HOUSE OF LORDS SESSION 2007–08

[2008] UKHL 32

on appeal from: [2007] EWCA Civ 601

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Bowden (AP) (Appellant) v Poor Sisters of Nazareth (Respondents) and others (Scotland)
Whitton (AP) (Appellant) v Poor Sisters of Nazareth (Respondents) and others (Scotland)
(Consolidated Appeals)

Appellate Committee

Lord Hoffmann
Lord Hope of Craighead
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe
Lord Carswell

Counsel

Appellants:
Susan O'Brien QC
Alison Stirling
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Respondents:
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HOUSE OF LORDS

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LORD HOFFMANN

My Lords,

1. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hope of Craighead. For the reasons he gives, with which I agree, I too would dismiss these appeals.

LORD HOPE OF CRAIGHEAD

My Lords,

2. The appellants are former residents of a children's home called Nazareth House at Cardonald in Glasgow which was run by the religious order known as the Poor Sisters of Nazareth. In May 2000 they raised separate actions of damages against the respondents in the Court of Session for loss, injury and damage in respect of physical abuse which they claim to have suffered during their time there. They maintain that they were regularly assaulted and subjected to cruel punishments, as a result of which they suffered pain and distress and long-standing psychological or psychiatric problems and that these led to their being disadvantaged in the workplace and to financial loss. The respondents deny these allegations. They also say that the actions are

time barred, as the appellants' allegations relate to events that are said to have happened many years ago.

3. These appeals are concerned only with the issue of time bar. Before I explain why this is so, I ought to mention that the issue should be seen in a wider context. The allegations of child abuse which the appellants make are grave enough in themselves. But your Lordships were told that several hundred other actions have been raised against the same religious order by other persons who lived as children in homes which were run by it. Several hundred more have been raised against other institutions which ran children's homes during the same period. They all share this feature in common, that their actions were generated by publicity that was given to the allegations, many years after the event, in the media. The abuse that is alleged to have taken place was the subject of a series of newspaper articles that were published in 1997, two or three decades after the appellants left Nazareth House. It was only then that solicitors were consulted and steps were taken to claim damages against those who were said to have been responsible. Miss O'Brien QC for the appellants was at pains to stress that these appeals are not to be taken as test cases. Nevertheless it is plain that the issues which they raise are of critical importance not only to the appellants themselves but also to all those who claim to have been abused. The way the issue of time bar is disposed of in their cases is likely to affect the many others that remain in the pipeline.

4. The appellants have drawn attention to the fact that on 1 December 2004 the then First Minister, Jack McConnell, made a public apology for what had happened in these institutions to the Scottish Parliament. It must be stressed, however, that this was a purely political initiative. It has no legal significance whatsoever. The homes were not institutions for the running of which either he or anyone else in the Scottish Executive was responsible. Indeed the First Minister was careful to say that it was not his purpose to cut across the work of the courts. He acknowledged that it was for the courts to establish, in accordance with the law, where responsibility lay and what was to happen as a result. Moreover he did not mention the fundamental problem which was already facing the claimants in all these cases. This is the defenders' contention that due to the delay in raising proceedings they are all time barred.

The 1973 Act

5. The law of limitation of actions in Scotland is set out in Part II of the Prescription and Limitation (Scotland) Act 1973. The limitation periods that it sets out are the product of the judgment of the legislature as to where the interests of justice lie in the case of delayed claims in the civil courts. Breaches of the criminal law are, except in the case of those that are to be prosecuted summarily, not normally subject to any time limits. But in the case of civil justice the position is different. It has been observed repeatedly that where there is delay the quality of justice diminishes. Witnesses may have died, memories may have become dimmed and relevant documents may have been destroyed or lost. As time goes on these effects may become less easy to detect, and this in itself is apt to produce injustice. Times change too, and conduct which may seem reprehensible today may have been regarded as acceptable or even as normal many years ago. So, as McHugh J said in *Brisbane South Regional Health Authority v Taylor* [1996] 186 CLR 541, 553, the public interest requires disputes to be settled as quickly as possible. A judgment has been made by the legislature where the balance lies between the demands of justice and the general welfare of society. The responsibility of the courts is to give effect to that judgment.

6. The section in the 1973 Act that applies to an action of damages for personal injury brought by the person who sustained the injury is section 17, as substituted by section 2 of the Prescription and Limitation (Scotland) Act 1984. The general rules as to the time within which actions must be brought are set out in that section. Then there is section 19A, which was inserted by section 23(a) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, with retrospective effect, in response to the decision of this House in *McIntyre v Armitage Shanks Ltd* 1980 SC (HL) 46 in which an action by a workman who had contracted pneomoconiosis and knew all the relevant facts but was advised by the local secretary of his trade union that he could not sue was held to be time barred. This section gives a discretion to the court to allow the action to be brought despite the operation of section 17.

7. Section 17(2) of the 1973 Act provides as follows:

> "Subject to subsection (3) below and section 19A of this Act, no action to which this section applies shall be brought unless it is commenced within a period of three years after –
>
> (a) the date on which the injuries were sustained or, where the act or omission to which the injuries were attributable

was a continuing one, that date or the date on which the act or omission ceased, whichever is the later; or

(b) the date (if later than any date mentioned in paragraph (a) above) on which the pursuer in the action became, or on which, in the opinion of the court, it would have been reasonably practicable for him in all the circumstances to become, aware of all the following facts –

(i) that the injuries in question were sufficiently serious to justify his bringing an action of damages on the assumption that the person against whom the action was brought did not dispute liability and was able to satisfy a decree;

(ii) that the injuries were attributable in whole or in part to an act or omission; and

(iii) that the defender was a person to whose act or omission the injuries were attributable in whole or in part or the employer or principal of such a person."

Subsection (3) of that section provides that in the computation of the period specified in subsection (2) there is to be disregarded any time during which the person who sustained the injuries was under legal disability by reason of nonage or unsoundness of mind. The appellants' disability by reason of nonage ceased, for the purposes of these actions, when they attained the age of 18: Age of Majority (Scotland) Act 1969.

8. Section 19A(1) of the 1973 Act provides:

"Where a person would be entitled, but for any of the provisions of section 17, 18, 18A or 18B of this Act, to bring an action, the court may, if it seems to it equitable to do so, allow him to bring the action notwithstanding that provision."

Subsection (2) of that section provides that its provisions are to have effect not only as regards rights of action accruing after the section's commencement but also as regards those accruing before that date in respect of which a final judgment has not been pronounced. The appellants' actions both fall into the latter category.

The facts in outline

9. Mrs Bowden was born on 6 January 1963. She was a resident in Nazareth House from about 1966, when she was three years old, to about 1979, shortly after she was 16. She attained the age of majority on 6 January 1981. Assuming that she was aware of all the facts referred to in section 17(2)(a) of the 1973 Act on or shortly after her departure from Nazareth House, the period of three years referred to in that subsection ended on 6 January 1984. On Sunday 18 May 1997 an article appeared in the *News of the World* describing events that were said to have taken place in Nazareth House many years previously. It was followed by several other articles to the same effect later that year and in 1998 in that and other newspapers. On 5 June 1997, thirteen years after the expiry of the three year period, Mrs Bowden consulted a solicitor. He instructed a psychologist's report, which was provided on 21 August 1998. On the basis of that report it is averred that she has been diagnosed as suffering from post traumatic stress disorder as a result of her experiences. In May 2000 she raised her action in the Court of Session.

10. Mrs Whitton was born on 25 November 1953. She was a resident in Nazareth House from 1961, when she was about eight years old, to 1969, shortly after she was 16. She attained the age of majority on 25 November 1971. Assuming that she was aware of all the facts referred to in section 17(2)(a) of the 1973 Act on or shortly after her departure from Nazareth House, the period of three years referred to in that subsection ended on 25 November 1974. Twenty three years later, on 6 December 1997, she consulted a solicitor. She was seen by a psychologist who reported on 11 August 1998 that she was suffering from symptoms comparable to post traumatic stress disorder as a result of her experiences. In May 2000 she too raised her action in the Court of Session.

11. A third child resident of Nazareth House, Mr DM, raised his action against the respondents at the same time and his case was heard together with those of Mrs Bowden and Mrs Whitton on the procedure roll, at the preliminary proof and on the reclaiming motions which then followed in the Inner House. But he was not granted legal aid for the purposes of an appeal to this House. Your Lordships were told that this was because he did not reply to correspondence from the Scottish Legal Aid Board. He is not a party to these appeals.

12. The respondents included in their defences pleas that the actions were time barred. In reply the appellants averred that the actions were raised within the triennium set out in the 1973 Act and that if, contrary

to their averments, they were time barred it would be equitable to allow them to bring their actions under section 19A of that Act. The cases were sent to the procedure roll for a debate on these issues. The cases were heard separately but on consecutive court days by the Lord Ordinary, Lord Johnston.

13. On 30 July 2004 Lord Johnston held that the appellants' attempts to rely on section 17 of the 1973 Act were irrelevant and should not proceed any further. He said that there should be a preliminary proof restricted to the question whether the court should exercise its discretion in the appellants' favour under section 19A of that Act: 2004 SLT 967, paras 11 and 18. He rejected the appellants' argument that the commencement of the limitation period could be delayed under section 17(2)(b) until May 1997 when they learned that they had a right of action as result of the publicity that had been given to the allegations in the media. The relevant part of the interlocutor which he pronounced in each case was in these terms:

> "Sustains the 1st and 2nd defenders' second plea in law to the extent of excluding all reference to section 17 of the Prescription and Limitation (Scotland) Act 1973 as amended and to the averments in Condescendence 4 from further consideration; *quoad ultra* allows to parties a preliminary proof on the issues focused in Condescendence 6 and Answer 6 in relation to section 19A of the said Act."

The appellants would have been entitled to reclaim against these interlocutors to the Inner House, but neither of them did so. Instead they acquiesced in them, and a preliminary proof in each case was held concurrently over several weeks before Lord Drummond Young: 2005 SLT 982. His decision, which was adverse to the appellants on this issue, was reviewed and affirmed by the Inner House: *AS v Poor Sisters of Nazareth* [2007] CSIH 39, 2007 SC 688.

The issues

14. Miss O'Brien's fundamental point was that the procedure that was adopted in the Court of Session on the section 19A issue was unfair because the appellants were not able to put forward the case they needed

to before Lord Drummond Young because of the terms of Lord Johnston's interlocutors. She also criticised Lord Drummond Young's approach to the exercise of his discretion under that section. She said that he had misdirected himself by, among other things, deciding the three cases that were before him as test cases, by failing to balance the equities for and against each appellant as individuals and by approaching the case on the basis that it was for the appellants to satisfy him that special circumstances existed which justified a departure from the normal limitation rules. She submitted that Lord Johnston's interlocutors should be set aside and the cases sent back to the Outer House for the issue of time bar to be re-examined by means of a proof at large at which evidence would be led on all issues, reserving all pleas relating to time bar and to relevancy, before a different Lord Ordinary. She did not however advance any arguments in support of the case which the appellants made under section 17(2)(b) to Lord Johnston and which he rejected. That provision was said in their written case to be largely irrelevant for the purposes of this appeal.

15. On the procedural issue, she said that Lord Drummond Young had taken the terms of Lord Johnston's interlocutors too literally. The essence of her complaint was that the Lord Ordinary erred in his handling of three arguments: the silencing effect of the abuse which the appellants claimed to have suffered because of the fear and confusion that it creates; the proposition that persons who are so inhibited cannot reasonably be expected to seek the legal advice that will lead to litigation; and the inequitable nature of the result if the person whose abuse has had this effect was allowed to evade liability by pleading the time bar. Lord Drummond Young made it clear at the outset of his opinion that he had decided that the preliminary proof was to proceed on the assumption that the appellants' factual averments were correct, so he did not need to decide whether their evidence as to what had happened to them was credible and reliable: 2005 SLT 982, para 4. Miss O'Brien said that he reached this conclusion because the facts they were speaking to were the subject of averments in article 2 of the Condescendence, not those in article 6 referred to in Lord Johnston's interlocutors on which the preliminary proof was to focus.

16. Her complaint was that this reading of the interlocutors made it impossible for the appellants' cases on the psychiatric injuries which they had suffered, and on their causes and effects, to be fully explored and tested in evidence. This was unfair because the respondents' medical witness, Dr Boakes, had formed her own views on these matters. They led her to the opinion that the appellants were not suffering from post traumatic stress disorder. This had a direct bearing

on the weight to be attached to the appellants' reasons for not disclosing what had happened to them previously. Those reasons were based on the contrary opinion of their own medical witness, which Lord Drummond Young rejected in favour of that of Dr Boakes. She also submitted that the way the preliminary proof was conducted tended to obscure the differences between the individual appellants. There was a risk that their cases were being treated simply as part of a generic group and not as claims by them as individuals.

17. On the issue of the exercise of discretion, Miss O'Brien submitted that Lord Drummond Young failed to exercise it in the manner that was required by section 19A. She said that he followed the decision of the Court of Appeal in *KR v Bryn Alyn Community (Holdings) Ltd* [2003] QB 1441 which had now been disapproved in *A v Hoare* [2008] 2 WLR 311. The effect of this was that he had fettered the exercise of his discretion. He failed to weigh up each appellant's explanation against the effects in each case of the delay on the respondents. He wrongly took account of the scale of the litigation that the defenders faced when all the other claims were borne in mind and the problems which the respondents would be likely to encounter in recovering their expenses from other litigants. He gave too much weight to prejudice caused by the media publicity and the methods used to investigate the claims. He failed to apply the effects of the delay to the appellants as individuals.

Discussion

18. It must be appreciated that it is not the function of this House to exercise afresh a discretion that was vested in the Lord Ordinary. This is especially so when the way he exercised his discretion has already been reviewed by the Inner House on appeal. Normally this House will not entertain a second appeal on an issue of that kind. Moreover it will always be slow to interfere with a decision of the Court of Session on matters of procedure: *Girvan v Inverness Farmers Dairy* 1998 SC (HL) 1, 21. So Miss O'Brien's bold argument faced formidable obstacles from the outset, and despite her best endeavours I do not think that she came close to overcoming them.

19. I deal first with the question of procedure. It is not unusual for a preliminary proof to be ordered on issues relating to time bar. If the facts are all agreed the discretion given by section 19A may be capable of being exercised on the motion roll: *Carson v Howard Doris Ltd* 1981

SC 278. But where the facts relevant to its exercise are disputed, as in this case, a proof of some kind will be necessary. A preliminary proof will normally be allowed so that these issues of fact can be decided without the delay and expense of a hearing on the merits which may prove, in the event, to be unnecessary. The longer the time that has elapsed since the events complained of, the more likely it is that the defender will be able to maintain that he has been prejudiced by the delay and that he ought not to have to face a proof on the merits until the issue of time bar has been disposed of: see, for example, *McCabe v McLellan* 1994 SC 87. It does not appear that there was any dispute before Lord Johnston that if an inquiry into the facts was to be ordered it should be by way of a preliminary proof. He said that the averments as to what happened in the home were to be taken *pro veritate* and that the issue to be judged on a preliminary basis was to be directed entirely to whether or not it was appropriate in the circumstances for the discretion to be exercised: 2004 SLT 967, para 18. This was an entirely orthodox observation in the light of pleadings that were before him.

20. If the appellants had any misgivings at that or any later stage, they did not take the appropriate action. They did not reclaim against Lord Johnston's interlocutors. They acquiesced in them to the extent of proceeding with the preliminary proof that he ordered. The preliminary proof that then followed occupied many days of court time. It was not suggested at any time during its progress that it should be stopped and the cases returned for further discussion on the procedure roll. The proposition that, notwithstanding all that has taken place, the parties should be sent back to the beginning and required to engage in a proof at large with all pleas standing has all the hallmarks of an attempt to rescue a situation that should have been addressed years ago. It is so extreme that it would only be in the event of a grave miscarriage of justice that such a course could be contemplated. The complaints that the appellants make of the way the preliminary proof was conducted do not fall into that category. Indeed, as the respondents point out in their written case, the appellants did not produce the first report of their medical witness or make reference to his explanation for the delay in the averments that were before Lord Johnston. This is a surprising omission as it was available to them before the actions were raised. If, as the appellants now submit, the scope of the proof was inhibited by the terms of his interlocutors, this is not something for which the respondents can be said to be in any way responsible.

21. Furthermore, the question whether Lord Johnston's interlocutors should be opened up under the power that undoubtedly exists under rule 38.8(1) of the Rules of the Court of Session 1994 was debated in the

Inner House and answered in the negative: 2007 SC 688, paras 14-18. In the course of its opinion the Inner House observed that there may be cases where the merits were so inextricably interrelated with issues of time bar that a single proof was appropriate, but that there was no such demonstrable interrelationship in this case: para 17. Miss O'Brien submitted that this was an error of law, but it was plainly a view that the Inner House was entitled to reach in the light of the way the case was pleaded and conducted in the Outer House. It was an exercise of judgment on what was essentially an issue of procedure. Issues of that kind are not appropriate for further review by way of a second appeal to this House. I would however respectfully endorse the Inner House's observation later in the same paragraph that it would not be fair or just, after all that has happened, to permit the issue to be relitigated.

22. As for Miss O'Brien's criticisms of Lord Drummond Young's exercise of his discretion under section 19A, they have to be seen in the context of a procedure which did not enable Lord Drummond Young to form a view as to the credibility or reliability of the appellants' allegations. They were taken *pro veritate* for the purpose of considering where the equities lay. But a necessary consequence of this, as he made clear, was that account had to be taken of the difficulties that would have to be faced if their credibility and reliability had to be tested in a proof on the merits in a way that was not unfair to the respondents. Miss O'Brien said repeatedly that Lord Drummond Young failed to address himself to their cases as individuals. But his treatment of their evidence was an inevitable consequence of the fact that the case had not been fully investigated. So there was a lack of detailed cross-examination of them about their allegations. An assessment of the truth or otherwise of their allegations, and the complex exercise of disentangling their effects from all the other surrounding circumstances, were tasks that lay in the future. The Lord Ordinary was right to deal with these issues at a certain level of generality. He was in no position to do otherwise.

23. Lord Drummond Young spent some time at the outset of his opinion examining the approach of the law to questions of limitation in general and to the exercise of the discretion under section 19A in particular. He said that he found the most helpful discussion of the policy of the limitation statutes to be that of McHugh J in the High Court of Australia in *Brisbane South Regional Health Authority v Taylor* [1996] 186 CLR 541 which, as he pointed out, was closely paralleled in Scotland by an opinion which had been delivered two years earlier by the First Division in *McCabe v McLellan* 1994 SC 87. In *Brisbane South Regional Health Authority v Taylor*, p 555, McHugh J said that it

seemed more in accord with the legislative policy underlying limitation periods that the right that the plaintiff lost at the end of the limitation period should not be revived than that the defender should have a spent liability reimposed upon it. At the end of the passage from *McCabe v McLellan* at pp 98-99 which Lord Drummond Young quoted in para 28, I said that the effect of the expiry of the triennium was that the defender was protected against the disadvantages which were caused by the delay whereas, if section 19A was operated against him, that protection would be withdrawn and in that respect he would undoubtedly be prejudiced. Adopting McHugh J's analysis, Lord Drummond Young said in para 27 that the fundamental legislative policy was to avoid the real possibility of significant prejudice and that if the prejudice could be shown to be real, rather than merely a possibility, that policy applied with its full force and must be given effect.

24. Miss O'Brien did not question the soundness of what was said in *Brisbane South Regional Health Authority v Taylor* and *McCabe v McLellan*. But she said that Lord Drummond Young overstated the onus that rested on the appellants and that he read into section 19A tests that were not there. In para 138, for example, Lord Drummond Young said:

> "If the discretion under section 19A is not exercised in [the pursuers'] favour, they will lose any right to compensation. If the discretion is exercised, the defenders will lose their right to rely on the defence of limitation. In my opinion these elements should be balanced in the manner suggested by McHugh J in *Brisbane South Regional Health Authority v Taylor*, supra, quoted in para 21. The limitation period is the norm enacted by the legislature; the discretion under a provision such as section 19A is an exception to that norm. Consequently the onus is on the pursuers, who seek to invoke the exception, to satisfy the court that special circumstances exist. If they fail to do so, they must lose their legal rights; that merely gives effect to the legislative policy."

She criticised the use of the expression "special circumstances". Section 19A said that the discretion was to be exercised if it seemed equitable to the court to do so. She accepted that the burden rested on the appellants as they were seeking the exercise of that discretion in their favour, but she said that Lord Drummond Young had set the standard too high. This was demonstrated by a passage in para 111 of his opinion where he

said that the delay beyond the statutory limitation period in each case was at least 10 years which was very substantial by any standards, and that the periods were so long that a serious decline in the quality of justice was inevitable. This made no allowance for the silencing effects of the abuse and the unfairness of a situation where the abuser was allowed to evade liability.

25. I would reject that criticism. In *Carson v Howard Doris Ltd* 1981 SC 278, 282 Lord Ross said, shortly after the provision was enacted, that the power conferred by the section should be exercised sparingly and with restraint. There is a risk that if that approach were to be adopted the court will fail to do what the section requires, which is to determine what would be equitable in all the circumstances. But the context in which that discretion is to be exercised is plain enough. Its effect will be to reimpose a liability on the defender which has been removed by the expiry of the limitation period. The issue on which the court must concentrate is whether the defender can show that, in defending the action, there will be the real possibility of significant prejudice. As McHugh J pointed out in *Brisbane South Regional Health Authority v Taylor*, p 255, it seems more in accord with the legislative policy that the pursuer's lost right should not be revived than that the defender should have a spent liability reimposed on him. The burden rests on the party who seeks to obtain the benefit of the remedy. The court must, of course, give full weight to his explanation for the delay and the equitable considerations that it gives rise to. But proof that the defender will be exposed to the real possibility of significant prejudice will usually determine the issue in his favour. This is a question of degree for the judge by whom the discretion under section 19A is to be exercised. I do not think that Lord Drummond Young, who examined all the issues on either side of the argument, was in error in his assessment of the test or of the underlying policy of the statute.

26. In the course of his discussion of the authorities on the exercise of the discretion Lord Drummond Young referred to various passages in the judgment of the Court of Appeal by Auld LJ in *KR v Bryn Alyn Community (Holdings) Ltd* [2003] QB 1441. Miss O'Brien said that he misdirected himself in law by doing so. In *Bryn Alyn* the Court of Appeal discussed the exercise of the discretion under section 33 of the Limitation Act 1980. But, as Lord Hoffmann pointed out in *A v Hoare* [2008] 2 WLR 311, para 25, this issue had become confused by the decision in *Stubbings v Webb* [1993] AC 498. This had led to the need for claimants who had suffered sexual abuse and had to seek the exercise of the discretion of the court under section 33 to allege that the abuse was the result of, or accompanied by, some other breach of duty

which could be brought within the language of section 11 of the 1980 Act. In para 42 of the judgment in *Bryn Alyn* Auld LJ said that, however artificial it might seem, the court had to consider whether such an already damaged child would have turned his mind to litigation in the sense required by section 14(1)(a) and (2) of the Act to start the period of limitation running under section 11. This dictum was disapproved in *Hoare*, in which the decision in *Stubbings v Webb* was departed from. Hence lay Miss O'Brien's criticism.

27. It should be noted however that it was the appellants who, basing themselves on this passage, submitted to Lord Johnston that time ought not to run against them until the symptoms of their psychological injury had been identified: 2004 SLT 967, para 6. They renewed this submission to Lord Drummond Young and in the Inner House: 2005 SLT 982, para 32; 2007 SC 688, para 27. But Lord Johnston expressed misgivings about *Bryn Alyn* in para 8, as did the Inner House in para 27. In para 15 of his opinion Lord Johnston made it clear that, despite what Auld LJ had said about the English legislation, the subjective factors relied on by the appellants were, as he put it, entirely relevant to the court's exercise of its discretion under section 19A. Lord Drummond Young too rejected the appellants' argument on this point. In para 32 he said that the test imposed by section 17(2) was quite independent of the exercise that the court had to perform under section 19A. His references to *Bryn Alyn* were directed instead to the passages about the exercise of the discretionary power which are not controversial. I have been unable to detect any error of law in these references. In *Horton v Sadler* [2007] 1 WLR 307 the House confirmed that the discretion under section 33 was unfettered. Lord Brown of Eaton-under-Heywood drew attention to this in *A v Hoare*, paras 84-86. As he explained, by no means everyone who brings a late claim for damages for abuse, however genuine his claim may be, can reasonably expect the section 33 discretion to be exercised in his favour. The approach that Lord Drummond Young took to the discretion under section 19A was entirely consistent with what Lord Brown said in that case.

28. Some of Miss O'Brien's criticisms of Lord Drummond Young's reasoning on points of detail might have carried weight if those aspects of his reasoning were to be viewed in isolation. But, as the Inner House said in para 95, they were directed to matters which were not central to his decision. His central conclusion, having taken into account all the various factors, was that the prejudice caused to the respondents by the lapse of time in raising these proceedings including the loss of evidence that resulted from it was by itself a sufficient reason for not allowing the actions to be brought under section 19A. The Inner House said that he

was entitled to come to this conclusion on the basis of the evidence before him and the authorities which he cited, and that he was correct to do so. I am not persuaded that there are any grounds which would justify your Lordships in differing from that assessment.

Conclusion

29. As I said in para 18, I do not think that Miss O'Brien came close to overcoming the difficulties which she faced in this case. The issue of time bar has been thoroughly and carefully litigated in the Court of Session, and it cannot now be re-opened. I would dismiss the appeals.

LORD RODGER OF EARLSFERRY

My Lords

30. I have had the advantage of reading the speech of my noble and learned friend, Lord Hope of Craighead, in draft. I agree with it and, for the reasons which he gives, I, too, would dismiss the appeals.

LORD WALKER OF GESTINGTHORPE

My Lords,

31. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hope of Craighead. I agree with it and for the reasons which Lord Hope gives I too would dismiss these appeals.

LORD CARSWELL

My Lords,

32. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hope of Craighead. For the reasons he gives, with which I agree, I too would dismiss these appeals.