evidence was that he had only relatively recently disclosed his history of abuse to his GP and the precise nature of those disclosures; when they were made; and what has been discussed between the pursuer and his GP in terms of possible treatment and diagnosis was not explored in evidence.

[232] I accept that Dr Scott's evidence as to the nature of ICD 10, F43.1 was not as full and clear as it could have been, but ultimately she did explain what that meant. She explained the 'high threshold' for trauma as defined in ICD 10 as being events which would be traumatic for any person, such as assault, rape, etc. She had available to her the pursuer's medical records and she took a history from the pursuer. It is clear that she based her opinion about PTSD on an overall assessment of the material available to her, including the pursuer's description of his symptoms. I accepted her evidence.

Causation (PTSD)

[233] In a case such as this, it can be difficult to say with confidence whether problems in later life are attributable to one or other negative experience occurring earlier. In the present case, Dr Scott, while attributing the pursuer's PTSD and psychological symptoms to the treatment he received at the residential school, did not go so far as to suggest that *all* of his problems are attributable to that. She specifically accepted that the effect of the abuse had been to make his mental and psychological state in later life worse than it would have been. (This is noted in paragraph 113 of her report and in response to a question about paragraph 114, she agreed that the last sentence thereof was expressed in terms which were too absolute and should be read as a reference to the terms of paragraphs 89 and 90 of her report.)

[234] But, I accepted Dr Scott's evidence about causation and find that the pursuer's PTSD was attributable to (i.e. materially caused by) the direct actions of Brothers Ryan and Farrell and of Timothy Foxhall.

Solatium

[235] I begin by considering the factors identified by Lord Menzies in *J v Fife Council*. The nature and severity of the abuse, and its character whether sexual, non-sexual but violent, or mental / emotional; and the frequency thereof

[236] I have found it more difficult to get a clear picture of the extent of the physical abuse, other than the specific instances spoken to by the pursuer, than of the sexual abuse. I say that for several reasons.

[237] First, what was acceptable as methods of enforcing discipline in the early 1980s was very different to what would be acceptable nowadays. The most obvious example of this is the use of the tawse, which remained legal until about 1986 or 1987. There was no evidence that the use of the tawse was so excessive as to render it unreasonable and therefore unlawful. Likewise, it cannot be said that the use of a method such as the “long stand” would in itself have amounted to abuse, although making a pupil stand in one place from morning to night (which the pursuer did speak to) would probably be regarded as unreasonable, even 40 years ago.

[238] Second, the pursuer’s evidence about the physical assaults, such as blows to the head or twisting of arms or grabbing faces was vague as to frequency.

[239] I accept that with the passage of time, it would be difficult for the pursuer to identify all – or even many – of these instances specifically, especially if the treatment was commonplace. Nevertheless, the limited number of examples given makes it difficult for me to extrapolate to a conclusion as to frequency.

[240] I accept that the regime at the residential school was harsh and interspersed with assaults, but I have found it difficult to assess the overall level of unlawful violence on the

one hand, compared, on the other, to treatment which would now be regarded as unacceptable but which at the time was not abnormal.

[241] The picture about sexual abuse is clearer, because there can never have been any question of that having been justifiable or lawful.

[242] Accordingly, I hold that there were bouts of violence perpetrated by individuals that were certainly unlawful, but this was against a background of physical treatment which was not always unlawful. The sexual abuse was of a very serious kind and became a regular feature of the pursuer's life at the residential school whilst he was there.

The duration of the abuse

[243] The abuse started shortly after the pursuer commenced at the residential school and continued throughout the duration of his stay, namely two years.

The age of the pursuer at the time of the abuse

[244] The pursuer was 14 years old when he started at the residential school. Accordingly, he was young and going through a crucial part of his adolescence.

[245] The very reason why the pursuer (like the other boys who were there) was in the residential school was because of difficulties, of one kind or another, which meant that they could not live at home. The pursuer was vulnerable.

The immediate effects of the abuse on the pursuer

[246] The effects were to render T's life at the residential school miserable. It is not clear from the evidence whether the pursuer analysed it in any more concrete way at the time.

This is not surprising given his young age.

Whether any apportionment is required to reflect abuse by others, or other causes of the pursuer's problems

[247] While the pursuer's early life probably had more effect on him than he was prepared to accept in 1980, and is likely to have left him with attachment and trust issues, the pursuer has come to terms with that period of his life and accordingly any ongoing effects thereof are of a residual nature only. The dominant cause of his PTSD and associated psychological issues is the abuse to which he was subjected whilst at the residential school. No question of apportionment arises.

The emotional and social consequences of the abuse for the pursuer

[248] I accepted the evidence of the pursuer and his wife as to the emotional and social impact of the abuse on the pursuer; and of Dr Scott as to the appropriate diagnosis, namely PTSD. The consequences have been profound (though varying in intensity) since 1980; and will be lifelong.

Authorities

[249] Decisions as to awards of solatium in other cases can only ever be examples. I found the case of *J v Fife Council* to be of most assistance.

[250] In that case, the abuse was very serious, went on for longer and appears to have been more frequent, but there was only one perpetrator and a link with psychiatric and psychological damage was not proved. While I accept that the number of perpetrators may be a relevant factor, I do not think it is an especially powerful one. In comparison with *J*, the duration and frequency of the abuse are distinguishing features suggesting a lower award in

this case, while the development of psychiatric and psychological sequelae in the present case is a distinguishing feature suggesting a higher award. The appropriate award in the present case is £120,000. Given the pursuer's age and the prognosis, I will apportion £80,000 of that to the past.

[251] Past solatium requires to be further apportioned between (i) the period when the pursuer was abused at the school ('period of abuse') and (ii) the period after his departure from the school ('period after abuse'). Given the passage of time to the date hereof, I will apportion the award of £80,000 for past solatium equally i.e. £40,000 to the period of abuse and £40,000 to the period after abuse: *JM v Fife Council* and *A & B v C*

[252] Interest on the solatium attributable to the period of abuse will be awarded at (i) 2% per year for the period from 30 January 1979 until 19 December 1980 and (ii) 4% per year from 20 December 1980 to date. Interest on solatium attributable to the period after the abuse will be awarded at 2% per year from 20 December 1980 to date. I set out the detailed interest calculations below.

Loss of earnings/earning capacity

[253] If the question of causation in relation to the pursuer's psychiatric and psychological condition and diagnosis – and hence to the appropriate award of solatium – is not straightforward, then the issue of loss of earnings/earning capacity is more complicated still. This is because of the increased number and type of variables and uncertainties which fall to be considered.

[254] In some cases, no more than a broad view can be taken: *The Quantum of Damages*, Kemp & Kemp paragraph 32 – 050.

[255] While we have an actual employment history for T, arriving at the 'correct' figure for past loss of earnings is still not straightforward. It is necessary to consider a number of different scenarios and compare the results.

[256] The pursuer gave unchallenged evidence that his periods of unemployment were directly related to symptoms caused by the abuse but it is not appropriate, particularly in relation to the early years, to draw a 'straight line' between the abuse and the loss of earnings, given the other factors which were in play.

[257] The primary position for the pursuer proceeds on the basis of the opinion of Mr Cameron and consists, put shortly, of a comparison of the pursuer's actual earnings with what he might expect to have earned had he been in consistent full time employment in a skilled trade.

[258] Mr Cameron is an experienced employment consultant but there are questions about the reliability of the opinions expressed by him. The first is this. Mr Cameron expresses the view that:

"in the context of how the latter part of [the pursuer's] career has developed and the level at which he has been working for several years now, it seems more probable than not that if the abuse he suffered as a child had not occurred and if the care and educational support that [the defenders] ought to have provided at [the residential school] had been made available to him, it is likely that [the pursuer] would have gained sufficient qualifications to have allowed him to develop his career in a skilled trade in the engineering sector in line with his ambitions when he was at school." (Emphasis added): production 5/2, paragraph 2.1.12; see also paragraphs 2.1.15; 2.2.1; and 3.2).

[259] Thus, Mr Cameron has taken account of a factor – namely educational support or lack thereof – which is not part of the pursuer’s case and about which no evidence, other than a few incidental details, was led. This fatally undermines Mr Cameron’s opinion as to the qualifications which the pursuer might otherwise have obtained and career which he might otherwise have followed.

[260] I was asked to conclude that such educational opportunities as were available at the residential school were lost as a result of the abuse that T was subjected to during his time there. It is not possible to do so. The pursuer was already showing a lack of ability in schoolwork. There was no evidence as to which (academic or practical) courses the pursuer might have pursued had he been given the opportunity to do so or what qualifications he might have obtained.

[261] I am not able to find that if the pursuer had not been abused he would have obtained qualifications which he otherwise did not.

[262] Second, Mr Cameron proceeds on the basis of the pursuer being employed from leaving school continuously without a break to the present day. That must be regarded as over optimistic. It is well-known that the unemployment levels in the 1980s in the UK were high. There have been other economic downturns in the last decades. There is no analysis by Mr Cameron of the availability of jobs of the type which he suggests the pursuer may have been able to obtain in the locality where the pursuer lived.

[263] On this topic, I preferred the evidence of the defenders’ expert, Mr Govan.

[264] He acknowledged that it was difficult to say whether and how the pursuer’s employment history might have been different had the abuse not happened. By reference to research mentioned in his report, he identified particular difficulties which children leaving care face, including that care leavers are less likely than those who have not been in care to

be in education, employment or training when they leave school; and those who do secure ongoing education, employment or training are less likely to sustain this. He expressed the view that although the data was of relatively recent origin, it was likely to be representative of the situation T would have faced: production 6/2, paras 3.1 – 3.5. I accept that evidence.

[265] Mr Govan also gave evidence about the job prospects for school leavers in the early 1980s to the effect that the number of school leavers whose first destination after school was unemployment rose sharply between 1979 and 1981 and would have been more dramatic still had there not been government funded schemes for unemployed young people.

Likewise, male unemployment generally increased substantially between 1979 and 1981 and the ratio of school leaver recruitment to total employment declined in most industries – and most of all in manufacturing.

[266] Mr Govan was cautious about being too specific as to how all of this could be said to have affected the pursuer. He was correct to do so because of the number of factors and how these might have impacted on the pursuer as an individual had he not been abused.

Nevertheless, it is information which is relevant to assessing the employment situation would have faced even had he not been abused.

[267] It is clear that the pursuer has thrown himself into his work. But the effects of the abuse suffered by the pursuer affected his psychological wellbeing in certain respects e.g. in relation to trust and his ability to cope with stress. What is much more difficult to say with any confidence is whether, in what way and to what extent these may have affected the arc of his career path and working life.

[268] For example, the pursuer himself said that he enjoyed working with his hands.

Assuming, for the sake of argument, that it can be said that if the pursuer had not suffered the abuse which he did suffer at the residential school, he would have obtained

qualifications which would have allowed him to pursue a skilled trade and that he had then followed that trade, who is to say that as somebody who enjoyed working with his hands, he would *not* have sought advancement to managerial role if that would have taken him away from work he enjoyed? If had followed such a career path – which is not a manifestly absurd hypothesis – his lifetime earnings to date would probably have been no more than what he has in fact earned.

[269] On the other hand, it intuitively seems wrong to conclude that the pursuer's longstanding PTSD and the symptoms thereof have had had no impact at all on his career.

[270] Drawing these points together, the figure for potential earnings and loss of earnings set out in Mr Cameron's report are not a sound basis for assessment as they proceed on an incorrect premise and speculation which can provide no more than a marker showing the outer limit of any possible calculation for past wage loss. In short, a claim for past loss of earnings amounting to £296,455 to date must be rejected as over optimistic.

[271] Nevertheless, I accept the broader picture that the pursuer is hard working and has shown ability (including in management) and resilience. His 'values' concerning work are vouched to some extent by the career paths of his children.

[272] It was suggested that in the alternative the Court could proceed on the hypothesis that the pursuer would have been employed in an unskilled manual role but for the abuse and that would produce a loss of earnings of £64,967.

[273] A further alternative suggested was to make an award based only for the periods when the pursuer was unemployed due to the abuse, producing a total award of £50,772. It was submitted that these approaches would under-compensate the pursuer.

[274] By contrast, it was submitted for the defenders that there only a broad, lump sum approach could be taken.

[275] My approach is to look at the pursuer's work history in phases and in the context prevailing at the time of each of these phases.

Past loss of earnings

[276] During the 1980's, the pursuer did not work full time or continuously. But it is clear that the pursuer was already struggling with schoolwork before he went to the residential home. This was also a period during which the pursuer had returned home. I think that it can be inferred from the situation prior to his going into care that his home situation would not by then have been particularly stable. The pursuer had no qualifications. He was a teenager and was living, as he described himself, an unstable and unsustainable lifestyle. That decade was a time of relatively high unemployment. There were particular challenges facing care leavers.

[277] In these circumstances, it cannot be said that but for the abuse the pursuer's work history during that period would have been better. There were other factors which would have impacted on his employment prospects during that time.

[278] The position began to change in the 1990's. He had married W and, if my arithmetic is correct, started a family. These were stabilising factors. His work pattern improved in the early 1990's. He had sustained periods of employment.

[279] Taking the evidence of the pursuer, his wife and Dr Scott, I accept that the period from 1995 to 1997 was a difficult period for the pursuer and that it and the consequent period of unemployment was attributable to the manifestations of his PTSD which he was experiencing as a result of the abuse suffered by him. Accordingly, it is reasonable to make an award for loss of earnings attributable to that period. It was suggested for the pursuer that such an award should be based on his prior full year earnings. That is a reasonable starting point and would produce a figure of just over £18,500. Allowing for the possibility

that the pursuer would have had some periods of absence during that 2 year period not attributable to his PTSD, I shall reduce that to £15,000. Interest on this portion of the past wage loss will run at the rate of 4% per year from 6 April 1995 to 5 April 1997; and thereafter at 8% per year from 6 April 1997 to date. The detailed interest calculation is set out below.

Past loss of earning capacity

[280] Other than that, the question is whether it can be said that there was a lack of career progression, either throughout the entire period since the pursuer left the residential school or at any specific periods since then.

[281] It is difficult to come to any firm conclusions. On the one hand, T had no qualifications and ongoing difficulties with literacy and numeracy. These were not attributable to the abuse. On the other hand, it is useful to consider the evidence about the effects of the PTSD on the pursuer's personality and behaviour and try to translate these into how the pursuer may have appeared as an employee. The pursuer (and his wife) described some of the symptoms which the pursuer suffered such as the inability to trust others; "not liking other people"; being "not good at all around other people"; low mood and anxiety; disturbed sleep; low self-esteem; and hyper-vigilance.

[282] It would be surprising if such behaviours did not have an effect on the pursuer in the employment context. Albeit hard working, it is likely that the pursuer, as a person with such a 'personality' was less likely to be identified as having potential for promotion than he would otherwise have been. To coin a phrase, he suffered a 'loss of promotability' rather than a loss of employability.

[283] How that should be reflected in an award of damages remains problematic. On the one hand, I have concluded that it is likely that the pursuer suffered a delay in advancement.

But it is not possible to say exactly when and in what circumstances he would have been promoted had he not been abused and developed PTSD. Given his other circumstances, it is not likely that the opportunities for promotion would have presented themselves until after 1997 and that the lack of literacy and numeracy skills would have been restricting factors.

[284] Looking at the matter in the round, I award £30,000 under this heading, being broadly equivalent to one year's net loss of earnings in the type of managerial post which the pursuer now holds. It is not entirely clear when the pursuer was first promoted into a managerial role, but my impression is that it was around 2003: productions 5/6/2; 5/8, para. 2.2.4; and 6/2/5, para. 2.8. I approach this part of the claim as an accruing loss. Accordingly, I shall award interest on the whole amount at the rate of 4% per year from 6 April 2013 to date. The detailed interest calculation is set out below.

Future disadvantage on the labour market

[285] Under reference to *Paterson*, I was invited to make no award since there was no evidence supporting the conclusion that the pursuer faced a substantial or real risk of losing his job. But the question of risk of loss of current employment is more nuanced and depends, as is made clear in *Moeliker*, on a multi-factorial assessment: Browne L J at 141C – D.

[286] Although the evidence on this point was not extensive, I agree with the pursuer's submissions. The pursuer still has a significant period to work before he reaches pension age – about 12 or 13 years. The days of 'permanent employment' are long gone in many areas and sectors. As I understand it, the pursuer's employers provide hygiene services to another host company. Presumably these types of contract are reviewed from time to time. The contract may be lost. The pursuer has a condition which puts him at risk of relapse. It cannot

be said that the risk of the pursuer losing his present employment over the next decade or so is fanciful. As such, it is a real risk.

[287] The difficulties which the pursuer might face if he were to lose his present employment are clearer. The actual loss of employment itself would be likely to make his mental condition worse, because of the therapeutic effect which employment has for him. Given a combination of that and his age, he could find it difficult to gain alternative employment.

[288] The pursuer suggested that an award of 2.5 years earnings was appropriate. But it is not possible to quantify the likelihood of the pursuer losing his current employment other than to acknowledge that there is a risk of such; nor is it possible to say when that might happen. In addition, any award falls to be discounted to take account of it being a payment made in advance.

[289] I have concluded that the correct starting point is one year's net salary. Taking account of the possibility of loss of employment at some indeterminate point in the future; and the requirement to discount to take account of the advance payment, this is reduced to £20,000.

Pension loss

[290] The terms of Mr Pollock's report were agreed. But other than some evidence that the pursuer might have had access to an employee's pension scheme, there was no evidence as to the pursuer's attitude towards such. In these circumstances, I make no award under this head.

Cost of treatment

[291] The pursuer was quite clear in his evidence. If treatment were to be offered, he would not take it. An award under this heading is not appropriate.

Summary of award

[292] The total award, net of interest is:

| | |
|---|-----------------|
| Solatum | 120,000 |
| Past wage loss 1995 – 1997 | 15,000 |
| Past wage loss attributable to delay in promotion | 30,000 |
| Future disadvantage in labour market | <u>20,000</u> |
| Total | <u>£185,000</u> |

Interest calculations, summary of award and disposal*Interest**Introduction*

[293] There are six interest calculations to be carried out, summarised as follows:

- i. Element 1 – solatium attributable to period of abuse (£40,000): interest accruing during period of abuse;
- ii. Element 2 – solatium attributable to period of abuse (£40,000): interest accruing from end of the abuse to date;
- iii. Element 3 – solatium attributable to period from end of the abuse to date (£40,000): interest accruing from end of the abuse to date;
- iv. Element 4 – past wage loss, 1995 - 1997 (£15,000): interest accruing during period of loss;

- v. Element 5 – past wage loss, 1995 - 1997 (£15,000): interest accruing from end of period of loss to date; and
- vi. Element 6 – loss/delay in promotion (£30,000): interest from commencement of accrual of loss to date.

[294] I now turn to the calculations themselves.

Element 1

[295] Interest is to be applied at 2% per year from 30 January 1979 until 19 December 1980.

That is a period of 689 days; or 1.89 years¹. That gives interest of $£40,000 \times 2\% \times 1.89 = £1,510$.

Element 2

[296] Interest is to be applied at 4% per year from 20 December 1980 to date. That is a

period of 14,285 days or 39.14 years. That gives interest of $£40,000 \times 4\% \times 39.14 = £62,619$.

Element 3

[297] Interest is to be applied at 2% per year from 20 December 1980 to date. That gives

interest of $£40,000 \times 2\% \times 39.14 = £31,310$.

Element 4

[298] Interest is to be applied at 4% per year from 6 April 1995 to 5 April 1997. That is a

period of 2 years and gives interest of $£15,000 \times 4\% \times 2 = £1,200$.

¹ Leap years have been ignored in all calculations and all interest figures have been rounded to the nearest £1.

Element 5

[299] Interest is to be applied at 8% per year from 6 April 1997 to date. That is a period of 8,334 days or 22.83 years and gives interest of $£15,000 \times 8\% \times 22.83 = £27,399$.

Element 6

[300] Interest is to be applied at 4% per year from 6 April 2013 to date. That is a period of 2,490 days or 6.82 years. That gives interest of $£30,000 \times 4\% \times 6.82 = £8,186$.

[301] The interest calculations can be summarised thus:

| Element | Sum (£) | Start date | End date | Days | Years | Rate pa | Interest |
|----------------|----------------|-------------------|-----------------|-------------|--------------|----------------|-----------------|
| 1 | 40,000 | 30/01/1979 | 19/12/1980 | 689 | 1.89 | 2% | £1,510 |
| 2 | 40,000 | 20/12/1980 | 30/01/2020 | 14,285 | 39.14 | 4% | £62,619 |
| 3 | 40,000 | 20/12/1980 | 30/01/2020 | 14,285 | 39.14 | 2% | £31,310 |
| 4 | 15,000 | 06/04/1995 | 05/04/1997 | 730 | 2.00 | 4% | £1,200 |
| 5 | 15,000 | 06/04/1997 | 30/01/2020 | 8,334 | 22.83 | 8% | £27,399 |
| 6 | 30,000 | 06/04/2013 | 30/01/2020 | 2,490 | 6.82 | 4% | £8,186 |

Summary of total award

[302] The total award may be summarised thus:

| | |
|-----------------------|----------------|
| Solatium | £120,000 |
| Interest on Element 1 | £1,510 |
| Interest on Element 2 | £62,619 |
| Interest on Element 3 | <u>£31,310</u> |

| | | |
|---|----------------|-----------------|
| Total interest on past solatium | | <u>£95,439</u> |
| | | £215,439 |
| Past wage loss | £15,000 | |
| Past loss of employability | <u>£30,000</u> | |
| | | <u>£45,000</u> |
| | | £260,439 |
| Interest on Element 4 | £1,200 | |
| Interest on Element 5 | £27,399 | |
| Interest on Element 6 | <u>£8,186</u> | |
| Total interest on past loss of earnings | | <u>£36,785</u> |
| | | £297,224 |
| Future loss of employability | | <u>£20,000</u> |
| Total damages | | <u>£317,224</u> |

Disposal

[303] I find that the defenders are liable to make reparation to the pursuer for the loss, injury and damage which he suffered as a result of the actions of Brothers Ryan and Farrell and Mr Foxhall, for which they are vicariously responsible; and thereafter grant decree for payment by the defenders in the sum of £317,224 including interest to the date hereof.

[304] All questions of expenses are reserved. If a hearing on expenses is required, this should be arranged through the sheriff clerk.