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*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

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2015/7711

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

ELLEN FOSBERRY (nee REID)

Plaintiff/Appellant;

-and-

THE POOR SISTERS OF NAZARETH

Defendant/Respondent.

COLTON J

Background

[1] The plaintiff was born on 4 May 1936. She was a resident in the Nazareth House Children's Home, Ormeau Road, Belfast, between 19 November 1945 and 23 September 1950, during which time she was under the care of the defendant, the Poor Sisters of Nazareth.

[2] She alleges that during her residency there she was subject to a range of assaults, abuse and degrading treatment which has caused her personal injuries, loss and damage, the effects of which are ongoing.

[3] On 27 January 2015 she issued a Writ of Summons seeking damages arising from her treatment in the home alleging assault, battery, trespass to the person and negligence.

[4] On 11 April 2017 the defendant issued a summons pursuant to Order 18 Rule 19 of the Rules of the Supreme Court seeking an order for trial of a limitation point between the parties as a preliminary issue on the ground that the plaintiff's action was irrevocably time barred.

[5] The matter was heard initially by Master McCorry who delivered a written judgment in the matter on 2 April 2018. Rather than treating the matter as an

application for determination of a preliminary issue, with the consent of the parties the matter was treated as an application by the defendant to strike out the plaintiff's action on the ground that it was irrevocably time barred.

[6] Having heard the arguments of the parties and considered the relevant case law the Master struck out the plaintiff's claim on the ground that the defendant in this action has accrued an irrevocable limitation defence to the plaintiff's claim.

[7] The matter was appealed to the High Court. The parties agreed that the issue to be determined was whether the defendant enjoyed an irrevocable limitation defence to the plaintiff's claim.

Consideration

[8] The initiation of claims for damages long after the facts which give rise to the claims raise difficult issues relating to limitation, none more so than in cases of alleged historical institutional abuse.

[9] The difficulties arise because of the fact that Parliament has made successive alterations to the limitation rules over the years, some of which are applied retrospectively.

[10] The determination of the issue in this case depends on the interpretation of a number of statutes. The matter is further complicated by the fact that the House of Lords has ruled definitively on the interpretation of analogous, but not identical, statutory provisions in England and Wales.

[11] In considering this issue I have been greatly assisted by counsel in both their oral and written submissions. Mr Montague QC appeared with Mr Gareth Purvis on behalf of the defendant/respondent and Mr Michael McCartan appeared for the plaintiff/appellant.

What then are the key dates and statutory provisions?

[12] It is agreed that the plaintiff's cause of action accrued between 19 November 1945 and 23 September 1950.

[13] At that time the relevant limitation periods were governed by the Common Law Procedure Amendment Act (Ireland) 1853 (the 1853 Act) and in particular sections 20 and 22.

[14] Section 20 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.

[15] Section 22 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 majority, then

21 years. The plaintiff reached the age of 21 on 4 May 1957. Thus, to use the language of the case law, the plaintiff had a “six year claim”. The six year period did not begin to run against the plaintiff by reason of section 22 until 4 May 1957.

[16] For the purposes of this application it was agreed that on the basis of the 1853 Act the limitation period in respect of the plaintiff did not expire until 4 May 1963 at which time her claim became statute barred. Mr Montague argued that this remains the date upon which the plaintiff’s claim is statute barred but on reflection, after initially agreeing with this, Mr McCartan submitted that as a result of subsequent legislation the plaintiff’s claim in fact became statute barred on 4 May 1960. Whilst this point is an important one, it is not determinative of the issue that the court has to decide in this appeal.

[17] Section 4(3) of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1954 (the 1954 Act) reduced the limitation period for personal injury claims to 3 years.

[18] However, the Act also provided a transitional provision at section 8(1) 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.”

[19] Thus the 1954 Act does not change any of the material dates, with the plaintiff’s claim remaining time barred on 4 May 1963 (subject to Mr McCartan’s submission on the effect of subsequent legislation).

[20] This case turns on the interpretation of the effect of the enactment of the Statute of Limitations Act (Northern Ireland) 1958 (the 1958 Act). This Act came into force on 1 January 1959 and did not alter the limitation periods for claims for personal injuries as provided for in the 1954 Act.

[21] Prior to 1 January 1959 there was no provision to allow the court to override the statutory limitation period. The power to override the fixed time limits applies by reason of subsequent amendments introduced by the Limitation Act (Northern Ireland) 1964 (the 1964 Act), the Limitation (Northern Ireland) Order 1976 (the 1976 Order) and the subsequent consolidating provisions of the Limitation (Northern Ireland) Order 1989 (the 1989 Order). In particular the 1976 Order amended the 1958 Act by introducing sections 9A to 9D which inter alia provided the court with a discretionary power to override time limits.

[22] It is the plaintiff/appellant's case that she is entitled to avail of section 9A and 9D of the 1958 Act to ask the court to override the relevant limitation period.

What then is the effect of the 1958 Act, as amended, on the plaintiff's claim?

[23] The key is section 6(1)(a) which provides that:

“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 ...”

[24] It is important to understand that the 1958 Act repealed sections 20 to 27 of the 1853 Act and repealed section 4 of the 1954 Act but retained the three year limitation period by virtue of section 9. The Act also preserved the extension of time for persons under a disability.

[25] On the face of it the provision is clear. If the defendant enjoys a time barred defence accruing before 1 January 1959 under section 20 of the 1853 Act, a plaintiff cannot avail of the discretion introduced by the 1958 Act as amended. In such a case the plaintiff's action would be “barred” before 1 January 1959 and the defendant would enjoy an irrevocable limitation defence.

[26] In this case the plaintiff's action was not barred until either 4 May 1963 (according to the defendant) or 4 May 1960 (according to the plaintiff). Since both dates are after 1 January 1959 the plaintiff argues that in this case the court has the power to exercise its discretion to override the statutory limitation provisions.

[27] This issue has been considered in two cases in this jurisdiction, namely **Bowman and others v Harland & Wolff Plc** [1991] NI 300 and **Una Irvine v The Sisters of Nazareth** [2015] NIQB 94.

[28] In **Bowman** the court was dealing with claims brought by plaintiffs who were alleging they had developed vibration white finger in the course of their employment with the defendant. Because of the “date of knowledge” provisions the court did not have to consider the impact of the 1958 Act as amended but per curiam Carswell J provided clarification of the relevant limitation cut-off dates under Northern Ireland legislation.

[29] The relevant passages in the judgment are as follows:

“Counsel debated in argument before me the effect of the decision in **Arnold v Central Electricity Generating Board** [1988] 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 defences accrued under certain earlier legislation were not taken away by the Limitation Act 1963 or the Limitation Act 1974. 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 Actions Etc) Act 1954 came into operation – remained barred.

Since I have found that the material date for purposes of negligence is 1 January 1973, the cut-off date which must at the latest be before the Statute of Limitations (Northern Ireland) 1958 came into force is not relevant in these actions. 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.

In **Baxter v Harland & Wolff** [1990] 1 NIJB 37, 48 MacDermott LJ held that it was 1 January 1953 and this date was propounded in argument in the present case by counsel on each side. In an earlier unreported case, **Simpson v Harland & Wolff Ltd**, McCollum J adopted 2 December 1954 as the cut-off date, but his reasoning does not appear from the report. I must respectfully differ from both. In my opinion the position is rather more complicated and because of the differences in legislation quite different from that which applies in England. On my analysis it may be summarised as follows:

- (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 CEGB** is that they so remain.
- (b) Causes of action which accrued on or after 2 December 1954, the date the 1954 Act was passed, and before 1 January 1956 were governed by the 1954 Act and became time barred after

3 years. They became barred before 1 January 1959 and so remain.

- (c) Causes of action which accrued between 1 January 1953 and 1 December 1954 (both dates inclusive) were governed by the 1853 Act. They so remain by reason of section 8(1) of the 1954 Act, and continue to be subject to a 6 year time bar. This period had not in any such case expired on 1 January 1959, when the 1958 Act came into operation. They were then subject to the 3 year limitation period of the 1958 Act, and became thereupon barred. Along with other cases governed by the 1958 Act, they then became in due course subject to the Limitation Act (Northern Ireland) 1964 and the Limitation (Northern Ireland) Order 1976 – and now the consolidating provisions of the Limitation (Northern Ireland) Order 1989. In such cases the court has power to override the fixed time limits.”

[30] Mr McCartan argues that the analysis in **Bowman** supports his submission. Indeed, on reflection, he says that in accordance with paragraph (c) of Carswell J’s judgment because the limitation period in this case had not expired on 1 January 1959, when the 1958 Act came into operation, the case was then subject to the three year limitation period of the 1958 Act. He submits that the plaintiff’s case is in fact now governed by the 1958 Act. Thus, he says that in fact the limitation period expired for the plaintiff on 4 May 1960, but crucially for him after 1 January 1959.

[31] He says that, as a result, the decision of the court in **Irvine** was correct.

[32] In that case the plaintiff had also been a resident of the Nazareth Home on the Ormeau Road and she too initiated proceedings seeking damages based on abuse she had allegedly sustained during her period there. In **Irvine** the plaintiff’s cause of action accrued between March 1935 and September 1944. The plaintiff was born in August 1930 and reached the age of majority (21 years) in August 1951. Applying the relevant limitation periods this meant that the plaintiff’s limitation period expired in August 1957. By that time the defendant had accrued an irrevocable limitation defence. As of August 1957 there was no discretion to dis-apply a limitation period. Applying both the 1958 statute and the reasoning in **Bowman** and **Arnold** her claim was time barred before 1 January 1959 and remained so. She could not avail of the provisions of the 1958 Act because the defendant had accrued an irrevocable defence before it came into effect. Such a defence was expressly preserved by section 6(1)(a) of the 1958 Act.

[33] Put simply, he submits that in order for the defendant to succeed in this application it must establish that it had an irrevocable defence prior to 1 January 1959. The plaintiff submits that because her claim did not become time barred until after 1 January 1959 she is entitled to apply to the court to exercise its discretion to override the limitation period.

[34] Mr Montague submits that the key date is the date upon which the cause of action has accrued. He says that the effect of the decisions in **Arnold v Central Electricity Generation Board** [1998] AC 228 and **McDonnell v Congregation of Christian Brothers Trustees and Others** [2004] 1 All ER 641 are such that the defendant does enjoy an irrevocable time barred defence and that has not been affected by the 1958 Act.

[35] In order to assess the effect of these decisions it is important that they are analysed carefully in the context of the legislation in England and Wales, which is not identical to the legislation governing the plaintiff's action.

[36] **Arnold** concerned an action brought by a widow whose husband had died from mesothelioma which had been caused by exposure to asbestos during his employment with the Central Electricity Generating Board between April 1938 and April 1943. The deceased died in May 1982 having been diagnosed in October 1981. Proceedings were issued against his former employer in April 1984. The defendant successfully argued that the claim was statute barred.

[37] In 1943 the relevant statute in force was the Limitation Act 1939 (the 1939 Act). This prescribed by section 2(1) a general period of limitation of six years for actions founded in tort. However section 21 prescribed a period of limitation of one year for actions against public authorities to which the Public Authorities Protection Act 1893 applied. The defendant was such a public authority. It was assumed for the purposes of the hearing that the plaintiff's cause of action accrued at the latest by April 1943. Thus the limitation period expired in April 1944.

[38] The critical question to be determined by the court was whether anything in the series of statutes dealing with limitation of actions since the 1939 Act leading up to the 1980 Consolidating Act 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. Although the case was governed by section 21 of the 1939 Act the court expanded its consideration to include the effect of section 2(1) of the 1939 Act which was the six year limitation period, reduced to three years by the Law Reform (Limitation of Actions) Act 1954 (the 1954 Act).

[39] The next relevant enactment post-1939 was the 1954 Act, which came into force on 4 June 1954. It repealed the Public Authorities Protection Act 1893 and section 21 of the Act of 1939. It amended section 2(1) of the 1939 Act by the addition of the following proviso:

“Provided that, in the case of actions for damages for negligence, nuisance or breach of duty ... 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, this sub-section shall have effect as if the reference of six years there were substituted a reference to three years.”

[40] Section 7(1) provided:

“The 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 in force, whichever is the later.”

[41] This is a similar transitional provision to that provided in section 8(1) of the 1954 Act in this jurisdiction.

[42] The effect of this in relation to an action for damages for personal injuries against public authorities was to apply the new limitation period of three years to causes of action which accrued within 12 months before 4 June 1954, but not to revive any cause of action which accrued more than 12 months before that date and which was already timed barred.

[43] Disquiet arising from the case of **Cartledge v E Jopling and Sons** [1963] ultimately led to the passing of the 1963 Act in England and Wales which was designed to introduce what are known as the “*date of knowledge*” provisions.

[44] The determination of the **Arnold** case turned primarily on the interpretation of that Act.

[45] In analysing the 1963 Act Lord Bridge in the judgment of the court says as follows at page 268; paragraph D:

“It is, I think, beyond question that the Act of 1963 operated retrospectively, when the appropriate conditions were satisfied, to deprive a defendant of an accrued time bar in respect of a claim for damages for personal injuries in which the cause of action had accrued since 4 June 1954 and which had, therefore been subject to the three year period of limitation introduced by the Act of 1954. This is the combined effect of the relevant provisions of sections 1, 6 and 15.”

[46] Section 1 provided:

“(1) Section 2(1) of the Limitation Act 1939 (which in the case of certain actions imposes a time limit of three years from bringing the action) shall not afford any defence to an action to which this section applies ...”

[47] Section 6 provides:

“6(1) Subject to the following provisions of the section, the provisions of the Part of this Act ... shall have effect in relation to causes of action which accrue before, as well as causes of action which accrued after, the passing of this Act, and shall have effect in relation to any cause of action which accrued before the passing of this Act notwithstanding that an action in respect thereof has been commenced and is pending at the passing of this Act ...

[48] Section 15 provides:

“15. Except insofar as the context otherwise requires, any reference in this Act to an enactment shall be construed as a reference to that enactment as amended or extended by or under any other enactment.”

[49] Lord Bridge concludes at page 269; paragraph C:

“Hence it is the new three year period of limitation introduced by the amended section 2(1) of the Act of 1939 which is no longer to be available as a defence if the court has granted the appropriate leave and the conditions as to knowledge prescribed by section 1(3) are satisfied. The specific provisions relating to pending actions in section 6, distinguishing between actions awaiting trial and actions subject to appeal after a final judgment, would be otiose unless the Act were intended, in any pending action awaiting trial, to deprive the defendant of a time bar which already accrued on expiry of a three year limitation period at the date of issue of the writ. If that was the intention in the case of pending actions it must likewise have been the intention where the three year time bar had accrued but no action had yet been started.”

[50] In considering what, if any, further retrospective operation in depriving defendants of accrued time bars can be ascribed to the provisions in the Act of 1963, Lord Bridge admitted that at page 261; paragraph F:

“The point that most troubled me in the course of the argument was what, as it seemed to me, would be the absurdity of attributing to the legislature an intention to give retrospective effect to the new limitation provisions so as to deprive an ordinary defendant of the right to rely on a time bar accrued under the unamended provisions of the Act of 1939 but at the same time to leave intact the defence of a public authority acquired by virtue of the special position that public authorities previously enjoyed under section 21 of the Act of 1939 in regard to limitation of actions.”

[51] It was for this reason that he strived to avoid construing the Act as affecting such a distinction unless plainly compelled by its language to do so.

[52] He refers back to the terms of section 1(1) of the Act of 1963 and points out that the only time bar of which the defendants are in terms deprived of in this sub-section is the three year time bar which accrued under section 2(1) of the Act of 1939 as amended in 1954.

[53] He held that the Act of 1963 did not operate to deprive any defendant of a time bar which had accrued on the expiry of the six year limitation period prescribed by section 2(1) of the Act of 1939 in its original form which by virtue of section 7 of the Act of 1954 continued to govern any cause of action in a personal injury case accruing before 4 June 1954.

[54] He went on to say at page 271; paragraph F:

“If the Act of 1963 had no effect upon the accrued time bars derived from the six year period of limitation under the unamended section 2(1) of the Act of 1939, it is hardly to be expected that it was intended to have any effect on accrued time bars derived from the one year period of limitation under section 21. The operative provision is section 1(4)(a) of the Act of 1963 which reads:

‘Nothing in this section shall be construed as excluding or otherwise affecting –

(a) Any defence which, in any action to which this section applies, may be available by virtue of any enactment other than section 2(1) of the Limitation Act 1939 (whether it is an enactment imposing the period of limitation) or by virtue of any rule of law or equity ...’”

[55] The court held that:

“The defence of an accrued time bar under section 21 of the Act of 1939 is available ‘by virtue of’ ‘an enactment other than section 2(1) of the Act of 1939’ and thus it is by these words that the defence is expressly preserved.”

[56] The court went on to consider the Limitation Act 1975 (the Act of 1975) which introduced a discretion to the court to override the normal period of limitation in an appropriate case.

[57] This was achieved by an elaborate amendment of the Act of 1939. The proviso to section 2(1) of the 1939 Act, introduced by the 1954 Act, (which reduced the limitation period from 6 to 3 years) is removed by the repeal of section 2 of the Act of 1954. By Schedule 1 paragraph 2, a new sub-section (8) is added to section 2 of the Act of 1939 which provides:

“This section has effect subject to section 2A below.”

[58] The Act of 1975 then introduces new sections 2A, 2B, 2C and 2D into the Act of 1939. Section 2A(1) provides:

“This section applies to any action for damages for negligence, nuisance or breach of duty ... where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injury to the plaintiff or any other person.”

[59] The remaining sub-sections deal with date of knowledge, and the discretion to disapply the provisions of section 2A or 2B, subject to limitations laid down in the section.

[60] Finally, section 3 of the Act of 1975 contains the transitional provisions as follows:

“(1) The provisions of this Act shall have effect in relation to causes of action which accrued before, as well as causes of action which accrue after, the commencement of this Act, and shall have effect in relation to any cause of action which accrued before the commencement of this Act notwithstanding that an action in respect thereof has been commenced and is pending at the commencement of this Act;

(2) *For the purposes of this section an action shall not be taken to be pending at any time if a final order or judgment has been made or given therein, notwithstanding that an appeal is pending or that the time for appealing has not expired;*

(3) *It is hereby declared that a decision taken at any time by a court to grant, or not to grant, leave under Part I of the Limitation Act 1963 (which, so far as it relates to leave, is repealed by this Act) does not affect the determination of any question in proceedings under this Act, but in such proceedings account may be taken of evidence admitted in proceedings under the provisions repealed by this Act.*

(4) *In this section 'action' includes any proceeding in a court of law, an arbitration and a claim by way of set off or counterclaim."*

[61] In relation to this section Lord Bridge says at page 274; paragraph C:

"To my mind the key question is to determine the extent to which section 3 of the Act of 1975 was intended to give retrospective effect to the earlier sections embodied by way of amendment of the Act of 1939. It will have been observed that section 3(1) and (2) of the Act of 1975 used the same terms as section 6(1) and (3) of the Act of 1963. This correspondence adopts precisely the Law Reform Committee's recommendation in paragraph 147 of their report. Reliance is placed on this by the counsel for the widow, but, by itself, it seems to me a neutral factor. It is clear that, for the same reasons as I have expressed earlier in relation to section 6 of the Act of 1963, section 3 of the Act of 1975 was intended to have some retrospective effect. (My underlining) If the Act of 1975 had been the next relevant statute immediately followed by the Act of 1954 without the intervening Act of 1963, I should have taken precisely the same view of its effect as that expressed by Mr Ogden QC. In those circumstances, section 21 of the Act of 1939 having already been repealed, there would, as I think, have been no effective counter to the argument of the generality of the language of the new section 2A of the Act of 1939 in the light of the retrospective effect given to it by section 3 of the Act 1975, had swept away all time bars in personal injury actions previously acquired since 1939, leaving all causes of action accruing since that date to be

determined by the application of the new statutory provision.

But it must be legitimate and necessary to construe the Act of 1975 in the light of the preceding legislative history. To give full effect to the remedies which the Law Reform Committee proposed in order to correct the defects which they discovered in the operation of the regime for the limitation of personal injuries actions since under the Act of 1963 as amended by the Law Reform Statutory Provisions Act 1971 it was clearly necessary, for the reasons they explained in paragraph 137-146 of their report, to embody in the new statute transitional provisions giving the benefit of the new regime to plaintiffs whose causes of action had accrued during the period governed by the preceding regime, i.e. at any time between 1954 and 1975. Thus, plaintiffs whose causes of action had accrued between those dates would be entitled, where appropriate, to the exercise of the court's discretion under section 2(d) of the Act, of 1939, they would not require the leave of the court to sue and their date of knowledge would be determined under the provisions of section 2A(6) to (8). All this was an essential part of curing the defects which the Law Reform Committee had exposed in the state of the law as they found it. But there is not the slightest hint in that report that the extent of the retrospective operation of Act of 1963 was an aspect of the law causing for any remedial action. It is in this negative sense that the report seems to me to give support to the case for the Board."

[62] The key passage of the judgment is as follows at page 275; paragraph B:

"Consistently with the presumption that a statute affecting substantive rights is not to be construed as having retrospective operation unless it clearly appears to have been so intended, it seems to me entirely proper, in a case where some retrospective operation was clearly intended, equally to presume that the retrospective operation of the statute extends no further than is necessary to give effect either to its clear language or to its manifest purpose. Construing sections 2A to 2D of the Act of 1939 in the light of section 3 of the Act of 1975, I think that full effect is given both to the language and to the purposes of the legislation if it is held retrospectively applicable to all personal injury actions previously governed by the three year limitation period under the Act of 1954 whether as then enacted or as amended by the Act

of 1963. Conversely, I can find nothing in the language or discernible purposes of the statute which leads clearly, let alone unavoidably, to the conclusion that the defendants previously entitled to rely on the accrued six year and one year time bars under the original Act of 1939 which the Act of 1963 left intact were intended to be deprived of those accrued rights by the Act of 1975."

[63] The House of Lords applied the principles set out by Lord Bridge in the case of **McDonnell**.

[64] Mr Montague points out that the facts of that case in terms of dates were very similar to the facts of this case.

[65] **McDonnell** was born in 1936 and sought to recover damages against the defendants for alleged abuse suffered at various times between 1941 and 1951 whilst under their care. At the time of the alleged abuse the statute governing limitation was the Limitation Act 1939. As already explained, section 2(1) of the 1939 Act provided that an action for personal injuries could not be brought after the expiration of six years from the date when the cause of action had accrued. Under section 22 of the 1939 Act a person under a disability at the date when the cause of action accrued had a period of six years from the date he ceased to be under a disability to bring an action. The plaintiff, being under 21, was such a person. The plaintiff's six year period expired on 6 January 1963 without his commencing any proceedings. By that time the Law Reform (Limitation of Actions, etc) Act 1954 had come into force, which amended section 2(1) of the 1939 Act by shortening the limitation period to three years and made a corresponding amendment to section 22 of the 1939 Act. However, transitional provisions had saved the claimant's six year period. The 1963 Act introduced provisions dealing with the position where material facts relating to a cause of action were not known to a claimant in time to start proceedings within the limitation period. In those circumstances section 1 of the 1963 Act provided that section 2(1) of the 1939 Act which in the case of certain actions imposes a time limit of three years for bringing the action did not afford a defence. The effect of later enactments consolidated in the Limitation Act 1980 was that after the Limitation Act 1975 was passed there was a three year limitation period from the date of knowledge of material facts. Paragraph 9(1)(a) of Schedule 2 to the 1980 Act provided that nothing in any provision of the 1980 Act enabled any action to be brought which was barred by, inter alia, the 1939 Act before August 1980. The claimant issued proceedings against the defendants in August 2000. He relied on the 1980 Act on the basis that it was only in October or November 1997 that he had decided to investigate the possibility of making a claim against the defendants.

[66] The defendants argued that they had an irrevocable limitation defence. The House of Lords held that the defendants were entitled to rely on an accrued six year time bar under the 1939 Act which the 1963 Act had left intact. Crucially it held that the defendants had not been deprived of these accrued rights by the Act of 1975.

The key passage in the judgment of the court is paragraph [21] of Lord Bingham's judgment:

*"[21] Ms Gumble's second submission was that the appellant's case is distinguishable from **Arnold's** case. That (she said) was a narrow case turning on section 21 of the 1939 Act. The appellant's claim, unlike that in **Arnold's** case, was not statute barred when the 1954 Act was passed. **Arnold's** case, it was argued, only applies to claims statute barred when the 1954 Act came into effect. I have, again, two observations. First, although the House could in **Arnold's** case have confined its attention to section 21 it did not do so. For reasons given by Lord Bridge the House thought it necessary to consider the retrospectivity issue in the context of pre-1954 six year claims as well as in the context of section 21 and it plainly intended its reasoning to be determinative. Secondly, while accepting the differences between **Arnold's** case and the present case in which Ms Gumble relied, I find nothing in the reasoning of Lord Bridge to suggest that this should lead to a different outcome. It so happens that, because of disability, the appellant had under the 1939 Act a period of nearly 12 years after the end of the abuse in which to pursue a claim and this period straddled the passing of the 1954 Act. But it was also, although deferred, a six year claim, and the House held in **Arnold's** case that the 1963 and 1975 Acts did not operate to overcome an accrued limitation defence in such cases."*

[67] Mr Montague argues that precisely the same principle applies in this case. Although the plaintiff's claim was deferred because of her disability it is right that the limitation period straddles the passing of the 1954 Act. But because this was a "six year claim" under the 1853 Act he submits that the 1958 Act does not operate to overcome an accrued limitation defence in such cases.

Conclusion

[68] In considering this matter it is important to understand the basic principle at play. What is at issue is the interpretation of the relevant limitation statutes. The principle is that a party who has an accrued right (in this case the defendant's time barred defence) should not be deprived of such a defence unless the legislation clearly provides for this. Following on from this principle there was a presumption that when a statute was clearly intended to have some retrospective operation that was not to extend any further than was necessary to give effect either to its clear language or to its manifest purpose.

[69] This issue in this case therefore is whether or not the legislation in this jurisdiction has effected any limitation defence which was available to the defendant under the 1853 Act.

[70] The court has considered carefully the House of Lords judgments in the case of **Arnold** and **McDonnell**. I have come to the conclusion that they do not assist the defendant/respondent in this case. I say so because of both the factual differences in this case and because of the important differences in the legislation dealing with limitation in this jurisdiction compared with that in England and Wales.

[71] I return to the basic principle. A defendant should not be deprived of a time barred defence accrued to him under a limitation statute unless the legislation clearly provides for this.

[72] The effect of the judgment in **Arnold**, approved in **McDonnell** was that the 1963 Act preserved the section 2(1) defence and there was nothing in the subsequent legislation which changed that. By contrast in this jurisdiction the 1958 Act expressly repealed the equivalent to section 2(1) of the 1939 Act, namely section 20 of the 1853 Act.

[73] Thus section 1(4)(a) of the 1963 Limitation Act in England expressly refers to the fact that nothing in the section shall be construed as excluding or otherwise affecting:

“(a) Any defence which, and any action to which this section applies, may be available by virtue of any enactment other than section 2(1) of the Limitation Act 1939 ...”

[74] The equivalent section 1(4)(a) of the 1964 Limitation Act in this jurisdiction rather than referring to the 1853 Act refers to section 9 of the 1958 Act. This is because the 1958 Act repealed the 1853 Act. What was being preserved in this jurisdiction was any potential defence under the 1958 Act.

[75] This difference is also reflected in the consolidating provisions. Thus in England and Wales the 1980 Act in Schedule 2 paragraph 9 preserves any defence under the Limitation Act 1939 in that jurisdiction; whereas the equivalent provision in our 1989 Order at Schedule 2 paragraph 7 preserves the defence under the 1958 Act (described as “the Statute of Limitation”).

[76] In any event if one looks at the facts of the **Arnold** case the defendant had accrued an irrevocable limitation defence as of April 1944, long before any amending legislation. In that respect the plaintiff was no different from the plaintiff in **Irvine**. The defendant had accrued an irrevocable defence at that time and the court held that there was nothing in the subsequent provisions which operated retrospectively to change that. Equally in **McDonnell** the defendant had accrued an irrevocable

defence on 6 January 1963 (allowing for the disability period). In that case, again like **Irvine**, the defendant had accrued the defence prior to the introduction of the 1963 Act. What the court determined was that there was nothing in the subsequent legislation which altered that and the defence remained intact.

[77] Crucially on the facts in this case the defendant had not accrued a limitation defence until after the coming into effect of the 1958 Act.

[78] I return to the case of **Bowman** which in my view accurately sets out the law in this jurisdiction and which supports the plaintiff/appellant in this case. As Carswell J said in his judgment the situation here is "*quite different*" from that which applies in England.

[79] He identifies the effect of the **Arnold** decision on which he was clearly sighted, namely that a claim which becomes time barred before the 1958 Act came into operation on 1 January 1959 remains so barred.

[80] In this case the plaintiff's claim was not time barred before 1 January 1959 and so is not effected by the **Arnold** decision.

[81] I consider that the defendant (and the Master) has placed undue reliance on the fact that Carswell J was referring to the date upon which cause of actions "accrued". In that case he was not dealing with a person under a disability. Equally I consider that there has been undue reliance placed on the fact that in **McDonnell** the court referred to a "*six year claim*". The key date is the date upon which the defendant accrues the defence. In my view this is clear from the principle which is at stake and from a proper reading of the authorities. Thus Lord Bridge refers to the 1963 Act having no effect "*upon the accrued time bars*". In his judgment he concluded that there was nothing in the language of the 1963 Act or 1975 Act which deprived a defendant of "*the accrued six year and one year time bars*". Equally in the House of Lords, Lord Bingham refers to the fact that the 1963 and 1975 Acts "*did not operate to overcome an accrued limitation defence in such cases*". The fact that he refers to the "*six year claim*", being deferred is not determinative because the deferral had no effect on the accrued defence in either **Arnold** or **McDonnell**, unlike the facts in this case.

[82] Returning to Carswell J, this case, for the purposes of limitation defences, is one which is governed by the 1958 Act and which has become in due course subject to the Limitation Act (Northern Ireland) 1964 and the Limitation (Northern Ireland) Order 1976 - and now the consolidated provisions of the Limitation (Northern Ireland) Order 1989. As Carswell J concluded:

"In such cases the court has the power to override the fixed time limits."

[83] I conclude that this is such a case and that the court has power to override the fixed time limit in this case.

[84] I therefore allow the appeal and dismiss the application brought by the defendant/respondent.