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Judgment: approved by the Court for handing down | *Delivered:* **13/11/2015**
*(subject to editorial corrections)**

2012 No: 98966

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION

_____

Between

UNA IRVINE

Plaintiff

and

THE SISTERS OF NAZARETH

Defendant

_____

COLTON J

Background

[1] The plaintiff in this action was born in August 1930 and was in the defendant's care at premises at Nazareth Lodge, Ravenhill Road, Belfast, between 1 March 1935 to 25 September 1944.

[2] She alleges that whilst she was in the defendant's care she was subjected to a harsh regime which involved physical and psychological abuse. She alleges that she has suffered personal injuries as a result of that abuse and has brought a civil action against the defendant seeking damages.

[3] In the course of the hearing I heard oral evidence from Dr Best, Consultant Psychiatrist, and the plaintiff's daughter Mrs Kate McCausland.

[4] I also had the benefit of evidence taken on commission from the plaintiff prior to the trial.

[5] In addition I had the following documentary material:

(a) The plaintiff's medical notes and records.

(b) Medical reports from Dr Best on behalf of the Plaintiff and Dr Oscar Daly, Consultant Psychiatrist, retained on behalf of the defendant, an agreed note of a meeting between Dr Best and Dr Daly, a medical report from Dr Cochrane, Consultant Cardiologist, dated 27 October 2014, a medical report from Mr Millar dated 12 November 2013 on behalf of the Plaintiff, records from Nazareth Lodge, a statement of the plaintiff made to the PSNI for the Historical Inquiry into Abuse in Institutions currently being conducted under the Chairmanship of Sir Anthony Hart and some edited statements from that inquiry.

[6] I am also grateful to the extremely helpful written and oral submissions I received from counsel in the case Mr Brian Kennedy QC and Mr Donal Flanagan for the plaintiff and Mr Turlough Montague QC and Mr Gareth Purvis for the defendant.

Summary of Evidence

[7] In her evidence in chief under commission the plaintiff explained how she entered the Nazareth Lodge home in 1935 having been placed there by her mother. She frankly admitted that she despised her parents and she never reconciled with them. Generally she described a harsh and cruel regime and made a number of specific complaints including the fact that she was only known by a number, that the food was very poor and that she and others had to polish the chapel floor on her hands and knees in the morning before going to school. She was frequently punished and verbally abused by a Sister Colman who used a cane and frequently smacked her with her hands. She claimed that during school she was obliged to stand in a corner with the word Dunce written on her back, that she was struck by a Father Agnew, that she had to clean the toilets with a brush without the benefit of any gloves, that she had to kneel in dormitory at night when it was really cold, that she was punished when she was caught stealing apples from a nearby orchard, that on one occasion she was struck by a stick with nails in it after she had been caught stealing apples and that she was mocked about the fact that her father was a drunk who would not come to see her or provide her with anything. She also described circumstances when she was not permitted to go to the toilet and just had to stand and wet herself before she could get the opportunity to clean herself properly. Understandably it was difficult for her to remember some of the detail given the passage of time. She went on to describe her unhappy circumstances after she left the home where she was subjected to further physical and verbal abuse.

[8] She described how she got married when she was aged approximately 21 and that she had two daughters. Whilst she had difficulty remembering and that "everything is black or blank you know in my mind", she indicated that she took a nervous breakdown in her twenties and that she attended her doctor who gave her tablets. She did not receive inpatient treatment but went every day to "Clifton Street". She could not remember any other relapses in her psychiatric condition and

could not really elaborate on how she was affected after she left the home. During cross-examination by Mr Montague the plaintiff revealed herself to be a feisty independent lady with a great sense of humour. As was the case with her evidence in chief her mind was understandably blank about a lot of matters. Significantly, at the outset it was clear that she did not appear to know that she was bringing a claim, why she was bringing a claim or in what circumstances the claim was initiated. She made significant concessions about some of the specific allegations that were made in the pleadings for example in relation to contact with her sisters who were also in the home and in relation to the allegation that she was only recognised by a number when in fact this only applied to her laundry. It was clear that she had a very difficult relationship with Sister Colman who was in charge of discipline and the plaintiff frequently clashed with her. On reading the evidence on commission it is clear that there were some good people she came into contact with in the home in positions of authority and she also enjoyed good times with the other children who were in the home. She gave evidence in relation to two specific injuries one in relation to a cut to her finger which occurred on her right hand and an injury to her leg when she was struck by a stick after having been caught stealing apples in the orchard. However, she was very vague about both these specific allegations.

[9] The plaintiff called Dr Richard Best, Consultant Psychiatrist. He had provided a medical report dated 2 December 2012 on the basis of an interview conducted on 7 November 2012. He took a history from the plaintiff and also interviewed the plaintiff's daughter. He recorded the allegations of abuse in the children's home and specifically her complaint that she suffered from a period of mental illness at the age of 29. She remembered attending a psychiatrist in Clifton Street. She received medication for a month and was treated as an outpatient. She remembered being worried about her husband's employment and that there were difficult times as the couple were not well off financially. His view was that she appeared depressed at interview. Her daughter reported that she "was aware that mother was depressed on occasions, that she attended a Dr Chew at Knockbracken Clinic and that she took anti-depressants from time to time". He diagnosed a recurrent depressive disorder as a result of her unfortunate childhood in the Children's Home at Nazareth Lodge. He provided a further report based on an interview with the plaintiff on 7 September 2015 when he spoke to the plaintiff at the High Court in Belfast. He indicated that since the previous examination the plaintiff had developed memory problems and had been diagnosed as suffering from dementia. He performed some tests in relation to her mental state and came to the view that she was suffering from a significant degree of confusion that would distort her judgment but remote memory could be accurate. He took the view that her judgment was now affected by dementia and that the neglect she described in the home "was a major contributing factor to the development of depressive episodes throughout her life even though they were precipitated by social stresses at the time of relapse". He concluded that her childhood experience was a major cause of her vulnerability to depression.

[10] It was clear that when Dr Best provided his initial report he did not have access to the plaintiff's medical notes and records. However, on cross-examination Mr Montague put to Mr Best the contents of a cardiologist's report from Dr D Cochrane which was the basis upon which the plaintiff applied to have her evidence taken by way of commission. That report was dated 27 October 2014 and indicated that the plaintiff was suffering from a heart condition as a result of which she would not be medically fit to attend for psychiatric examination. Arising from the contents of that report it appears evidence was taken on commission in July 2015. Dr Best accepted that there was no reference to any dementia as being relevant in terms of her ability to be examined. Specifically it was put to him that there was never any suggestion that the plaintiff was suffering from dementia until his addendum report which was completed on the day previous to the trial commencing.

[11] Dr Best was cross-examined closely on the contents of the medical notes and records which had been disclosed in relation to the plaintiff. In particular it was put to Dr Best that there was not a single reference in the entirety of the extensive notes and records to the plaintiff's time in Nazareth Lodge as contributing to any of her symptoms. Indeed, the contrary was the case in that when she was admitted with psychiatric problems a particular reason was given for the onset of the symptoms. He was further referred to correspondence from the plaintiff's daughter who gave evidence in this case which attributed her mother's condition to matters not related to Nazareth Lodge. It was put to Mr Best that the first reference to depression in her records was in 1962 when she was aged 31 with an absence of any further record until 40 years later in April 2003. These attendances were precipitated by contemporaneous events. Dr Best did concede that clearly there were multi-factorial reasons for the plaintiff's subsequent depressive episodes but he maintained his position that she developed psychological problems because of her poor care in Nazareth Lodge and that these experiences were a main contributing factor to her developing psychological vulnerability to depression. He accepted that subsequent depressive episodes were then triggered by social stress at the time of the depressive episodes in question. In maintaining his position he referred to various studies of patients who had suffered abuse in homes during their youth. Dr Daly did not get an opportunity to examine the plaintiff because of her cardiac problem but he did carry out a comprehensive analysis of the medical notes and records and came to the conclusion that her tendency to depression was multi-factorial in origin – something with which Dr Best agreed. Like Dr Best he agreed that there were detrimental social factors before and subsequent to her time in Nazareth Lodge that could later impact on her mental health. There were also difficult experiences as a teenager after leaving Nazareth Lodge that contributed to poor mental health in later adult life.

[12] It was agreed that she functioned well as a mother and had a stable work record. It was also accepted that should she develop dementia it was not related in any way to her experience in the children's home. Dr Daly's conclusion was that the plaintiff's vulnerability to depression was at least partly because of her time in care

but feels that the depressive episodes are more likely mainly due to the social stressors at the time of depressive episodes. Thus whilst there was a measure of agreement between the consultant psychiatrists there was a significant difference of emphasis in terms of the extent to which her time in Nazareth lodge contributed to subsequent depressive episodes. The plaintiff also obtained a medical report from Mr Millar, Consultant Plastic Surgeon, dated 12 November 2013 when he was asked to examine the plaintiff and report on scarring allegedly caused by assaults in the course of her time in Nazareth Lodge. In particular she alleged that she was beaten and struck on the right thigh with a stick with nails in it. On examination Mr Millar was unable to identify any specific scars on her right thigh. The plaintiff also complained that she sustained injuries to her chin and to her right finger in incidents when she was trying to run away and on examination he found a fine pale scar measuring one centimetre just below the point of her chin and on the dorsal aspect of her right ring finger near the nail there was a fine pale scar measuring 1.3 centimetres. He took the view that whilst the two visible scars were small they do bear witness to a history of wounds in these areas. He regarded the absence of any scarring to the right thigh as a neutral matter as any scars could have faded in the intervening period.

[13] In short the plaintiff says that her evidence together with that of her daughter should be sufficient to establish that the plaintiff was indeed subjected to unlawful acts whilst she was in care in Nazareth Lodge. They say that as a result she suffered some physical injury but more important a psychiatric injury and rely on the report of Dr Best together with the evidence of the plaintiff and her daughter in this regard. The defendants say that the court could not be satisfied that the evidence of the plaintiff and her daughter were sufficiently specific or reliable to come to a view on the matter and that the evidence of Dr Daly should be preferred to that of Dr Best and it clearly pointed to other factors as being the cause of subsequent depressive episodes.

[14] I stress that this is a summary of the evidence and submissions and I have not gone into any further detail for reasons which should be apparent in the course of the judgment.

The Limitation Issue

[15] The original defence in this action served on 19 June 2014 pleaded a limitation defence in the following terms:

> "The defendant pleads that the plaintiff's claim, if any, which relates to the appropriate dates of June 1935 to 1944, is statute barred by reason of a lapse of time pursuant to the provisions of the Limitation (Northern Ireland) Order 1989 and the Limitation Acts (Northern Ireland) 1958-1989."

[16] The defence also pleaded laches and inordinate and inexcusable delay alleging that the maintenance of the claim against the defendant was contrary to the interests of justice and the rights of the defendant to a fair hearing and a trial within a reasonable time.

[17] At the commencement of the proceedings counsel for the defendant Mr Montague QC applied to amend the defence to plead that the plaintiff's claim "is irrevocably statute barred by reason of the lapse of time pursuant to the provisions of the Common Law Procedure Amendment Act (Ireland) 1853 and the Law Reform (Miscellaneous Provisions) Act 1954. The defendant further pleads that the provisions of the Limitation (Northern Ireland) Order 1989 and in particular Articles 7 and 50 affording the court's discretion to override time limits should not apply." Mr Kennedy QC objected to the amendment on the grounds of the lateness of the application. I granted the application on the grounds that the Plaintiff had been on notice of the intention to amend the defence as of 8 June 2015 (the hearing commencing on 8 September). It was clearly in the interests of justice that the issue of limitation be determined on the correct and appropriate legislation and the particular amendment had no bearing on the evidence to be called in the action as it involved a legal interpretation of the appropriate provisions to apply to the case. However, I did provide the Plaintiff with the opportunity to consider the legal issues by adjourning the hearing after the evidence was completed so that legal submissions could be submitted on the Plaintiff's behalf.

[18] The following dates are important in respect of the limitation issue and were not in dispute:

(a) The plaintiff's cause of action accrued between 1 March 1935 and 25 September 1944, with the latest date being 25 September 1944.

(b) The plaintiff's date of birth was in August 1930. Arising from this the following dates are important. The plaintiff achieved her 21st birthday on in August 1951 which meant that a 4 year limitation period would expire on in August 1955 and a 6 year period of limitation would expire on in August 1957.

(c) The letter of claim and was sent on 1 August 2012.

(d) A writ was issued on 5 September 2012.

(e) A Statement of Claim was served on 2 April 2014.

[19] In short the defendants say that they have an unassailable accrued time limit defence under the appropriate legislation and that the plaintiff's action should be dismissed on that account. They submit that the date of knowledge and discretion provisions contained in Article 7 and 50 of the Limitation (Northern Ireland) Order

1989 or any of the earlier similar provisions do not apply to the circumstances of this case.

The Legislative Framework

[20] The starting point is the Common Law Procedure Amendment Act (Ireland) 1853. Section 20 thereof imposes a 6 year limitation period for a personal injury claim based on negligence and a 4 year limitation period for a claim based on assault or battery. Section 22 of the Act provides that time does not begin to run against a person who has accrued a relevant cause of action until he or she reaches the age of 21 years. The limitation period for personal injury claims was reduced to 3 years by the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1954. Section 4 which states:

> "4-(1) Notwithstanding any provision contained in Section 20 of the Common Law Procedure (Amendment) Act (Ireland) 1853, with respect to the period within which any action to which this section applies may be brought, any action to which this section applies may be brought before, but shall not be brought after, the expiration of 3 years from the date on which the cause of action accrued.
>
> …
>
> (3) This section applies to actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a provision made by or under a statute or independently of any contract or any such provision) where the damage is claimed by the plaintiff for the negligence, nuisance or breach of duty consists of or include damages in respect of personal injuries to any person (including any disease and any impairment of his physical or mental condition)."

[21] The Act also provided a transitional provision at Section 8 in the following terms:

> "A time for bringing proceedings in respect of a cause of action which arose before the passing of this Act shall, if it is not then already expired, expire at the time when it would have expired apart from the provisions of this Act or at the time when it would have expired if all the provisions of this Act had at all material times been enforced, whichever is the later."

[22] Thereafter, the Statute of Limitations (Northern Ireland) Act 1958 came into force on 1 January 1959. This was in effect a consolidated provision and did not alter the limitation period for a claim for personal injuries as provided for in the 1954 Act. The relevant provisions of the 1958 Act are as follows:

> "6-(1) Nothing in this Act shall –
>
> (a) Enable any action to be brought which was barred before the commencement of this Act by an enactment repealed by this Act … ."
>
> "9-(1) Subject to sub-section (2) and to Section 10, an action founded on tort shall not be brought after the expiration of 6 years from the date on which the cause of action accrued.
>
> (2) The following actions shall not be brought after the expiration of 3 years from the date on which the cause of action accrued –
>
> …
>
> (b) An action claiming damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person."

[23] Section 50 deals with the extensions of limitation periods in the cases of disability and maintains the position in the previous legislation.

[24] I interject here to refer to the case of A and others v Hoare and others [2008] UKHL 8 when the House of Lords overruled the decision in Stubbings v Webb [1993] AC in terms of the definition of personal injuries and which held that the words were wide enough to include all personal injury claims no matter what the cause of action.

[25] In terms of chronology the next relevant legislation is the Limitation Act (Northern Ireland) 1964 which for the first time introduced a "date of knowledge" provision in the following terms:

"1-(1) Subsections (2) and (3) of Section 9 of the Statute of Limitations (Northern Ireland) 1958 (which imposed a time limit of 3 years for bringing certain actions …) shall not afford any defence to an action to which this section applies insofar as the action relates to any cause of action in respect of which –

…

(b) The requirements of subsection (3) are fulfilled.

(2) This section applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.

(3) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that the material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff within a date which –

(a) either was after the end of the 3 year period relating to that cause of action or was not earlier than 12 months before the end of that period; and

(b) in either case was the date not earlier than 12 months before the date in which the action was brought."

[26] The now familiar date of knowledge and discretion provisions in relation to limitation were first introduced in this jurisdiction by the Limitation (Northern Ireland) Order 1976 and the regime was subsequently consolidated by the Limitation (Northern Ireland) Order 1989. The relevant provisions are of course Article 7 which deals with the time limit in relation to actions for personal injuries and Article 50 which deals with the court's power to override certain time limits. I will return to the specific provisions of these orders at a later stage in the judgment.

[27] The Northern Ireland Legislative Framework which I have set out above closely mirrored that of the relevant English legislation. The Limitation Act 1939 had the same effect as the Common Law Procedure Amendment Act (Ireland) 1853 and was followed by the Limitation Act 1954 which for the purposes of limitation

period and transitional provisions mirrored the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1954. There followed the Limitation Act 1963 (similar to the Limitation Act (Northern Ireland) 1964), the Limitation Act 1975 (read our 1976 Order) and the subsequent consolidation in the Limitation Act 1980 (read our 1989 Order).

[28] What therefore are the relevant limitation periods in relation to the plaintiff's claim and what is the applicable law? Clearly (and this is not in dispute) the applicable law in relation to the Limitation of Actions at the time the plaintiff's cause of action accrued was the Common Law Procedure Amendment Act (Ireland) 1853. Having regard to the disability provisions of that Act and having regard to the decision in Hoare in relation to personal injuries, under the 1853 Act the limitation period applicable to the plaintiff's case expired on 30 August 1957 (ie 6 years after her 21st birthday).

[29] There are 3 relevant cases which analyse the combined effect of the Limitation Act. The first important case is the House of Lords decision in Arnold v Central Electricity Generating Board [1988] AC 228. Arnold involved an action on behalf of a plaintiff who had been employed by a public authority between 1938 and 1943 and who subsequently developed mesothelioma of which he died in May 1982. The widow's claim was defended inter alia on the basis that the claim was statute barred by virtue of Section 21 of the Limitation Act 1939. The court reviewed the relevant English legislation (which mirrors our own legislation) and came to the view that the subsequent limitation provisions to the 1939 Act did not deprive the defendant of any defence which he could make good including the accrued right to rely on a time bar which had been acquired under the repealed provisions of Section 21 of the Act of 1939 and that accordingly since the Limitation Act 1980 had merely consolidated the relevant law the plaintiff's claim was barred by the time bar which had accrued under Section 21 of the Act of 1939. The court first analysed the impact of the 1963 Act in the leading judgment of Lord Bridge at page 265 paragraph C, as follows:

> "The current general law of limitation of actions is found in the Limitation Act 1980, a consolidating statute, which by Section 11(4) prescribes for personal injury actions on a period of 3 years from –
>
> (a) the date on which the cause of action accrued; or
>
> (b) the date of knowledge (if later) of the person injured."

It is common ground that "the date of knowledge" of the deceased within the meaning of that phrase in Section 11(4) as defined by Section 14 was not earlier than October 1981. If the deceased had a cause of action subsistent at that date of his death in May 1982 there is nothing in the Act of 1980 which would bar the widow's claim in an action commenced in April 1984.

Paragraph 9(1) of Schedule 2 to the Act of 1980 provides, so far as relevant that:

> "Nothing in any provision of this Act shall –
>
> (a) Enable any action to be brought which was barred … by the Limitation Act 1939 before 1 August 1980."

The similar provision in our 1989 Order is schedule 2 paragraph 7.

Thus the critical question to be determined in this appeal is whether anything in the series of statutes dealing with limitation of actions leading up the 1980 consolidation, each of which was passed to ameliorate aspects of the law believed to operate unjustly, has had the effect of removing retrospectively the bar to the widow's action which accrued to the Birmingham Corporation pursuant to Section 21 of the Act of 1939.

By Section 16(1) of the Interpretation Act 1978 the repeal of an enactment "does not, unless the contrary intention appears … (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under that enactment …". In Yew Bon Tew v Kenderaan Bas Mara [1983] 1 AC 553 the Privy Council held that, on the expiry of a relevant period of limitation, a potential defendant to an action acquired an "accrued right" within the meaning of an identical provision in the Malaysia Interpretation Act 1967 to rely on the time bar as giving him immunity from liability, which was not affected by the source of the repeal of the relevant limitation provision unless a contrary intention appeared. Lord Brightman delivering the judgment of the Board, went further when he said at page 558:

> "Apart from the provisions of the interpretation statutes, there is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used."

[30] The court went on to analyse the subsequent Limitation Acts in England between 1939 and 1980 and came to the clear view that the limitation defence was preserved.

[31] This analysis of the law was expressly approved in this jurisdiction in the case of Bowman v Harland & Woolf [1991] NI 300. The plaintiffs in those actions were men employed by the defendants who alleged that they had suffered vibration white finger in the course of their employment. In that case Carswell J took the opportunity to set out the relevant cut off dates under Northern Ireland legislation relating to limitation periods as in his view they required clarification. The relevant portion of the judgment is set out at page 25 in the following terms:

> "Counsel debated in argument before me the effect of the decision in Arnold v Central Electricity Generating Board [1998] AC 228, as applied to the Northern Ireland legislation governing the limitation of actions. In that case the House of Lords held that time barred offences accrued under certain earlier legislation were not taken away by the Limitation Act 1963 or the Limitation Act 1975. Accordingly, causes of action which had accrued before a specified cut-off date – in England 4 June 1948 6 years before the Law Reform (Limitation of Acts etc) Act 1954 came into operation – remained barred.
>
> There has however been some uncertainty about fixing the cut-off date under Northern Ireland legislation, and I feel that I should express my opinion on it as shortly as I can.
>
> …
>
> (a) Causes of action which accrued prior to 1 January 1953 became time barred after 6 years by the operation of Section 20 of the Common Law Procedure Amendment (Ireland) Act 1853. They were unaffected by the changes made by the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1954, by virtue of Section 8(1) of that Act. They became time barred before the Statute of Limitations (Northern Ireland) 1958 came into operation on 1 January 1959 and the effect of Arnold v CEGV is that they so remained."

[32] If one applies this analysis to the current case the plaintiff's cause of action accrued prior to 1 January 1953 (September 1944) and became time barred on 30 August 1957 (by reason of the plaintiff's disability ie she was under the age of 21). Thus her claim was time barred before the Statute of Limitations (Northern Ireland) 1958 came into operation on 1 January 1959. On the basis of Arnold and the analysis of Carswell J the subsequent enactments do nothing to defeat the time barred defence accrued to the defendant.

[33] That this is the law was reaffirmed by the House of Lords in the case of McDonnell v Congregation of Christian Brothers Trustees and another [2003] UKHL 63. Here again the court held that the defendants in that action were entitled to rely on an accrued 6 year time bar under the 1939 Act, which the 1963 Act had left intact and they had not been deprived of those accrued rights by the 1975 Act. The court reviewed the legislation focusing on the particular issue in that case but endorsed the decision in Arnold. In holding for the defendant Lord Bingham concluded that whilst the decision in Arnold had been the subject matter of some criticism it "was a

unanimous decision of the House which has now stood for 16 years. It may doubtless have been relied on and applied to defeat other claims. Parliament could, if it wished, have reversed the decision, but has not done so. The decision is not plainly wrong, even if one were inclined to disagree with it, and the House has made plain that "it requires much more than doubts as to the correctness of (a considered majority opinion of the ultimate tribunal) to justify departing from it … sympathy for the possible injustice suffered by the appellant must be tempered by recognition of the almost impossible task the respondents would face in seeking to resist a claim of this kind after the lapse of half a century".

[34] Having regard to these authorities and an analysis of the relevant provisions in my view the law is clear. The defendants in this case do enjoy an unassailable time bar defence.

[35] Mr Kennedy QC realistically conceded in his oral and written submissions that this was the effect of the law and that the court had little option but to follow this line of authority. He did in his subsequent written submissions invoke Articles 6 and 3 of the European Convention of Human Rights. In relation to Article 6 he argued that the court should read the legislation under consideration in a way which was compatible with the plaintiff's Article 6 rights. In my view this is of no avail to the plaintiff. Firstly, the European Jurisprudence makes it clear that limitation provisions are a legitimate method to be employed by a state in pursuit of legitimate aims and within the state's margin of appreciation. See Stubbings v UK [1996] 1 BHRC 316. In any event having regard to the decision of In Re McKerr [2004] 1 WLR 807 the House of Lords held (in the context of an Article 2 claim) that the Human Rights Act 1998 did not act retrospectively. Furthermore, this express point was considered by the Court of Appeal in England in the case of A v Hoare and others [2006] 1 WLR, the relevant passage is at page 2340 at paragraph 48 onwards:

> "[48] We accept the submission that limitation is a procedural defence and that it must be pleaded. However, we are unable to accept the claimant's contention that the defendants did not have a relevant accrued right to rely upon Section 2 of the 1980 Act before the HRA came into force. Nor or we able to accept the submission, if it is different, that they are entitled to rely upon Section 3 of the HRA to defeat the defendant's defences of time bar (if it is otherwise good), notwithstanding the fact that the six year period expired in each case before 2 October 2000."

[36] The judgment goes on to analyse the decision of the Privy Council in Yew Bon Tew (1983) IRC 553 to which I referred earlier. It will be recalled that in that case the court held that the defendants had acquired an "accrued right" on the failure by the appellants to commence an action within a specified period. At paragraph 56 the judgment continues as follows:

"In Rowe v Kingston Upon Hull City Council [2003] ELR 771, the claimant claimed damages for breach of duty by his teachers committed before 1991. It was suggested on his behalf that Section 3(1) of the HRA should affect the construction of Section 14(1) of the 1980 Act. In agreeing with the judgment of Keene LJ, who did not comment on this point, Mummery LJ said at paragraph 46:

> "It is import to note that Mr Rowe's cause of action in this case is alleged to have arisen before the Human Rights Act 1998 came into force on 2 October 2000. Although no retrospectivity point has been taken on behalf of the appellant it is my opinion that, on the present state of the authorities, Section 3 of the Human Rights Act 1998 does not in general apply retrospectively to a cause of action which arose before the Human Rights Act 1998 came into force, so as to take away from the defendant public authority, the limitation defence which would otherwise have been available to it before the Human Rights Act 1998 came into force."

We agree."

[37] In relation to the Article 3 argument which was raised in the plaintiff's written submissions it seems to me that the arguments in relation to Article 6 are also applicable in terms of the state's margin of appreciation and the retrospectivity argument. There are further difficulties with the Article 3 submission in any event. Firstly, the plaintiff asserted that the defendant in this case was "a public body" and therefore there was an obligation to investigate the plaintiff's allegations if in fact they do amount to "inhuman and degrading treatment". The plaintiff called no evidence whatsoever in support of this assertion. It may well be that the Sisters of Nazareth are or were a public body at the relevant time but having regard to the judgment of Lord Neuberger in Johnston and others v Havering [2007] UKHL this is by no means clear cut. In that case the applicant was placed into the defendant's care by a local authority acting under a duty to provide care under the National Assistance Act 1948. The House of Lords found that while the arrangement of care remained a duty of local government, its provision in this case was a private arrangement, with distinct motivations for the carer company. It was not susceptible therefore to ECHR challenge. Even though in that case the cost of the care and accommodation was funded by the local authority pursuant to its statutory duty the court did not accept that the functions being exercised were of a public nature. Even if it is accepted that the defendant was a public authority it seems to me that the Article 3 claim is misconceived as it relates to the state's obligation to carry out an effective and thorough investigation into alleged inhuman and degrading treatment.

This obligation can be satisfied in a number of ways and the plaintiff's allegations are matters which are currently being dealt with by the Historic Institutional Abuse Inquiry to whom the plaintiff herself has made a statement. For all these reasons I do not believe that the limitation defence accrued to the defendants in this case can be defeated by any Article 3 arguments.

[38] Accordingly, the defendant is entitled to judgment against the plaintiff by reason of its accrued limitation defence.

Limitation under the 1989 Order

[39] I was encouraged by the plaintiff's lawyers to consider the position if in fact the court did enjoy a discretion in respect of the limitation period under the consolidated provisions of the 1989 Order. Although this is not necessary given my decision in relation to the primary point I will make some observations on this argument if it were applicable to the facts of the case.

[40] The starting point is obviously the statute itself and in particular Article 50 which states as follows:

> "Courts power to override certain time limits
>
> 50-(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which –
>
> (a) the provisions of Article 7, 8 or 9 prejudice the plaintiff or any person whom he represents; and
>
> (b) any decision of the court under this paragraph would prejudice the defendant or any person whom he represents,
>
> The court may direct that these provisions are not to apply to the action, or not to apply to any specified cause of action to which the action relates.
>
> …
>
> (4) In acting under this Article, the court is to have regard to all the circumstances of the case and in particular to –
>
> (a) the length of and the reason for the delay on part of the plaintiff;

(b) the extent to which having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by Article 7, 8 or as the case may be 9;

(c) the conduct of the defendant after the cause of action arose, including the extent if any to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were and might be relevant to the plaintiff's cause of action against the defendant;

(d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;

(e) the extent to which the plaintiff acted properly and reasonably once he knew, whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;

(f) the steps, if any, taken by the defendants to obtain medical, legal or other expert advice and the nature of any such advice he may have received."

[41] There is a wealth of authority in relation to the application of the provisions of this statute. Most recently in this jurisdiction the authorities were reviewed by Gillen J in the case of McArdle v Marmion [2013] NIQB 123. Having referred to Article 50 he set out the relevant principles with reference to some Northern Ireland cases in the following terms:

> "[8] The principles governing the manner in which this Order is to be applied and in particular the exercise of the discretion under Article 50 are now well-trammeled in this court, for example in Walker v Stewart [2009] NIJB 292, McFarland v Gordon [2010] NIQB 84 and Taylor v McConville [2009] NIQB 22. Accordingly I need only make brief reference to them in this case. They include:
>
> - The discretion under Article 50 is expressed in the widest terms.

- The trial judge must have regard to all the circumstances of the case and not merely the six matters set out above. The exercise of the court's discretion to dis-apply the time limits is unfettered.

- The burden of proof in an application under Article 50 rests on the plaintiff.

- Ordinarily the court should not distinguish between the litigant himself and his advisors. That said, the prejudice the plaintiff may suffer if the limitation is not dis-applied may be reduced by his having a cause of action in negligence against his solicitors.

- Discretion can in an appropriate case be exercised in the plaintiff's favour even where the delay is substantial, but in such cases careful consideration must be given to the ability of the court to hold a fair trial. (Buck v English Electric Company Limited [1977] 1 WLR 806). Even 5 or 6 years delay raises a presumption of prejudice to a defendant but this presumption is rebuttable. As a general rule however the longer the delay after the occurrence of the matters giving rise to the cause of action, the more likely that the balance of prejudice will swing against allowing the action to proceed by dis-applying the limitation period.

[9] However what is at the heart of Article 50 is whether it would be equitable to allow an action to proceed, and in fairness and justice, the obligation of a tortfeasor to pay damages should only be removed if the passage of time has significantly diminished his opportunity to defend himself. The basic question therefore to be asked is whether it is fair and just in all the circumstances to expect the defendant to meet the claim on the merits notwithstanding the delay in the commencement. (See Cain v Francis [2009] 3 WLR 551)."

[42] Certainly it appears that the focus of the courts is on the potential fairness of any trial. Thus a focus on the cogency of the evidence available to the parties and in particular to the defendant in the event of the limitation period being dis-applied is central to the exercise of the discretion although of course the court must take into account all the other circumstances to which the statute refers in addition. In the course of Mr Montague's robust response to the plaintiff's written submissions he referred me to the recent decision in RE v GE [2015] EWCA Civ 287 in which the

Court of Appeal moved away from the approach taken in earlier cases (ie in summary if a fair trial was possible, the claim should proceed notwithstanding the length of and the reason for the plaintiff's delay). Lewison LJ said at [78]:

> "I would regard the possibility of a fair trial as being a necessary but not a sufficient condition for disapplication of a limitation period."

[43] In RE the trial judge's refusal to exercise his discretion in the claimant's favour was upheld principally because there was no adequate explanation for the claimant's delay. Mr Montague argued that the crucial point was that in that claim the plaintiff was not permitted to proceed even though in other proceedings a judicial finding had been made that the abuse alleged had occurred. Even in those circumstances the lack of explanation for the delay was sufficient for the discretion to be exercised against the claimant.

[44] I turn now to the specific matters to which I must have regard under Article 50 as they apply to the circumstances of this case.

[45] Firstly, the length of and the reasons for the delay on the part of the plaintiff. It would be trite to say that the delay in this case is substantial, namely 68-77 years. In my review of the authorities I could find no case in which such an extraordinary delay was present. What are the reasons for the delay on the part of the plaintiff? The short answer to this is that there is absolutely no evidence whatsoever in this regard. Indeed, the answers given by the plaintiff in cross-examination by Mr Montague in the course of the evidence on commission reinforces this point. I refer to the following passage:

> "TM; and em, you are seeking compensation from them. Did you know that?
>
> UI: No.
>
> TM: Do you know why we are here?
>
> UI: I'm not very clear about anything to be quite honest with you.
>
> TM: Alright. Well could you tell us what were the circumstances that brought you to bring a claim against the Sisters of Nazareth? You do not know?
>
> UI: No.
>
> TM: Do you know how you came into contact for instance with your solicitor?

UI: Who was the solicitor?

TM: Well you have Mr Moorehead here but you have probably been dealing mostly with a younger lady called Claire McKeegan. Do you know her?

UI: No.

TM: A solicitor? No? Well how did you come to go to the police to make a statement to the police in 2000 and, I think it was 11 but I will just check yes in December 2011, do you remember making a statement to the police? About your time in care?

UI: I don't remember. I might have done it but I don't remember it.

TM: Well what brought you to make a statement to the police in 2011 so many years after you had left the home? What brought this about?

UI: I don't know honestly.

TM: Or what brought you to go and see a solicitor?

UI: Again, I don't know."

[46] Furthermore, when Mr Montague returned to this issue at the end of his cross-examination the following is recorded:

"TM: Alright. Now, I want to ask you again about what we started at the outset, when I was questioning you about bringing the claim, and you, you do not appear to understand that you are bringing a claim.

UI: No I didn't as far as I know, I am not bringing a claim.

TM: Alright.

UI: Unless someone is doing it for me.

TM: Alright and you can give no account or no reason why, why a claim has been brought on your behalf?

UI: Ah probably the years that we went through hell.

TM: Well why bring it now for you and not 40 years or 30 years ago or

UI: I would need to ask them that.

TM: So someone else is bringing a claim for you is that right?

UI: Ah huh, I would need to find out who it was.

TM: Alright, but you don't know.

UI: No."

[47] Thus the court has absolutely no evidence as to the reasons for any delay on the part of the plaintiff and it appears the plaintiff herself is not even aware that she is bringing this claim. The court cannot be expected to speculate on this important point particularly having regard to the onus of proof which applies to the plaintiff.

[48] Secondly, the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed.

[49] It is abundantly clear that there must be significant issues about the cogency of the evidence from both the plaintiff and the defendant. I have already referred to the passages arising from cross-examination by Mr Montague. It is also clear from reading the evidence on commission that the plaintiff was having difficulty remembering certain issues. Mr Quinn QC who then appeared for the plaintiff had considerable difficulties extracting evidence from the plaintiff about an allegation that she had been assaulted after she had stolen some apples from a nearby orchard. It was also clear on cross-examination that the plaintiff had difficulty remembering specific issues with frequent references to her mind "going blank". Because of the plaintiff's inability to give evidence the court did not have the opportunity of assessing her in the witness box. Even within the limited scope of the commission evidence it was clear that there were significant issues about the cogency of the evidence of the plaintiff. By way of example part of the case pleaded and strongly relied upon by the plaintiff related to the fact that she had no contact with her two younger sisters who were also in the Nazareth Lodge home whilst she was there. However, it is clear from her evidence under commission that she had very

significant contact with her sisters whilst they were in the home and in fact that she actually looked out for them. Similarly, in the statement of claim there is an allegation that the plaintiff was compelled to clean out toilets with her bare hands but it was clear that what in fact what was involved was scrubbing the toilets with a brush albeit she did not have gloves when using the brush which put a different perspective on the allegation. One could make similar comments about the allegation that she was never known by her name in the home but only by a number whereas when questioned about this she conceded that it may well be that the number was only used for laundry purposes. I do not make any of these points to criticise the plaintiff but to demonstrate how the cogency of her evidence by necessity is unreliable given the lapse of time.

[50] Because of the passage of time the plaintiff is not in a position to call her younger sister whom it is alleged had a much better memory of what took place in the home. The evidence of the plaintiff's daughter, Mrs Kate McCausland was of limited value. Again the oral evidence presented by her fell short of what was pleaded in the statement of claim but all she could do was do her best to recount what her mother had told her about what had happened when she was in the home. The main thrust of Ms McCausland's evidence was the repeated reference that the nuns responsible for her mother's care said that she would never come to anything or words to that effect, something which of course time has demonstrated to be completely wrong. The plaintiff went on to have a good working life and raise two daughters to whom she was clearly devoted.

[51] The cogency of the evidence in this case also impacted significantly on any assessment of quantum. It was very clear that there was a significant difference of opinion between Dr Daly and Dr Best to which I have referred above. It is also clear that there were many other factors in the plaintiff's life both before and after her admission to the care home which could have impacted on her health. So therefore the evidence of the experts is such that the attribution of causation has become a significantly more difficult task because of the delay in this case. There is a complete absence of any medical note or record in relation to any effects of her time in the home and indeed such records as do exist point to other factors as contributing to her various complaints. For the purposes of the limitation argument this demonstrates the difficulty a court would have in terms of the evidence available to it which arises from the delay in the initiation of these proceedings.

[52] Of course the most important aspect about the cogency of the evidence and the fairness of the trial relates to the prejudice suffered by the defendants in this case. All of those who are accused of abuse are dead. Self-evidently therefore a fair trial for the defendant will be extremely difficult if not impossible. Mr Kennedy on behalf of the plaintiff points out that there are statements from other people who attended in this home who make similar type of complaints against one of the nurses in particular. Whilst I agree this is something that can be taken into account it falls well short of curing the prejudice suffered by the defendants in seeking to defend this claim.

[53] Thirdly, the conduct of the defendant after the cause of action arose, including the extent if any to which he responded to requests reasonably made by the plaintiff for information or inspection with the purposes of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant.

There is absolutely no evidence or any criticism of the conduct of the defendant after the cause of action arose.

[54] Fourthly, the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action – this has already been built in to the fact that the plaintiff was deemed to be disabled up until the age of 21. There is nothing in her history thereafter or in the medical evidence which supports any continuation of disability as a matter of law.

[55] Fifthly, the extent to which the plaintiff acted properly and reasonably once he knew whether or not the act or omission on the defendant to which the injury was attributable might be capable at the time of giving rise to an action for damages.

As is in the case of the first question I have absolutely no evidence on this point.

[56] Similar consideration applies to the sixth question namely the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received save that the matter was dealt with reasonably by her lawyer after the letter of claim was sent on 1 August 2012.

[57] It seems to me that the comments of Lord Bingham in McDonald to which I have already referred:

> "Sympathy for the possible injustice suffered by the applicant must be tempered by recognition of the almost impossible task the respondent would face in seeking to resist a claim of this kind after the lapse of half a century."

are particularly apt in this case.

[58] It seems to me therefore that if I were to be asked to exercise a discretion if it existed, which I hold that it does not, under the 1989 Order or otherwise I would not do so because of the reasons I have set out above. The plaintiff falls well short of what would be necessary to satisfy the court that the discretion should be exercised. Indeed, because of the difficulties identified in my judgment in relation to the state of the evidence I would have great difficulty in reaching any decision on either liability or quantum.

[59] Finally, in this regard I should note that I have no evidence whatsoever in respect of a delayed date of knowledge argument. In the hypothetical situation that the 1989 Order applied in this regard, I find as a fact that the Plaintiff first had the necessary knowledge under Article 7 when she attained her majority aged 21 on 30 August 1951.

Liability and Quantum

[60] I have been asked by Plaintiff's counsel to give my views on liability and quantum if I had been able to reject the limitation defence, particularly having regard to the Plaintiff's declared intention to appeal my judgment in that event.

[61] As I indicated earlier in my judgment I have considerable difficulties in doing so because of the state of the evidence.

[62] Doing the best I can I consider that there is sufficient evidence to support the Plaintiff's claim. Of course in doing so I must bear in mind that the applicable standards in the late 1930s and early 1940s was very different from now, particularly with regard to society's views on corporal punishment. The Plaintiff's complaint must be seen in the context of the times. The events about which she complained also occurred shortly before and during the second world war when times were hard and food was scarce.

[63] Taking that into account I am of the view that the Plaintiff was subjected to corporal punishment which went beyond what was reasonable or lawful. An obvious example of this was her being punished by being struck with a stick with nails in it after she had been stealing apples from a nearby orchard. I also accept that she was subjected to unlawful assaults by way of discipline in particular from Sister Coleman. There is also in my view credibility to her allegation that she was not permitted to go to the toilet when she wet herself and that generally she was subject to a harsh and uncaring regime. Of course I come to these conclusions in the context where the defendants had been unable to contradict or counter the Plaintiff's allegations by way of direct evidence. In terms of physical injuries it does not appear that the Plaintiff sustained any significant injuries. At no stage for example did she require medical assistance because of any assaults. Nonetheless, on the Plaintiff's evidence assaults were fairly frequent and occurred over a sustained period of time. For the physical injuries suffered by the plaintiff I would have awarded £7,500.

[64] The main complaint relates to the emotional trauma suffered by the Plaintiff and psychiatric injury. By reason of the assaults to which I have referred and to the overall harsh nature of her care the Plaintiff alleges that she has suffered both emotional stress and psychiatric injury. I have dealt with the medical evidence in detail at paragraphs 9-12 of the judgment. As indicated it is very difficult to assess the extent to which any psychiatric injury suffered by the Plaintiff is attributable to any tort committed by the defendant. It is correct that she suffered from depressive

incidents in 1962 and subsequently in 2003 and on an intermittent basis thereafter. What is not clear is the extent to which this can be attributed to her time in care. Dr Best on behalf of the Plaintiff argues that her time in care was the main contributing factor to her developing psychological vulnerability to depression. Dr Daly accepted that her vulnerability to depression was partly because of her time in care but felt that the depressive episodes are more likely mainly due to the social stressors at the time of the depressive episodes. One of course also bears in mind that perhaps the most devastating feature of the Plaintiff's life was the fact that she was abandoned by her parents and it is clear from her evidence and from the medical reports that this was a primary source of her subsequent unhappiness. As I have indicated attributing causation here is extremely difficult. The function of the courts in assessing damages requires careful scrutiny of the evidence, the drawing of conclusions about the nature and extent of any relevant injury and the impact of that injury on the life of the Plaintiff. It involves an exercise of judgment in light of all the relevant circumstances. This is not a case where the Plaintiff can establish that as a result of tortious acts by the defendant she has suffered an actual psychiatric injury. At best she has been rendered vulnerable to psychiatric injury and that injury has materialised because of other stressors in her life. Had it not been for the limitation defence my judgment is that a figure of £20,000 would be an appropriate award for this aspect of the case having regard to the medical evidence which I heard and carefully considered.

[65] Accordingly, had it not been for the limitation issue I would have awarded the Plaintiff the sum of £27,500.

Conclusion

[66] The defendant is entitled to judgment against the Plaintiff in this action and I order accordingly.