

Queen's Bench Division

BXB v Watch Tower and Bible Tract Society of Pennsylvania and another

[2020] EWHC 156 (QB)

2019 Nov 25–29; Dec 10; 2020 Jan 30

Chamberlain J

Vicarious liability — Jehovah's witness elder — Sexual abuse — Elder raping member of congregation at his home — Whether defendant governing body and trustees of congregation vicariously liable for rape when elder not performing religious activity at time

Evidence — Hearsay evidence — Notice to admit — Claimant objecting to admission in evidence of hearsay statement in agreed trial bundle — Whether court to admit statement where agreement quickly rescinded and no notice of proposal to admit evidence served — Civil Evidence Act 1995 (c 38), s 2(1)¹ — CPR Pt 32, Practice Direction 32, para 27²

The claimant was a member of a congregation of Jehovah's Witnesses who was raped by an elder, S, one of the spiritual leaders of the congregation, following a morning of evangelising door-to-door and a lunch at his home. The claimant brought an action against the defendants, the governing body of the Jehovah's Witnesses and the trustees of the particular congregation, claiming damages for psychiatric injuries, alleging, inter alia, that the defendants were vicariously liable for the rape. In the course of the trial, the claimant objected to the admission in evidence of a statement contained in the agreed trial bundle on the ground that it was hearsay, that the maker could have been called, and that if he were not called a hearsay notice should have been served under section 2(1) of the Civil Evidence Act 1995. The judge permitted the hearsay evidence to be adduced, reserving his reasons for so doing. In relation to liability, issues arose, inter alia, as to (i) whether S's activities were an integral part of the "business" activities carried on by the defendants and for their benefit, (ii) whether the commission of the rape was a risk created by the defendants by assigning those activities to S and (iii) if so, whether the rape was sufficiently closely connected to S's position to make it just and reasonable that the defendants should be held vicariously liable for it.

On the claim, and giving reasons for admitting the hearsay statement in evidence—

Held, allowing the claim and awarding damages, (1) that any organisation which conferred on its leaders power and authority over others created a risk that those leaders would abuse that power and authority, which was as true of a religious organisation as a secular one; that, further, an organisation which made rules for all aspects of its adherents' lives and set them up as moral and spiritual exemplars imbued those leaders with power and authority even outside the confines of their religious activities; that the evidence demonstrated that an elder, such as S, was as integral to the "business" of a congregation of Jehovah's Witnesses as a priest was to the "business" of the Catholic Church; that, moreover, the commission of the rape was a risk created by the congregation by assigning those activities to S; that, therefore, the relationship between the defendants and S was capable, in principle, of giving rise to vicarious liability for acts of sexual abuse perpetrated by him on members of the congregation; that while the rape had not occurred

¹ Civil Evidence Act 1995, s 2(1): "A party proposing to adduce hearsay evidence in civil proceedings shall, subject to the following provisions of this section, give to the other party or parties to the proceedings— (a) such notice (if any) of that fact, and (b) on request, such particulars of or relating to the evidence, as is reasonable and practicable in the circumstances for the purpose of enabling him or them to deal with any matters arising from its being hearsay."

² CPR Pt 32, Practice Direction 32, para 27: "27.1 The court may give directions requiring the parties to use their best endeavours to agree a bundle or bundles of documents for use at any hearing. 27.2 All documents contained in bundles which have been agreed for use at a hearing shall be admissible at that hearing as evidence of their contents, unless— (1) the court orders otherwise; or (2) a party gives written notice of objection to the admissibility of particular documents."

while S was performing any religious duty, that was not a necessary ingredient of liability in a case such as the present: that the test was more open-textured and required an analysis of all aspects of the relationship between the tort and the abuser's status; that, having regard to all relevant features of the relationship, the rape was sufficiently closely connected to S's position as elder to make it just and reasonable that the defendants should be held vicariously liable for it; and that in respect of the psychiatric injuries for which the claimant sought compensation which were attributable to the rape, she would be awarded £62,000 by way of general damages (post, paras 157–159, 160–164, 165–174, 217).

Dicta of Longmore LJ in *Maga v Archbishop of Birmingham* [2010] 1 WLR 1441, para 84, CA, *A v Trustees of the Watch Tower Bible and Tract Society* [2015] EWHC 1722 (QB) and *Cox v Ministry of Justice* [2016] AC 660, SC(E) applied.

(2) That it was very common for a hearing bundle to contain a large number of documents containing hearsay and a requirement to serve a hearsay notice in respect of each and every such document would very significantly complicate preparations for trial; that the plain purpose and effect of paragraph 27 of Practice Direction 32, supplementing CPR Pt 32, was to avoid that complication by disapplying the notice requirement under section 2(1) of the Civil Evidence Act 1995 in respect of documents in an agreed hearing bundle so that the document was then admissible, subject to any contrary ruling by the court or to written objection by the opposing party; that where, however, as in the present case it was submitted that the agreement to the bundle was given in error and quickly rescinded it would be appropriate to treat the rescission of the agreement as a notice of objection for the court to consider and to decide what weight to attach to the evidence, having regard to the factors set out in section 4(2) of the 1995 Act; and that in the present case the hearsay evidence admitted had very limited weight (post, paras 63–64).

Dicta of Sedley LJ in *Charnock v Rowan* [2012] CP Rep 18, paras 22–24, CA applied.

CLAIM

By a claim form issued on 8 June 2017, Mrs B, the claimant, advanced two separate heads of claim, firstly, that the defendants, (1) the WatchTower and Bible Tract Society of Pennsylvania (the governing body of the Jehovah's Witnesses) and (2) the Trustees of the Barry Congregation (of which congregation she had been a member at the time), were vicariously liable for the assault and trespass (ie the rape) committed by an elder, Mark Sewell, on 30 April 1990 ("the vicarious liability claim"); secondly, that the defendants were liable in negligence for the failure of the elders of the Barry Congregation and other elders appointed by them "adequately to investigate and to conduct a proper inquiry into the claimant's allegation of rape and to take appropriate steps having done so" and that they had a duty to conduct the investigation in such a way as to avoid causing harm to her ("the investigation claim"). The claimant claimed damages for the injuries she had suffered and for losses of earnings which she said were consequent on her injuries.

The facts are stated in the judgment, post, paras 1–6.

James Counsell QC (instructed by *Bolton Burdon Kemp*) for the claimant.

Catherine Foster (instructed by *Legal Department, Watch Tower*) for the defendants.

The court took time for consideration.

30 January 2019. **CHAMBERLAIN J** handed down the following judgment.

Introduction

1 The events giving rise to this claim began in 1984, when the claimant (to whom I shall refer as "Mrs B" rather than "BXB") and her husband ("Mr B") started to attend the Kingdom Hall in Barry, South Wales, the meeting place of the Barry Congregation of Jehovah's Witnesses. The Trustees of the Congregation are the second defendants to this claim. The first defendant is the worldwide governing body of the Jehovah's Witnesses, which has offices in New York state. It is not necessary to consider further the relationship between the first and second defendants, because the first defendant has agreed that it will satisfy any judgment against the second. In the remainder of this judgment, I therefore refer to "the defendants" without differentiating between them.

2 Certain essential facts are not in dispute. Mrs B was baptised as one of Jehovah's Witnesses in 1986. Those who are so baptised are known as "publishers". Mr and Mrs B became friendly with another couple, Mark and Mary Sewell. Mark Sewell was then a "ministerial servant", a member of the congregation with special responsibilities. He later became an "elder", one of the

spiritual leaders of the congregation. On 30 April 1990, the two couples went “pioneering” (door-to-door evangelising) in Cowbridge, Glamorgan. Mark drank heavily at lunch-time. The two couples returned to the Sewells’ home where, in a back room, Mark Sewell raped Mrs B.

3 Mrs B did not report the rape immediately. In 1991, however, she discovered that Mark Sewell had also been sexually abusing a girl aged under 14, who was related to him and was a member of the congregation (“CXC”). At that point, Mrs B reported both matters to the elders. They appointed investigators (whose identity is now disputed). The investigators interviewed Mrs B. She says that they asked her intimate and irrelevant questions, which caused her a great deal of distress. A “judicial committee” consisting of elders from a nearby congregation was convened. There was a hearing at which Mrs B was asked further questions in the presence of Mark and Mary Sewell. Mark Sewell denied the allegations. The judicial committee found them not proven. Mrs B says that this was because of a Biblically derived rule which requires that allegations of serious sin which are denied must be corroborated by at least one additional witness (“the two-witness rule”). Mark Sewell remained a member of the Congregation, but was later “disfellowshipped” (ie expelled) for unrelated conduct. Mrs B says that the investigations conducted by the elders in the aftermath of the rape, and the experience of being questioned and disbelieved, were deeply traumatic.

4 It was not until decades later, long after Mrs B had ceased to be one of Jehovah’s Witnesses, that Mark Sewell’s offences were investigated by the police. On 2 July 2014, after a contested trial at which Mrs B had to give evidence, he was convicted of raping Mrs B and of seven counts of indecent assault against CXC and another individual and sentenced to a total of 14 years’ imprisonment.

5 After the rape, Mrs B suffered from several episodes of depression. In 2014, before, during and after the trial, she also suffered symptoms which have since been identified as indicative of post-traumatic stress disorder (“PTSD”). On 8 June 2017, this claim was issued. In the Particulars of Claim, two separate heads of claim are advanced. In the first instance, Mrs B claims that the defendants are vicariously liable for the assault and trespass (ie the rape) committed by Mark Sewell on 30 April 1990 (“the vicarious liability claim”). Secondly, Mrs B claims that the defendants are liable in negligence for the failure of the elders of the Barry Congregation and other elders appointed by them “adequately to investigate and to conduct a proper inquiry into BXB’s allegation of rape and to take appropriate steps having done so”. In particular, Mrs B says that the defendants had a duty to conduct the investigation in such a way as to avoid causing harm to her (“the investigation claim”). Mrs B claims damages for the injuries she suffered and for losses of earnings which she says were consequent on her injuries.

6 The defendants accept that Mark Sewell raped Mrs B. They do not accept, however, that they are vicariously liable for his tort. They also do not accept that they owed a duty of care in the conduct of the investigation or that they breached any such duty. They rely on a limitation defence and submit that it would be wrong to extend time under section 33 of the Limitation Act 1980 (“the 1980 Act”). They dispute the extent of the injury attributable to any breaches of duty and, in any event, deny that it can be shown to have resulted in any loss of earnings in the past or that it is likely to result in such losses in the future.

7 The issues are therefore these:

- (a) Should time be extended under section 33 of the 1980 Act in respect of either or both of the vicarious liability and investigation claims?
- (b) Are the defendants vicariously liable for the rape of Mrs B by Mark Sewell?
- (c) In relation to the investigation claim: (i) Did the defendants owe Mrs B a duty of care?
- (ii) If so, did the defendants breach this duty?
- (d) To what extent were the psychiatric injuries for which Mrs B seeks compensation attributable to (i) the rape and/or (ii) any breach of duty in relation to the investigation?
- (e) How much should Mrs B be awarded in damages?

The witnesses who were and might have been called

8 Mrs B gave evidence herself. She also relied on the factual evidence of her current husband HXB and of FXC, who was an elder in the Barry Congregation and the father of CXC. Mrs B’s expert evidence was given by Dr Ash Roychowdhury, a consultant forensic psychiatrist.

9 The defendants relied on the evidence of Andrew Schofield, who has been an elder of the Jehovah’s Witnesses for 19 years and works in the Service Department of the Britain branch office of the worldwide organisation of Jehovah’s Witnesses. He was able to speak to the practices and teachings of Jehovah’s Witnesses in general, though not directly to the events that took place in Mrs B’s case. The defendants also adduced evidence from Michael Jones and Brian Jones. They are not related and were both elders in the Barry Congregation. They say they were initially

tasked with the investigation of Mrs B's complaints, though Mrs B denies this. Finally, the defendant relied on the evidence of Simon Achonu, the solicitor with conduct of this litigation. He gave evidence on matters relevant to limitation. The defendant's expert evidence was given by Professor Anthony Maden, a consultant forensic psychiatrist and emeritus professor at Imperial College, London.

10 Mr Achonu identified the witnesses who were not called, but might have been had the claim been brought earlier. Thomas Brown served as presiding overseer of the Barry Congregation when Mrs B made her complaint. He died on 27 June 2017. Four other elders—FXC's father, Hugh McGinty, Barrie Jones and John Wood—had also died, the latter three at various dates between 2000 and 2014. Tony Sewell died on 7 December 2015. David Newman, who served as chairman of the judicial committee that investigated Mrs B's complaints, died on 18 January 2017. Finally, Edward Lee, who also served on the judicial committee, died on 13 November 2018.

11 This must be set against the evidence in the second witness statement of FXC, who was an elder in the Barry Congregation at the relevant time. He says that none of FXC's father, Hugh McGinty, Barrie Jones and John Wood would have been able to give relevant evidence because, apart from an initial meeting where Mrs B's complaints were disclosed to the body of elders, none played any part in the subsequent investigation. FXC points out that David Newman gave evidence at Mark Sewell's criminal trial in 2014 but said that he could not remember any of the events. Edward Lee, by contrast, refused to give evidence at the criminal trial, but was interviewed twice by Mr Achonu before he died. Finally, FXC notes that there is no witness statement from Arthur Taylor, who served on the judicial committee, and is still alive.

My approach to the evidence

Factual disputes about the events in Barry

12 As can be seen from the foregoing summary, some of the facts central to this claim are not disputed. There is no dispute that, on 30 April 1990, Mark Sewell, who was then an elder, raped Mrs B. There is also no dispute that the rape took place in Mark Sewell's home in Barry after Mr and Mrs B and Mark and Mary Sewell had been out pioneering. Much of Mrs B's account about how and why she came to be, and remained, close to Mark Sewell is, however, disputed, as is much of her account about the subsequent investigation undertaken by the elders.

13 Ms Catherine Foster, who appeared for the defendants, challenged Mrs B robustly as to her recollection of events. She made clear that she was not suggesting that Mrs B was telling deliberate untruths. Her case was that Mrs B had allowed her feelings of antipathy towards Jehovah's Witnesses to colour her memory of events. (In her evidence, Mrs B described Jehovah's Witnesses as a "cult" on more than one occasion.) This, Ms Foster suggested, led her to construct a narrative of what had been said and done that was not accurate and to ascribe to herself and others motivations that they did not have at the time. In closing submissions, Ms Foster relied on the observations of Leggatt J in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) at paras 15–18:

"15. An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.

"16. While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.

"17. Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information

can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).

"18. Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time."

14 Leggatt J went on to note that the process of civil litigation was apt to subject the memories of witnesses to further powerful biases. At para 22, he concluded as follows:

"In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose—though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

15 Leggatt J's observations were considered recently by the Court of Appeal in *Kogan v Martin* [2019] EWCA Civ 1645; [2020] EMLR 4. At paras 88–89, Floyd LJ (giving a judgment of the court to which Henderson and Peter Jackson LJJ contributed) said:

"88. ... First, as has very recently been noted by Judge Gore QC in *CXB v North West Anglia NHS Trust* [2019] EWHC 2053 (QB), *Gestmin* is not to be taken as laying down any general principle for the assessment of evidence. It is one of a line of distinguished judicial observations that emphasise the fallibility of human memory and the need to assess witness evidence in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed. Earlier statements of this kind are discussed by Lord Bingham in his well-known essay 'The Judge as Juror: The Judicial Determination of Factual Issues' (from *The Business of Judging*, Oxford 2000). But a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all of the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence.

"89. Secondly, the judge in the present case did not remark that the observations in *Gestmin* were expressly addressed to commercial cases ... Here, by contrast, the two parties were private individuals living together for much of the relevant time. That fact made it inherently improbable that details of all their interactions over the creation of the screenplay would be fully recorded in documents."

16 The present case is, of course, not a commercial one. Some of the disputed matters (such as how and why Mrs B came to be, and remained, close to Mark Sewell) could hardly be expected to be the subject of documentary evidence. On those matters, the evidence could realistically only be based on the recollections of a very few witnesses—Mr and Mrs B, Mark, Mary and Tony Sewell. Of these, only Mrs B gave evidence. So, her evidence, together with documents showing what she had said previously to the police, psychiatrists and others, was the only evidence on some of the disputed points. In assessing her evidence, I bear in mind Leggatt J's observations about the fallibility of memory and the tendency of the human mind, however honest, to construct a narrative after the event. But, subject to the question of limitation, it is—as the Court of Appeal has said—my duty to reach findings of fact based on all the evidence. That duty applies even when the principal or exclusive evidence on a particular matter comes from the recollection of

one person. On other matters, there was a conflict of evidence. It has not been necessary to resolve all of these conflicts, because some of them are not material to the outcome. Where they are, I have resolved them on the basis of all the evidence before me, making findings of fact applying the ordinary civil standard of proof.

The proper role of the court in relation to matters of religious doctrine

17 It will be necessary at points in the analysis to consider questions of religious doctrine. Ms Foster submits that there are limits to the extent to which the court should pronounce on such matters. Those limits are particularly pertinent to the investigation claim, but are also potentially relevant to the vicarious liability claim in so far as that turns on the proper interpretation of religious teachings. It is therefore appropriate to establish at the outset the principles to be derived from the case law.

18 The modern law in this jurisdiction is set out in the decision of the Supreme Court in *Shergill v Khaira* [2014] UKSC 33; [2015] AC 359. That case arose from a dispute about the power to appoint trustees of charitable trusts governing the use of two gurdwaras used by a sect of the Sikh religion. The case turned on who, according to the tenets of the particular sect, was the successor of a Holy Saint acknowledged by its members to be their spiritual leader. Lord Neuberger of Abbotsbury PSC, Lord Sumption and Lord Hodge JJSC (with whom Lord Mance and Lord Clarke of Stone-cum-Ebony JJSC agreed) said this at para 45:

“This distinction between a religious belief or practice and its civil consequences underlies the way that the English and Scottish courts have always, until recently, approached issues arising out of disputes within a religious community or with a religious basis. In both jurisdictions the courts do not adjudicate on the truth of religious beliefs or on the validity of particular rites. But where a claimant asks the court to enforce private rights and obligations which depend on religious issues, the judge may have to determine such religious issues as are capable of objective ascertainment. The court addresses questions of religious belief and practice where its jurisdiction is invoked either to enforce the contractual rights of members of a community against other members of its governing body or to ensure that property held on trust is used for the purposes of the trust ...”

They went on to give examples of cases where it would be necessary for the court to address questions of religious belief and practice, before saying at para 53: “This clear line of authority contradicts the idea that a court can treat a religious dispute as non-justiciable where the determination of the dispute is necessary in order to decide a matter of disputed legal right ...”

19 *Shergill* was applied recently in *Otuo v Watch Tower Bible and Tract Society of Britain* [2019] EWHC 1349 (QB). That concerned a claim for slander arising out of things said at meetings of a congregation of Jehovah’s Witnesses. The words complained of were spoken at meetings convened to consider whether to disfellowship Mr Otuo on the basis of an alleged fraud, and then whether to reinstate him. The defendant submitted that the claims were non-justiciable. Warby J summarised the effect of *Shergill* at para 194:

“claims to enforce civil rights should generally be entertained by the courts, even if they involve some determination of the internal rules or practices of a religious institution, unless that process necessitates an investigation of some matter that is, by its nature, incapable of being objectively assessed. The validity of religious beliefs or rites is such a question, at least as a general rule ...”

20 Warby J went on to reject the non-justiciability defence in general at para 49. At para 73(4), however, he did hold non-justiciable an argument advanced on behalf of the claimant that the steps taken at the meeting had violated the “two-witness rule” derived from Matthew 18:16. In doing so, he endorsed a passage from the judgment of Rowe J for the Supreme Court of Canada in *Judicial Committee of the Highwood Congregation of Jehovah’s Witnesses v Wall* 2018 SCC 26; [2018] 1 SCR 750. There, it was held that a claim for judicial review challenging as procedurally unfair a decision of a judicial committee of elders disfellowshipping a member of the congregation should have been dismissed. That was principally because the judicial committee was not a public decision-maker and because there was no contractual right to any particular procedure. At para 38, however, Rowe J said this:

“In addition, sometimes even the procedural rules of a particular religious group may involve the interpretation of religious doctrine. For instance, the *Organized to*

Do Jehovah's Will handbook (2005) outlines the procedure to be followed in cases of serious wrongdoing: 'After taking the steps outlined in Matthew 18:15, 16, some individual brothers or sisters may report to the elders cases of unresolved serious wrongdoing' (p 151). The courts lack the legitimacy and institutional capacity to determine whether the steps outlined in Matthew have been followed. These types of procedural issues are also not justiciable. That being said, courts may still review procedural rules where they are based on a contract between two parties, even where the contract is meant to give effect to doctrinal religious principles ... But here, Mr Wall has not shown that his legal rights are at stake."

21 Mr Otuo's claim for slander was later dismissed in a detailed judgment by Richard Spearman QC sitting as a deputy High Court judge: [2019] EWHC 1349 (QB). One of the contentions advanced at trial by Mr Otuo was that the decision of the elders to disfellowship him had been ultra vires the constitution of the congregation. In rejecting that submission, Mr Spearman QC had to make a number of findings about the content and nature of the teaching of the Jehovah's Witnesses, where such findings were necessary to resolve a question of disputed legal right: see eg at paras 121–122.

22 Ms Foster also relied on article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), as interpreted in three judgments of the European Court of Human Rights ("the Strasbourg court").

23 The first of these, *Serif v Greece* CE:ECHR:1999:1214JUD003817897; 31 EHRR 20 concerned the prosecution of an individual who claimed to be the leader of a Muslim sect in Rodopi when another individual had been appointed as Mufti under Greek law. At para 51, the court held that "punishing a person for the mere fact that he acted as the religious leader of a group that willingly followed him can hardly be considered compatible with the demands of religious pluralism in a democratic society". At para 52 it said: "the court does not consider that, in democratic societies, the state needs to take measures to ensure that religious communities remain or are brought under a unified leadership."

24 That, however, was a case about direct state interference in the organisational structure and leadership of a religious group. So was the next case on which Ms Foster relied, *Sindicatul "Păstorel cel Bun" v Romania* CE:ECHR:2013:0709JUD000233009; 58 EHRR 10, which arose from a dispute about whether Orthodox priests were permitted by the statutes governing the Church to form a trade union. The Romanian courts held that they were not. The priests relied on their right to freedom of association under article 11; the Government relied on the rights of the Orthodox Church under article 9. The Grand Chamber of the Strasbourg court held that the situation gave rise to no violation of article 11 of the Convention. At para 137 it said:

"In accordance with the principle of autonomy, the state is prohibited from obliging a religious community to admit new members or to exclude existing ones. Similarly, article 9 of the Convention does not guarantee any right to dissent within a religious body; in the event of a disagreement over matters of doctrine or organisation between a religious community and one of its members, the individual's freedom of religion is exercised through his freedom to leave the community."

25 Finally, *Döğan v Turkey* CE:ECHR:2016:0426JUD006264910; 64 EHRR 5 concerned the refusal of the Turkish authorities to recognise the Alevi faith as a branch of Islam. The Grand Chamber held at para 121 that:

"in accordance with the principle of autonomy for religious communities which is established in its case law—and which is the corollary to the state's duty of neutrality and impartiality—only the highest spiritual authorities of a religious community, and not the state (or even the national courts), may determine to which faith that community belongs. Accordingly, it considers that the state's attitude towards the Alevi faith infringes the right of the Alevi community to an autonomous existence, which is at the very heart of the guarantees in article 9 of the Convention."

26 Ms Foster submits that it is possible to infer from these passages the proposition that secular courts and public authorities are prohibited from "determining whether religious procedural rules have been correctly applied, or indeed whether those religious rules should be changed". I would certainly accept that the cases to which she refers show that article 9 confers a right on religious communities to decide for themselves the rules governing who is entitled

to be a member or to be recognised as a leader of the community. Any interference with that right must be justified as proportionate to a legitimate aim. Those cases, however, are dealing with a set of problems quite different from the one at issue here. State recognition of religious groupings gives rise to particular difficulties in the context of a human rights convention to which states with different attitudes to the relationship between church and state are party. One prominent strain in the political and jurisprudential philosophies of many of the contracting states is a strong separation of church and state. The French concept of *laïcité* is a well-known example. A similar ideological commitment to a strictly secular state was for much of its recent history seen in Turkey.

27 None of this, however, is directly relevant to the issue with which this case is concerned —namely, the proper limits of the secular courts when adjudicating on matters of religious doctrine. On this, the United Kingdom Supreme Court has been clear as to the position in English, Welsh and Scots law. It may be summarised in this way. The courts will not resolve disputes about matters of religious doctrine unless the determination of the dispute is necessary in order to decide a matter of disputed legal right. But where it is so necessary, and there are objective standards by which the dispute can be resolved, not only can they do so—they must. This position is in my judgment wholly consistent with the principle that the state should be neutral with regard to the membership, internal organisation and leadership of religious groupings.

28 The judgments of the Canadian Supreme Court in the *Wall* case, and of Warby J in the *Otuo* case, are good examples of this consistency. In the latter case, Warby J accepted that it was neither necessary nor appropriate for the courts to concern themselves with the question whether Mr Otuo had been validly “disfellowshipped”. That was (in part) because the validity depended solely on the proper interpretation of religious rules which had no contractual force. But that did not mean that the courts were disabled from considering whether a tort had been committed, even when the tort was said to have arisen from words spoken at a religious meeting. That approach, which I would respectfully endorse, seems to me to be not only consistent with the principle of state neutrality, but required by it. If the religious context in which something was said or done could render it non-justiciable *even when it would otherwise be unlawful*, the state would be derogating from the principle of neutrality between religious views, and between religious and non-religious views, by conferring on religious groups a special exemption from the general law. Moreover, the extent of the exemption would be fixed by reference to the beliefs of the group in question.

29 In this case, Mrs B relies on the teachings of Jehovah’s Witnesses at the relevant time as relevant both to the vicarious liability claim and to the investigation claim. In each case, the defendants do not accept that she has correctly characterised the teachings in question. The areas of disputed evidence focused on: (i) the duty of Jehovah’s Witnesses to maintain “good association”; (ii) the scope and extent of the duty of publishers to follow the instructions and guidance of elders; (iii) the extent of any guidance about the reporting of sins which were also crimes to the relevant secular authorities; (iv) the rules relating to the conduct of investigations and judicial committees; and (v) the rules about disfellowship, repentance and reinstatement.

30 Where the resolution of these disputes is required in order to resolve questions of disputed legal right, applying the principles discussed, I am obliged to resolve them, provided that there is an adequate objective standard by which I can properly do so. It would be inappropriate for me to reach my own views about what the scriptures require in particular situations (just as it was inappropriate for the Canadian Supreme Court in the *Wall* case, and for Warby J in *Otuo* to opine on compliance with the procedural requirements in Matthew 18:15–18:16). The key issue in the present case, however, is not what the scriptures require, but what Jehovah’s Witnesses believe and teach that they require. On that, the evidence does supply me with an objective basis on which to reach a view. Mr Schofield, in his clear and impressive evidence, made clear that Jehovah’s Witnesses believe the Bible to be the inspired word of Jehovah (God). The word of Jehovah was constant and it was possible to derive a set of principles from it. The application of those principles to the changing circumstances of modern life involved interpretation. The best evidence of how the Biblically derived principles were interpreted and applied at particular times came from contemporaneous editions of *Watchtower*, a periodical issued under the aegis of the worldwide organisation of Jehovah’s Witnesses, which Ms Foster confirmed on instructions is the authoritative conduit through which the teachings of the faith are communicated to congregations. The articles in *Watchtower* address particular subjects by reference to relevant passages from the Bible, with footnotes posing questions to guide discussion by members of the congregation in study groups. The content of these articles provides a reliable guide to the

teachings of the faith at the relevant time on the subjects they address. To that extent, the task of ascertaining the content of the relevant beliefs and teachings is easier in the case of Jehovah's Witnesses than it would be in the case of some other religious groups where it is less easy to identify a particular source of doctrine as authoritative and where, therefore, there is more scope for legitimate disagreement within the group and fewer manageable standards by which a court could resolve that disagreement.

31 One issue on which the principles derived from the Strasbourg authorities could be of more direct relevance is the scope or extent of any duty of care owed in relation to the inquiry and decision whether to "disfellowship" a member of the congregation. Here, it is not possible simply to apply the test in *Shergill* and conclude that the resolution of disputed questions of doctrine is necessary to the determination of a disputed legal right, because the scope of the right is itself in question. Whether a duty of care arises depends on policy considerations; and if the imposition of a duty would involve the court having to determine questions of religious doctrine which courts are not equipped to determine, that could itself be a powerful policy reason for declining to impose one.

The evidence relevant to liability

Mrs B's evidence

32 Mrs B was born in London in 1962. She married Mr B in 1981. They moved to Barry, South Wales, where he lived. She worked as an audio typist before the birth of her son in 1982. She had a daughter in 1983. She went back to work in 1986 or 1987 in a school, initially as a lunchtime supervisor and then as a teaching assistant. She worked part-time in that role for about ten years.

33 Mrs B was introduced to the social network of Jehovah's Witnesses from about March 1982, by Mr B's cousin. In 1984, Mr and Mrs B decided to join the Barry Congregation. She was baptised, and so became a "publisher", in 1986. Mr and Mrs B raised their children as Jehovah's Witnesses, which, she says, meant mixing predominantly with other families who were also Jehovah's Witnesses. For women, full-time work was discouraged, though not forbidden.

34 Mrs B first met Mark and Mary Sewell when Mark was a ministerial servant. Mr and Mrs B would attend the twice-weekly services at the Kingdom Hall and would see Mark and Mary there. The role of a ministerial servant included handing round the microphone at meetings and allocating tasks to members of the congregation. To become a ministerial servant or elder (posts only open to men), it was necessary for a publisher to demonstrate that he was a spiritually strong member of the congregation.

35 Mr and Mrs B and their children got on well with Mark and Mary Sewell and their children. Mrs B insists, however, that it was because of Mark's position as a ministerial servant and then an elder that they became close. In her witness statement, she says: "We felt proud to count Mark as one of our friends. It was because of his standing as a Ministerial Servant and then an Elder that our friendship became as close as it did." It was in 1989 that Mark became an elder. At the same time, Mr B became a ministerial servant. Mrs B says:

"As I mentioned, my husband had now become a Ministerial Servant and had ambitions in due course to become an Elder. Having Mark as a friend meant that Mark would have been in a position to guide and assist my husband in that regard. In addition, Mark seemed like a lovely, kind, genuine, helpful man. He could be very charming and funny."

36 Mrs B describes the role of elders as follows:

"The Elders are like shepherds, as it were. Their directions are always followed by members of the congregation and they are very rarely criticised. There can be serious repercussions for those who disobey them. Anybody who disobeyed an Elder's instruction would receive what was called a 'shepherding call'. This would involve an elder coming to see the person concerned at their house or, in a more serious case, a judicial committee would be set up in the Kingdom Hall at which the person concerned would be given instructions on how to behave. If that person continued to disobey, they would be disfellowshipped."

37 Mark's duties as elder included greeting members of the congregation when they arrived at Kingdom Hall. Mrs B recalls that he often used to greet her and other female members of the congregation by kissing them on the lips. He did this in the presence of other elders. This made Mrs B feel "extremely uncomfortable", but no one commented on it, so Mrs B did not feel able

to complain to the other elders. She did, however, raise the subject with Mark himself. After she had done so, Mary told Mrs B that by raising the subject she had caused trouble between her (Mary) and Mark and asked Mrs B to allow Mark to continue to kiss her in that way. Mrs B says:

“I didn’t want to make an issue out of it nor did I feel able to complain to anybody else. The Jehovah’s Witness Organisation teaches members to love their brothers and sisters, and I therefore felt that complaining about a fellow member of the congregation would go against his teaching. As a Ministerial Servant and now an Elder, he was in a position of authority and had been awarded that title as a result of his being considered to be a trusted member of the congregation and capable of providing advice and guidance. It would have been very difficult to question his actions without facing repercussions. I did not know at the time that, if any ordinary member of the congregation had behaved in this way, it would have been considered to be inappropriate.”

38 Mark and Mary had a volatile marriage. Mark took his anger and frustration out on Mary. The couple had rows. Mary sometimes called Mr and Mrs B in the early hours of the morning to say that he had smashed up the house or had been aggressive towards Mary or the children. Mark had started to drink heavily. At around this time, Mark started to flirt with Mrs B. He would make sexual innuendos, hold her hand and give her kisses on the lips and compliments.

39 Mrs B was so concerned about Mark’s behaviour that she suggested to Mary that the two of them speak to Mark’s father, Tony Sewell, who was also an elder. Without Mark’s knowledge, Mrs B and Mary arranged to meet Tony at his home towards the end of 1989. Tony explained that Mark was suffering from depression and that he needed love and support. Mrs B told Tony that Mark would listen to her, but not to Mary. Tony told Mrs B not to worry and that this was a normal part of depression. He requested that Mr and Mrs B provide Mark with extra support. Mrs B says:

“He made us feel that this was the right thing to do as good Jehovah’s Witnesses.

“I was reluctant to spend more time with Mark because he made me feel uncomfortable. However, if an elder told me, as a publisher to do something, then it was my duty to do so. Tony had decided that this was the course of action to be taken and his request was really an instruction from an Elder. I was required by my faith and the congregation to carry out that instruction and to provide Mark with the extra support that he was deemed to require whatever I felt about it. Although there is no hierarchy of Elders, Tony was a highly respected Elder and had been an Elder for many years.

“The meeting between Tony, Mary and myself ended with Tony saying a prayer for us to help Mark and calling upon Jehovah to help us.”

40 Mrs B says that she would not have acceded to the request if it had not been made by an elder. She followed Tony’s advice, carried on supporting Mark and continued to report back to Tony about Mark’s behaviour.

41 Mark continued to act inappropriately towards Mrs B. On one occasion he came round to her house and asked her to run away with him. Mrs B continued to find it inappropriate that Mark would confide in her rather than Mary. On one occasion Tony brought Mary to Mr and Mrs B’s house and she remained there for four days because it was not safe for her to return home. Eventually, Mark’s behaviour became so unbearable that Mr and Mrs B tried to cut off contact with him and Mary, despite Tony’s instructions. When they did this Mark came to their house at 2am, crying that he could not handle not being friends with them. Mrs B said:

“My husband and I found that we had got to the stage where we could not remove ourselves from the situation. Mark was an Elder in the congregation, and his father, Tony, had directed us to support Mark. We had no choice but to maintain the friendship. Looking back, I am sure that, had it not been for the fact that Mark was an Elder and I had received an instruction from another Elder, his father, our friendship with Mark and Mary would have come to an end well before what I describe below happened. Indeed, this situation was so difficult for us that it was causing problems in my relationship with my husband.”

42 The circumstances of the attack itself are not in dispute. It is necessary, however, to describe those circumstances briefly. On 30 April 1990, when Mrs B was 29 years old, she, Mr B,

Mark and Mary were taking part in auxiliary pioneering in Cowbridge, South Wales. They all went to a local pub for lunch. Mark drank beer and wine. He argued with Mary and she threw a glass of whisky over him. Mark stormed off. Mr B went to look for him and found him outside with a card from a local solicitor's office, saying that he wanted to divorce Mary. Mr B told him that would not be possible as divorce is only permitted within the Jehovah's Witness community on specific grounds, which include adultery. Mark said that he would convince Mary that that ground was made out. Later that afternoon, Mr and Mrs B and Mark and Mary picked up their respective children and returned to Mark and Mary's house. The children were upstairs playing. Mark went into a back room. Mrs B says:

"Mark went into the back room. The children were on the third floor of the house playing. My husband, Mary and I sat in the front room talking about what we were going to do about Mark. As he had previously confided in me about his troubles and it was I who had been given that role, I decided that I should go to speak to Mark to try to convince him that he should go to the Elders about his depression."

43 Mark was drunk and upset. A conversation ensued during which Mark pushed Mrs B to the floor, held her down, pushed up her skirt, ripped off her underwear and raped her. The penetration lasted for about 20–30 seconds, during which he ejaculated.

44 After they got home, Mrs B told Mr B what had happened. She says:

"He reacted by saying 'I knew it' and told me about what Mark had said in Cowbridge about wanting to give Mary a reason for them to divorce. I remember him saying to me that 'half of me wants to go round and beat him ... but the other half of me says I have to forgive my brother'."

45 A few days later, there was a planned barbecue at the Sewells' home. Mrs B confronted Mark about what had happened. Mark begged Mrs B for her forgiveness. Mrs B's evidence was as follows:

"Part of the teachings of Jehovah's Witnesses is to forgive one's brother if they are truly repentant. At the time, I believed that Mark's pleas for forgiveness meant that he was truly repentant because he seemed so plausible and so genuine. I said to him that I wouldn't take the matter any further but that he shouldn't ever come near me again. He said that he would do whatever it takes, and we left it at that.

"I felt that my only option was to forgive Mark. It was in part due to these teachings that I did not feel compelled to report Mark to the Body of Elders. Although I know that this is not rational, I was absolutely terrified that, by my actions, I felt that I had brought shame on Jehovah's name and the others would find out. I was very worried about how that would affect my family and also Mary.

"I also felt shame and guilt. I also felt a continued pressure to continue to support Mark due to his position in the complication as Elder as well as his father's earlier request. The position that both Mark and his father held within the congregation also made me feel that I was unlikely to be believed if I choose to report Mark to the Body of Elders."

46 In May 1990, Mr and Mrs B and Mark and Mary went together on a family holiday to Portugal. The holiday had been booked before the rape occurred. Mrs B says:

"Obviously the last thing I wanted to do was to go on the trip with them, but my children were looking forward to it and I could not think of an adequate excuse to provide to Mary as to why we would not want to go and I had told Mark that I had forgiven him.

"I didn't want to disappoint my children and the honour associated with spending time with an Elder's family made it difficult for me to avoid socialising with Mark and Mary and their family.

"I was also aware of the continued instruction of Tony to support Mark and Mary, even though my fear of Mark increased. Given the position of an elder that both Tony and Mark held, I felt that I was unable to deny the request to continue to provide

support to Mark and Mary although my husband and I were really struggling with this now.”

On the holiday, there was an incident in which Mark ripped off Mrs B’s bikini top in the pool. This, she says, “brought back the horror of what he had done to me”.

47 Later that year, Mr and Mrs B booked another holiday, to Greece, but Mark found out about it and he and Mary ended up coming too.

48 In 1991, there was an occasion on which CXC’s parents had asked a Jehovah’s Witness neighbour to look after CXC while they travelled to a funeral. The neighbour called Mrs B because CXC had gone missing. Mrs B went to look for CXC and found her wandering around the train station, weepy and traumatised, saying that she wanted to run away to London. Mrs B convinced her to come back to her house. Because she was unable to contact CXC’s father, she telephoned Mark, who was also at the funeral and had a mobile telephone in his car. Later that evening, CXC disclosed to Mrs B that Mark had been sexually abusing her. At about 2am Mark arrived at Mr and Mrs B’s house and demanded to take CXC home. Mrs B told CXC not to go downstairs but CXC replied that things would only get worse if she did not go. She ended up going downstairs and going home with Mark.

49 Mrs B says:

“We spoke to Mark the next day. He told us he could do what he liked because he was an elder and that he was not answerable to us. He said that CXC needed to be disciplined because she had been smoking and that whatever she might have said would be lies.”

50 It was at this point that Mrs B decided that she would have to inform the other elders about what Mark had done. She telephoned Mark to tell him that she was going to report him to the elders. He came to her house and insisted that nothing had happened between him and Mrs B. Mary soon called and threatened Mr B saying that if Mrs B went to the elders she would say that she and Mr B were having an affair. None the less, Mrs B told CXC’s father—also an elder—what had happened to her.

51 Mrs B says that, once she had reported the matter, the task of investigating her complaint was assigned to three elders from the Cardiff and Penarth congregations. These were David Newman, the presiding Overseer of the Penarth Congregation, and Eddie Lee and Arthur Taylor, senior elders from Cardiff. Mrs B says that she was interviewed by these elders at her home. They took notes. Mrs B describes the investigation as follows:

“The process was extremely painful and humiliating for me to go through. I was asked explicit and inappropriate questions during the interview, including how widely I’d opened my legs when Mark had raped me. They told me that it was very important that they knew whether my legs were open wide during the rape and that they had all the details. I got hot and flustered. I told him I didn’t take a mental note of how far apart my legs were and told them all I could say was that they were somewhere in the middle. I felt very uncomfortable and I may have cried.”

52 The matter was then sent to a judicial committee, comprised of the same three elders and Michael Jones, of the Barry Congregation. This committee met at the Kingdom Hall. Mrs B says:

“We arrived at the Kingdom Hall and we were put in one of the rooms that they had in the back. Mark and Mary were in another room. Then they called my husband and me into a room and also called Mark and Mary in at the same time. We were all sitting in chairs in this room. David Newman started the meeting by saying a prayer, a bit like a swearing on the Bible, and said that they wanted to sort the situation out and wanted a conclusion.

“I couldn’t look at Mark and Mary so I sat the furthest away. Once again, I was questioned extensively and forced to relive the experience of the rape. They fired questions at me, and then would turn to Mark and say, ‘How do you answer?’ They would ask Mary the same thing. Mary did most of the talking. She said that what I was saying couldn’t be true because Mark was impotent when he was drunk. Mark said that it couldn’t have been true because I had said that my legs were in a closed position and that he had tried to penetrate Mary when her legs were in this position and had been unable to do so.

“To my horror, Mark denied all the allegations. His response to my allegations was that he couldn’t remember what had happened because he was drunk. Mary also denied the allegations. Mark and Mary accused me of causing the difficulties in their marriage. They admitted that they were having marital difficulties but said that I had taken advantage of this to try to get close to Mark.”

53 The result of the judicial committee’s deliberations was made known about a week later. Mrs B thinks that David Newman and the other two elders came to her home to communicate the outcome to her in person. She describes the conversation as follows:

“I think they came and visited me at home. Incredible as it may sound, I think David Newman said to me that this was a classic case of ‘wife swapping’. The committee reached this decision because it was Mark’s word against mine. It was necessary for there to be two adult witnesses to corroborate an allegation. This test was not met because Mark had denied what happened and there was no one else there to see it. This was also the case with CXC. She was not considered to be a witness at all because she was a minor. Furthermore, I was instructed not to tell anyone else about the abuse and that I ought to move congregation so that I no longer had to see Mark. My perception was that the Elders had concluded that Mark’s assault had been my fault.”

54 Mrs B was cross-examined robustly by Ms Foster. One prominent topic was the discrepancy between the version of events given in her witness statement for these proceedings and what she said to the police when interviewed by them in 2013. Some of the differences appeared to me to be immaterial. For example, in her police interview, she had said that she had got friendly with Mark Sewell “about two to three years” after she joined the Jehovah’s Witnesses, whereas in her witness statement she says it was “four or five years later”. It is not clear to me that this was truly a discrepancy at all. (The police statement put the date as two to three years from 1985 or 1986, which may have been the date of Mrs B’s baptism; whereas the witness statement for these proceedings seems to put the date as four to five years from 1984, the date she first started going to Kingdom Hall.) Even if there were a discrepancy, it was not directly relevant to any of the disputed issues, nor in my view did it provide any basis for doubting Mrs B’s evidence on any of those issues.

55 Ms Foster suggested that, whereas her witness statement in these proceedings sought to emphasise the importance of Mark Sewell’s role as ministerial servant and then as elder as the cause of Mr and Mrs B’s friendship with him, that was not what she had said to the police in 2013. Again, I do not accept that any discrepancy between the accounts was significant. First, it must be borne in mind that the police interview was focusing on obtaining the evidence necessary to decide whether to prosecute Mark Sewell for raping Mrs B. It would have been of little concern to the officers to probe the precise circumstances in which Mrs B and Mark Sewell became friendly. Secondly, Mrs B did in fact mention key aspects of the account she now gives in her police interview. Just before 11:24:37, she said:

“Now though I know it wasn’t, definitely wasn’t depression and he started displaying strange behaviour and, erm, his father who was an elder in the congregation asked me and my husband if we would help take care of the family and be supportive which we were happy to do cos they were our friends ...”

At 11:41:26, this exchange was recorded:

“[Mrs B]: Do you remember David Korash [sc Koresh] all those years ago that he was head of a sect in America and he slept with half of the congregation and even some of the men that he was friends with he slept with their wives? Mark was like that, he was such a charming, plausible, manipulative person and because he was an elder the things he said and did you almost accepted because of who he was and what he represented. It must be okay ...

“Police officer: Mmm.

“[Mrs B]: ... because he is an elder.”

At 11:45:01, Mrs B is recorded as saying this about the interview with elders in her house after she had reported the rape:

“They asked me some questions, erm, as to what lead up to it, why he did it and what he did and why didn’t I report it? And they also asked me what position my legs were in when Mark attacked me. I knew not why but I had to explain how far apart my legs were which I found excruciatingly embarrassing, erm, cos obviously my husband was sat next to me as well ...”

56 It was suggested to Mrs B that there was no scriptural requirement to befriend or to give unquestioning loyalty to ministerial servants or elders. Mrs B’s answers on this were clear. Jehovah’s Witnesses were taught that they should maintain “good association”; and ministerial servants and elders were regarded as morally virtuous. Jehovah’s Witnesses believed that they were appointed by Jehovah (God), so by obeying them one was obeying Jehovah. Mrs B had known cases where those who questioned elders had been labelled as insane or apostates.

57 Ms Foster put to Mrs B that her account differed from that given to Professor Maden, who had recorded in his report as follows: “She stressed throughout that her relationship with Mark and Mary was basically the same as it was with other witnesses and she and her husband were no closer to them than they were to other witnesses.” But that passage must be seen in context. The passage about the rape in Professor Maden’s report begins: “She says she was raped by an Elder in the Jehovah’s Witnesses in 1990.” Against that background, and bearing in mind that she recalls being told after the judicial committee hearing that this was a case of “wife swapping”, the passage on which Ms Foster relies is to my mind indicative of a desire to make clear that she had not been in any kind of intimate relationship with Mark Sewell at the time of the rape. It was not, in context, saying that his position as an elder had been unimportant.

58 Ms Foster put to Mrs B that, even if Tony Sewell had asked her to help, he had certainly not asked Mrs B to become Mark Sewell’s confidante. She replied that Tony Sewell had given the example of his wife, who had also had depression and mentioned that she had had a confidant, who was an elder (and therefore a man). Ms Foster suggested that this detail had not been mentioned by Mrs B in her witness statement and was an embellishment. In fact, however, it had been mentioned (at para 40, where the elder who acted as confidant to Tony Sewell’s wife was named). Mrs B accepted that Tony Sewell had never specifically said that she must be alone with Mark Sewell. She was well aware that, according to the teachings of Jehovah’s Witnesses, it was inappropriate for men and women who were neither married nor related to be together alone.

59 Ms Foster made much of the fact that, at the time of the trial, Mrs B had thought that the trip to Portugal had been before the rape, when in fact it was afterwards. This was an illustration of the way memory can re-order events that took place many years ago. But it did not, in my view, undermine the reliability of B’s evidence as to the reasons why she had become and remained a confidante of Mark Sewell.

60 Mrs B was adamant that the two elders who came to her house to interview her about the rape were Eddie Lee and Arthur Taylor, not Michael Jones and Brian Jones. They had not advised her to go to the police and she had not done so, because she was traumatised, ashamed, frightened and did not want to bring reproach upon Jehovah’s name. This was an important issue on which Mrs B’s evidence could not be reconciled with the defendants’. I shall return to it later.

61 Mrs B accepted that she had not been marched to the judicial committee hearing “with a gun to her head”, but she felt an obligation to the congregation and to CXC to confront Mark Sewell. She understood that the two-witness rule would apply, but thought that that rule would be satisfied given that there was an allegation from CXC. She was told, however, that CXC was a minor, so it was Mark Sewell’s word against hers.

62 With my permission, Ms Foster put to Mrs B a statement Mr B had made to police in 2013 in which he said that the judicial committee had “handled matters sensitively and professionally”. Mr Counsell had objected to the admission of that statement on the ground that it was hearsay. He submitted that Mr B could have been called; and that if he were not called, a hearsay notice should have been served. I rejected that submission, indicating that I would give my reasons for doing so in my judgment. I can do so briefly.

63 Mr B’s statement to the police is hearsay because it is made “otherwise than by a person while giving oral evidence in the proceedings” and is “tendered as evidence of the matters stated” (ie to show that the judicial committee proceedings were indeed conducted sensitively and professionally): see section 1(2)(a) of the Civil Evidence Act 1995 (“the 1995 Act”). This means that the requirement to give notice in section 2(1) of the 1995 Act applies, subject to section 2(2), which empowers the making of rules of court to provide for exceptions. CPR r 33.3(c) provides for an exception where the notice requirement is excluded by a practice direction. Paragraph 27.2 of CPR Practice Direction 32 provides that a document included in an agreed

hearing bundle is admissible as evidence of its contents unless the court orders otherwise or a party gives written notice of objection to the admissibility of particular documents. Ms Foster says that the effect of this is that the notice requirements in section 2(1) of the 1995 Act do not apply to a document included in an agreed hearing bundle. A similar submission was made to the Court of Appeal in *Charnock v Rowan* [2012] EWCA Civ 2; [2012] CP Rep 18. The editors of *Civil Procedure 2019* note at para 33.3.1 that the point was “considered but not decided there”. On my reading of the judgment in *Charnock v Rowan*, Sir Stephen Sedley (with whom Gross LJ and Mann J agreed) expressed strong views on the point, albeit he emphasised at para 16 that they were obiter. At para 24, he said that the argument that paragraph 27 of CPR Practice Direction 32 did not oust the notice requirement under section 2(1) of the 1995 Act “in addition to sitting ill with the practice direction, is an invitation to almost limitless and costly wrangling both before and at trial”. I respectfully agree. It is very common for a hearing bundle to contain a large number of documents containing hearsay. A requirement to serve a hearsay notice in respect of each and every such document would very significantly complicate preparations for trial. In my judgment, the plain purpose and effect of paragraph 27 of CPR Practice Direction 32 is to avoid that complication by disapplying the notice requirement in respect of documents in an agreed hearing bundle.

64 In this case, the document in question was disclosed by Mrs B. That fact does not, in and of itself, render the document admissible. However, when it was included by the claimant’s solicitors in a proposed hearing bundle and the bundle was agreed, it became admissible, by force of paragraph 27 of CPR Practice Direction 32 subject to any contrary ruling by the court or to written objection by Mrs B. If, as Mr Counsell submitted, the agreement to the hearing bundle was given in error and quickly rescinded, it would be appropriate to treat the rescission of the agreement as a notice of objection. Having considered the objection, I considered that it was appropriate to admit the document, but in considering the weight to be attached to it, the factors set out in section 4(2) of the 1995 Act were relevant. In this case, Mr B’s view about whether the proceedings had been conducted sensitively or professionally was of very limited weight given that: (i) unlike Mrs B, he had not been cross-examined and without cross-examination it was very difficult to know what he might have meant by “sensitively” or “professionally”; (ii) it had been open to the defendants to call him as a witness (see section 4(2)(a) of the 1995 Act); and (iii) the statement was made some 20 years after the event: section 4(2)(b) of the 1995 Act.

65 Taken as a whole, Mrs B’s answers to questions put in cross-examination made me more, not less, confident in the reliability of her evidence in its essential aspects.

FXC’s evidence

66 FXC was a Jehovah’s Witness from the age of five. He was baptised at the age of 15, appointed a ministerial servant in his 20s and an elder when he was about 30, in 1982 or 1983. He has served on many judicial committees and held oversight of departments at circuit and district level. He says he has “extensive knowledge of how the organisation works”.

67 In his witness statement, FXC says:

“Women and teenage girls are generally not allowed to be alone in the presence of men without someone else being present. This rule is intended to stop inappropriate friendships and behaviour from forming. Ministerial Servants and Elders are also expected to speak with women and teenage girls in the presence of another person. However, because Elders are trusted members of the congregation, there are occasions when they are permitted to do this. For example, when preparing for baptism women and girls have to attend three ‘question and answer’ sessions alone with an elder to ensure that they are ready for baptism. Elders may also pick female members up and take them out on field service with them. On these occasions they will be alone with the elder in his car. Congregation members would be more likely to allow their female family members to do this because the male that they would be alone with was an Elder. The organisation stress that all other relationships and loyalties must be subservient, including family members who do not hold to the faith.”

68 FXC met Mark Sewell when he (FXC) joined the Barry Congregation in 1973. He notes that Mark’s family was “prominent within the congregation” because his father was an elder and his brother Glynn a ministerial servant, later becoming an elder. Mark married FXC’s sister Mary in the early 1980s. FXC became close to Mark. He says:

“I would see Mark several times a week. I would see him about three times a week at the Kingdom Hall and several times either through work or socially.

“Our association with Mark Sewell was so frequently because of the edict of faith that we were bound by. As Jehovah’s Witnesses were only encouraged to associate with folks who were ‘good association’, spending time with an approved ministerial servant or elder and their family was looked upon as a good decision. In fact, if a Jehovah’s Witness were found to be in ‘bad association’, they could be chastised and disciplined, or even removed from the congregation. I was glad my daughters were seen around men who had a good reputation in the faith, both socially and especially at faith-related activities. In fact, [CXC’s] association with the Sewell family was primarily for Jehovah’s Witness events. We would also see each other once a week and do some work together because both Mark and I ran cleaning companies.”

69 FXC describes Mark as always being “tactile” with women. He would greet them by kissing them on the lips. He was “hands on” with CXC. FXC says: “I now feel his excessive tactile behaviour was a means to see how far he could go with inappropriate touching.” CXC regularly stayed at the Sewells’ home, from where she would participate in Jehovah’s Witness activities including preaching, attending meetings at the Kingdom Hall and Bible study. The latter would take place at the homes of approved members. FXC says: “The Sewell house was an ‘approved’ venue by the Barry Elders.”

70 CXC disclosed to FXC that Mark had been sexually abusing her. It was difficult to get her to say what had happened, so FXC encouraged her to write it down. FXC and his wife, together with CXC, went to confront Mark and Mary with the allegations. FXC says: “This was simply fulfilling the obligation to go see the individual first, which Jehovah’s Witnesses say must happen.” Mark and Mary denied the allegation. FXC then notified the body of elders. The elders wrote a letter detailing the allegations to “Bethel”, the Head Office of the Jehovah’s Witnesses’ Britain branch in London. Bethel wrote back saying that the victim should consider going to the police or, if the victim did not want to, their parents should go to the police or the elders should search their consciences and consider whether they needed to go to the police.

71 Within a month of reporting CXC’s allegation, Mrs B approached FXC and asked to speak to him. FXC went to Mr and Mrs B’s house. Shortly after he arrived, Tony Sewell also arrived. Mrs B told the two of them that she had been raped by Mark. Tony told her that, now she had told him and FXC about it she could forget about it. It would be dealt with. Tony then spoke to FXC on his own and tried to convince him that it was not necessary to take the matter further. FXC did not agree and went to the Presiding Overseer, Tom Brown. Tony tried to persuade him that the matter should be handled locally.

72 Meanwhile, a committee consisting of Brian Jones and Michael Jones had been set up to investigate CXC’s allegations. CXC and FXC were invited to a meeting with Mark and Mary at the Kingdom Hall. CXC read out what she had written down. FXC says:

“The practice of having the injured party face the accused and put to them the allegations is a formal Jehovah’s Witness procedure. This procedure was not questioned and was seen as a Biblical command, so coming from God. It was never questioned. Even though this experience had devastating effects for my young teenage daughter, this procedure had to be followed in order to handle matters in accordance with Jehovah’s Witness teachings.”

73 FXC describes what happened at the meeting as follows:

“Mark denied all the allegations but Mary did most of the talking. He had used his position as an elder to persuade and assign two ministerial servants to get evidence against CXC. Without any other authorisation from the body of Elders, Glynn Sewell (Mark’s brother) and Stephen Jones (Mark’s employee) had visited two teenage boys and got them to sign some paper saying that CXC could not be trusted, was a liar and had, herself, written a ‘love letter’ to one of the boys. I cannot remember the details but it was designed to undermine what CXC was now saying and prove that she could not be trusted. I do remember being disgusted at how these two men had fallen for such a low, devious and underhand act.”

FXC's evidence is that the investigating elders were unimpressed with this and found Mark arrogant. However, they reported Mark's denial to the other elders.

74 CXC's allegation was referred to a special committee consisting of seven elders. These were David Newman, Arthur Taylor, Eddie Lee and Alan Whitby (all from South Wales) and David Algar, Anthony Kendall and Edmund Kerr (who came from further away). The committee spent seven days in Barry, interviewing congregation members. On the final day of their visit the elders gave their judgment at Penarth Kingdom Hall. Tony Sewell was removed as an elder. Tom Brown was removed as presiding overseer. Advice was given to the other individual elders involved. The local elders then formed a judicial committee to deal with both CXC's and Mrs B's allegations against Mark Sewell.

75 FXC was not present at the judicial committee hearing concerning Mrs B's allegation. His understanding, however, is that Mark was removed as an elder not because he had raped Mrs B (this allegation was found not proven), but because he had admitted to being drunk. As to CXC's allegations, Mark continued to deny that he had sexually abused her. FXC says:

"Jehovah's Witnesses require two witnesses to an event in order for it to be verified. They said that there were not 'two witnesses' to the incident, so no further action could be taken. I was surprised at this because they were already aware of BXB's allegation but they said that CXC could not be a witness because she was a child."

76 Having been removed as an elder, Mark Sewell was subsequently disfellowshipped. FXC says he was told that this was because of his "bad attitude". Mark and Tony then started attending meetings at the Kingdom Hall in Llantwit Major, about 12 miles west of Barry. He was reinstated as a member about three years later.

77 At the trial in 2014, CXC gave evidence. She chose to do so without a screen. FXC describes the effect of the abuse and of the trial on CXC as devastating. It is not necessary to go into the details of that, since CXC's claim is not now before me.

78 Like Mrs B, FXC was cross-examined robustly. It was put to him that he was now a campaigner on the issue of child abuse in the community of Jehovah's Witnesses. He accepted that, but denied that he was hostile to Jehovah's Witnesses in general. He still had friends who were Jehovah's Witnesses. The careful and balanced answers he gave in cross-examination increased my confidence in the reliability of his evidence as a whole.

79 FXC was clear that Jehovah's Witnesses are encouraged to maintain "good association" and that this would include associating with pioneers, ministerial servants, or elders. It was true, he accepted, that Jehovah's Witnesses believe that all are equal in the eyes of Jehovah (God). But elders in particular had the role of giving spiritual advice and guidance to others. This advice and guidance might concern any aspect of their lives. By way of example, elders might advise publishers that they were wearing the wrong dress, reading the wrong book or watching the wrong film. They might advise about those with whom it was appropriate to associate. For example, he and many other Jehovah's Witnesses ran window-cleaning businesses. It would be inappropriate to clean the windows of an Army camp (since Jehovah's Witnesses are opposed to militarism) or a shop that sold cigarettes (since Jehovah's Witnesses teach that smoking is sinful).

80 FXC's experience was that many people who are Jehovah's Witnesses do not report sexual abuse to the police until they leave, because they are keen to ensure that no reproach should fall on the name of Jehovah (God).

81 It was put to FXC that Michael Jones and Brian Jones had not been the elders appointed to investigate CXC's complaint. FXC was adamant that they had. He made the point that this is not something he could forget, having been present with his daughter when she had been required to explain how she had been sexually abused to two male elders in the presence of her abuser.

Brian Jones's evidence

82 Brian Jones remains a member of the Barry Congregation. He has been an elder for 30 years. He recalls that he and Michael Jones met first with Mrs B at Barry Kingdom Hall. Mr B attended, but did not take part in the discussion. Mrs B said that she had been asked by Tony Sewell to help Mark with his depression. Brian Jones says: "If Tony had asked [Mrs B] to help Mark in this way, he must have done so in his capacity as Mark's father, as the body of Elders did not sanction or approve any such arrangement." Brian Jones adds that, if Mrs B had refused to comply with Tony Sewell's request, there certainly would have been no sanction against her. He continues:

“Indeed, our religious beliefs expressly discourage a married man or woman from forming a close friendship with a member of the opposite sex to whom they are not married. This applies even more so in relation to elders, who are counselled never to be alone with a member of the opposite sex.”

83 By way of comment, Brian Jones says this:

“The forging of friendships and connections between Jehovah’s Witnesses is no different to the same situation in any community. In my experience as one of Jehovah’s Witnesses, individuals decide who they will personally befriend and with whom they will socialise in a congregation according to a diverse range of factors including common interests, shared experiences, culture, age and many other intangible factors. They do not normally choose to befriend someone just because they have a particular responsibility or privilege in the congregation (eg serving as a ministerial servant or elder).”

84 Brian Jones’s recollection was that, after hearing from Mrs B, he and Michael Jones met separately with Mark. He says:

“I seem to recall that Mark’s wife Mary may have sat in on the meeting with Mark but I cannot be sure. I recall that he said, ‘no comment’ to every question. The only thing he did say was that he had drunk too much alcohol on the day in question. We subsequently wrote a report about the matter and sent it to the Britain branch. I recall that the Britain branch replied quickly, perhaps within a week or two. I recall that we were directed to advise [Mrs B] of her right to report the matter to the police. Due to Mark Sewell’s confession of misusing alcohol, the Britain branch also directed that he be removed as an elder and an announcement to the Congregation was made to that effect.”

85 Brian Jones believes that he and Michael Jones visited Mrs B at her home and advised her of her right to report the matter to the police.

86 It was put to Brian Jones in cross-examination that he had confused the investigation in CXC’s case with that in Mrs B’s. He said that he would not have been asked to carry out the investigation into CXC’s case because he was related to her.

Michael Jones’s evidence

87 Michael Jones is a member of the Haverfordwest Congregation of Jehovah’s Witnesses. He has served as an elder for 25 years. He served as an elder in the Barry Congregation from 1991 to 1995. He recalls being told of allegations that CXC had been self-harming “around the latter part of 1992/early 1993” and that her allegations against Mark Sewell emerged after that. He “cannot remember much about the detail of the allegations” but recalls seeking advice from the Britain branch office of Jehovah’s Witnesses and being advised to inform CXC’s father of his and CXC’s right to report the matter to the police. He recalls that this was done, but that, at the time, the police took no further action.

88 Michael Jones recalls hearing from Tom Brown, the Presiding Overseer, of Mrs B’s allegation against Mark Sewell. He says this:

“We took advice from the Britain branch and we were advised to inform [Mrs B] of her absolute right to report the matter to the police. We also received a letter from the Britain branch almost immediately removing Mark as an elder, given that he admitted that he was drunk in the presence of a female. An announcement was made to the congregation that Mark Sewell was no longer serving as an elder. I believe this was in August 1993.

“As it was [Mrs B’s] word against Mark’s, we had no Scriptural grounds to form a judicial committee at that point on the allegation of rape. An ecclesiastical judicial committee, normally comprising three elders, is formed when there is Scriptural evidence that one of Jehovah’s Witnesses has committed serious sin. In spiritually investigating serious sin, the elders apply the Bible’s rule of evidence which requires ‘the testimony of two witnesses’ (Deuteronomy 19:15; Matthew 18:16; 1 Timothy 5:19). This means, in the absence of a confession, the allegation must be corroborated by a second witness before the congregation can take internal judicial action. An allegation

may also be corroborated by a second witness to a separate allegation of a similar nature against the same accused person. The purpose of the judicial committee is to determine whether the sinner should remain one of Jehovah's Witnesses."

89 Michael Jones says that the advice was to tell Mrs B that she could present her allegation in Mark's presence if she wanted, but that she did not have to do so. "In such a scenario", he says, "a wrongdoer's conscience may move him to confess his sin". Brian Jones and Michael Jones were assigned to handle the matter. They met Mrs B and informed her of her right to go to the police. She did not wish to do that. They told her she could confront Mark if she wished, which she did. Michael Jones and Brian Jones therefore arranged a meeting between Mrs B and Mark and Mary. He believes that Mr B declined to attend. He recalls Mrs B describing the rape and Mark adamantly denying it, though admitting that he had been drunk. Michael Jones and Brian Jones reported their findings to the body of elders and he recalls they also wrote a report about the matter and sent it to the Britain branch.

90 A judicial committee consisting of Arthur Taylor, David Newman and Eddie Lee was convened. From that point on, matters relating to Mark Sewell were taken out of his hands. He recalls, however, that some time later, Mark Sewell was disfellowshipped. He does not recall being told the reason at the time, but was later shown a "Notice of disfellowshipping or disassociation", which he exhibits, recording that Mark Sewell was disfellowshipped for "brazen conduct". This refers to a range of misconduct, often including misconduct of a sexual nature.

91 In cross-examination, it was put to Michael Jones that he had mixed up the investigation in CXC's case with the investigation in Mrs B's case. His recollection was clear, however, that he and Brian Jones had indeed been assigned to investigate Mrs B's case. He distinctly remembered writing the report on that investigation.

Andrew Schofield's evidence

92 Andrew Schofield's evidence was directed to the organisational structure and teachings of Jehovah's Witnesses. It can be summarised as follows.

93 The organisational structure of Jehovah's Witnesses is modelled on first century Christianity as described in Scripture. In line with the precedent set in Acts 15, the Governing Body provide Bible-based instruction to over 8.5 million Jehovah's Witnesses in over 240 lands worldwide. There are around 90 branch offices worldwide and the activity of each is overseen by a Branch Committee. The Britain branch committee has offices in London. During the period relevant to this claim, the branch was divided into districts, overseen by a district overseer. Each district comprised approximately 12 circuits. A circuit comprised approximately 20 congregations and a circuit overseer (representing the branch office) visited each congregation for six days twice yearly.

94 Mr Schofield says:

"There is no clergy laity class distinction or paid clergy in our Christian community. The Bible teaches that there are no class distinctions in the Christian congregation, we are not to show favouritism and all are equal in God's sight (Galatians 3:28; James 2:9; Acts 10:34, 35). Jehovah's Witnesses call and view each other as spiritual 'brothers' and 'sisters'. No human is a 'leader' in the congregation—Matthew 23:8–10."

95 Baptism is a public declaration of one's dedication to God, whose name is Jehovah as revealed in the Bible. In order to be baptised, a person willingly undertakes a program of Bible study with one of Jehovah's witnesses. Mr Schofield says:

"Any obligation and individual feels once he is baptised as one of Jehovah's Witnesses arises from his knowledge and understanding of the Bible and his personal devotion to God. Jehovah's Witnesses are not under compulsion or obligation to any legal or natural person to engage in any particular religious activity. To the extent that Jehovah's Witnesses engage in such activities, they do so voluntarily out of love for God and neighbour in accordance with their personal knowledge and understanding of the Bible."

96 The Bible describes two groups of Christian men who have responsibilities to care for the congregation—"overseers" and "ministerial servants" (Philippians 1:1). Overseers are also known as "elders". During the relevant period, ministerial servants were recommended for appointment by the local body of elders in consultation with the circuit overseer when he made one of his biannual visits. The circuit overseer would, however, have to seek the approval of

the Britain branch before the appointment was confirmed. Ministerial servants assist the body of elders with routine organisational and physical tasks, including keeping the Kingdom Hall clean and tidy, arranging the platform and microphones, operating the sound system, organising and making available to the congregation literature, serving as attendance at meetings in the Kingdom Hall, assisting in emptying contribution boxes and in counting and keeping the books relating to donations, managing territory records to help co-ordinate ministry and other tasks to which they may be assigned from time to time by the elders. Ministerial servants could also be assigned other more responsible tasks by the elders, including assisting an elder in leading a congregation book study group, handling certain talks at mid-week congregation meetings or delivering 45-minute Bible-based talks at public meetings usually held at the weekend.

97 A body of Elders made up of mature spiritual men is carefully selected and approved for appointment based on scriptural qualification set out in 1 Timothy 3:1–7 and Titus 1:5–9. An elder will have been baptised for many years and will previously have served as a ministerial servant. During the period relevant to this claim, they were recommended for appointment by the body of elders in consultation with the circuit overseer. As with ministerial servants, the appointment required the approval of the Britain branch. The primary role of elders is to guide and protect the congregation spiritually, including taking the lead in evangelising and presiding over congregational meetings.

98 As to the authority and status of elders, Mr Schofield says:

“The teachings of Jehovah’s Witnesses do not require or even encourage individuals to follow instructions from an elder (or anyone else) that are not in harmony with Bible teachings and principles (Acts 5:29; Matthew 23:10). The teachings and practices of Jehovah’s Witnesses have never required that one act as a confidant to a member of the opposite sex to him if they are not related or married, and specifically caution a woman from associating alone with any man to whom she is not related or married.”

He adds: “When it comes to the ‘shepherding’ of a person of the opposite sex, elders have been specifically directed for many years to do so *only* in twos, *never* alone.” (Emphasis in original.)

99 Mr Schofield refers at this point to two articles in *Watchtower*. The first, published on 15 November 1991 and entitled “An Overseer Must Be ... Self-Controlled”, includes the following passage:

“Elders must be keenly alert to exercise self-control when it comes to their dealings with those of the opposite sex. It is inadvisable for an elder to make a shepherding call on a sister alone. The elder should be accompanied by another elder or a ministerial servant. Likely appreciating this problem, Paul counselled the elder Timothy: ‘Entreat ... older women as mothers, younger women as sisters with all chasteness’ (1 Timothy 5:1, 2). Some elders have been seen putting their hands on a sister as if with a fatherly gesture. But they could be deceiving themselves, for a romantic impulse instead of pure Christian brotherly affection could well be motivating such a gesture—Compare 1 Corinthians 7:1.”

The second article, published on 15 September 1989 and entitled “Elders Guard Your Trust”, says this:

“Sexual immorality is another pitfall to avoid. The world’s moral decay can influence even an elder if he does not resist the temptations used by Satan in his efforts to break the integrity of God’s people. (Compare Matthew 4:1–11; 6:9, 13.)”

Mr Schofield says that, while ministerial servants and elders have a measure of spiritual responsibility and authority in the congregation, the Bible teaches that “more than usual [is] demanded of [them]” (Luke 12:48, Hebrews 13:17, James 3:1).

100 The Bible teaches that some serious sins, such as sexual immorality (including rape and child sexual abuse), blasphemy, apostasy, idolatry and similar gross sins, require more than forgiveness from an offended individual (1 Corinthians 6:9, 10; Galatians 5:19–21). Because the spiritual and moral cleanness of the congregation is threatened, the Bible requires that such sins must be handled by the elders (1 Corinthians 5:6; James 5:14, 15). Individuals may approach the elders to confess their own sin or to report what they know regarding the wrongdoing of others (Leviticus 5:1; James 5:6). Where such a report is made, elders will be appointed to look into the

matter. At this point Mr Schofield referred to a document outlining training for elders delivered in the period September 1998 to February 1999. It instructs elders in how to deal with allegations of child sexual abuse and says this:

“When is it not advisable for the witness to confront the accused alone? What should the elders do? (When he is a party to the wrongdoing, as a victim, or is extremely timid. Children who are victims of molestation should not be required to confront the accused. In some cases two elders or an elder and the witness can confront the accused.)”

101 Mr Schofield explained that in conducting the spiritual investigation of an allegation of serious sin, the elders apply the Bible’s rule of evidence which requires “the testimony of two witnesses” (Deuteronomy 19:5; Matthew 18:16; 1 Timothy 5:19). This means that, in the absence of a confession, the allegation must be corroborated by a second witness for the congregation to take internal ecclesiastical judicial action. For these purposes, it is sufficient if the second witness attests to a separate allegation of a similar nature against the same accused person. If an accusation is evidenced in this way, the body of elders would assign a congregation judicial committee of at least three elders to handle the matter. Mr Schofield says:

“The decision of the body of elders as to whether an accusation is Scripturally established does not in any way affect the absolute right of any person within or outside the congregation to report the matter to the appropriate statutory authorities, including the police. Elders are advised to make this clear to any person who comes to them with allegations of child abuse.

“It is important to understand that these internal congregation Bible-based procedures focus on the wrongdoer’s relationship with God and the wrongdoer’s congregation status as one of Jehovah’s witnesses. They are not a substitute or replacement for the criminal investigation and prosecution processes. Jehovah’s Witnesses do not shield child abuses from the consequences of their sins. On the contrary, Jehovah’s Witnesses acknowledge and accept the authority of the state to investigate and prosecute any alleged crimes (Romans 13:1–4). In cases where the police investigate a crime that is also a Scriptural sin warranting congregation action, elders are usually directed to await the outcome of the criminal proceedings before concluding their spiritual investigation. This may include the wrongdoer not been given any complication responsibilities until the criminal matter is resolved. This was the advice to elders at the material time.”

102 At this point, reference was made to a letter sent by the Britain branch to all bodies of elders in Britain on 30 January 1992. Under the heading “Child Abuse”, it said:

“As members of the community in which Caesar still acts as God’s minister and hence still has a certain authority, all in the Christian congregation would want to consider their personal and moral responsibility to alert the appropriate authorities in cases where there has been committed or there exists a risk that there might be committed a serious criminal offence of this type ... In child abuse cases such authorities might include the family doctor, the Social Services, the NSPCC, or the police.”

Under the heading “Crimes and Criminal Investigations”, it says:

“In some cases the elders will form judicial committees to handle alleged wrongdoing that also could constitute a violation of Caesar’s criminal laws (eg theft, assault, etc). It is natural that the Christian congregation should find such situations to be distressing. There is clearly a need to balance the principle of ‘rendering Caesar’s things to Caesar’ (Matthew 22:21) with those concerning the spiritual cleanness of the congregation such as one Corinthians 5:11–5:13.”

The document goes on to advise that cases of this type should be considered at two levels. First, it is said secular courts view it is their prerogative to examine criminal charges and advice is given that the elders should not generally deal with matters while criminal investigations are ongoing. Second, elders are advised that when an alleged wrongdoing has made a confession

the congregation judicial committee may proceed on the basis of the confession without waiting for the criminal proceedings to be completed.

103 Mr Schofield explains that in every situation where wrongdoing is established, the primary objective of the judicial committee is to try to restore the wrongdoer to spiritual health. It is necessary for the committee to decide whether the wrongdoer is scripturally repentant. If so he will remain one of Jehovah's Witnesses, though restrictions may be placed on his activity within the congregation. If he is not scripturally repentant the wrongdoer will be disfellowshipped (ie expelled) to safeguard the moral and spiritual cleanness and good name of the congregation. A wrongdoer who is disfellowshipped in this way will be shunned by faithful congregants unless and until he demonstrates genuine repentance, applies for reinstatement and is accepted back into the congregation (1 Corinthians 5:5, 11–13).

104 In cross-examination, Mr Schofield was asked in particular about the status and position of elders. He said that elders were appointed to shepherd the congregation. They could administer warnings if a member of the congregation was straying from the teachings of Jehovah. The role of elder was held in high regard both by the congregation and by those who held it. Elders should be examples to other members of the congregation.

105 Mr Counsell put to Mr Schofield an article from *Watchtower* published on 15 September 1989 entitled "Be Obedient to those Taking the Lead", which included these passages:

"1. Jehovah has provided overseers for his organisation in this 'time of the end' (Daniel 12:4). They take the lead in caring for sheeplike ones, and their supervision is refreshing (Isaiah 32:1, 2). Moreover, loving oversight by elders who treat God's flock with tenderness serves as a protection from Satan and this wicked system of things—Acts 20:28–30; 1 Peter 5:8; 1 John 5:19.

"2. But how do you view the elders? In your heart, do you say: 'I'll never go to another elder in this congregation if I have a problem, for I have no confidence in any of them'? If that is how you feel, could you be overemphasising their imperfections?"

"3. Since Christian undershepherds have been provided by the Great Shepherd, Jehovah God, how do you think he wants us to view them? Surely, God expects us to follow the Bible-based direction received through loving overseers under the supervision of the governing body of Jehovah's Witnesses. Then 'the Lord will be with the spirit we show', we will enjoy peace, and we will be built up spiritually—2 Timothy 4:22; compare Acts 9:31; 15:23–32.

"4. Paul urged: 'Remember those who are taking the lead among you, who have spoken the word of God to you, and as you contemplate how their conduct turns out imitate their faith' (Hebrews 13:7). Among the early Christians, the apostles primarily took the lead. Today, we can observe those making up the governing body of Jehovah's Witnesses, other anointed overseers, and men of the 'great crowd' who take the lead and manners (Revelation 7:9). Although we are not urged to imitate their voice quality, posture, or other human traits, we should be able to make our conduct turn out well by imitating their *faith*."

"6. Overseers have been spirit-appointed to care for the spiritual needs of the congregation (Acts 20:28). They see to it that the Kingdom message is preached in the territory of the local congregation. These Scripturally qualified men also provide spiritual direction in a loving manner. They exhort, console, and bear witness to their spiritual brothers and sisters, to the end that these might go on walking worthily of God (1 Thessalonians 2:7, 8, 11, 12). Even when someone takes a false step before he is aware of it, these men seek to readjust him 'in the spirit of mildness'—Galatians 6:1.

"7. Our hearts are motivated to co-operate with such loving overseers. This is fitting, as Paul wrote: 'Be obedient to those who are taking the lead among you and be submissive, for they are keeping watch over your souls as those who will render an account; that they may do this with joy and not with sighing, for this would be damaging to you' (Hebrews 13:7). How are we to understand this counsel?

"8. Paul urges us to obey those governing us spiritually. We are to 'be submissive', to yield to these undershepherds."

"9. Jehovah would be displeased if we failed to be obedient and submissive to Christian overseers. This would also prove burdensome to them and would harm us spiritually. If we were unco-operative, the elders might care for their duties with sighing, perhaps in a spirit of discouragement that could result in a loss of joy in our Christian activities. But our obedience and submissiveness promote godly conduct and strengthen our faith."

“12. We will be helped to obey and honour those taking the lead if we remember that God himself has provided the elders (Ephesians 4:7–13).”

“Why Appreciate Their Service?”

“13. In the world, there is a tendency to reject leadership. As one lecturer said: ‘The rising education level has improved the talent pool such that followers have become so critical that they are almost impossible to lead.’ But a spirit of independent thinking does not prevail in God’s organisation, and we have sound reasons for confidence in the men taking the lead among us. For instance, only those meeting Scriptural requirements are appointed as elders (1 Timothy 3:1–7). They are trained to be kind, loving, and helpful, yet firm in upholding Jehovah’s righteous standards. The elders adhere to Scriptural truth, ‘holding firmly to the faithful word, that they may be able to exhort by healthful teaching’ (Titus 1:5–9). Of course, we should not magnify their human imperfections, for all of us are imperfect (1 Kings 8:46; Romans 5:12). Instead of feeling frustrated by their limitations and treating their counsel lightly, let us appreciate and accept the Bible-based direction of the elders as coming from God.”

Mr Counsell also relied on an article from the website of Jehovah’s Witnesses, JW.org, to much the same effect.

106 Mr Schofield accepted that the *Watchtower* article was an accurate summary of the beliefs of Jehovah’s Witnesses. He emphasised, however, that members of the congregation were not required to give unquestioned obedience to elders. The obligation to be “submissive” applied only to those instructions which were in accordance with the scriptures. Members of the congregation were required to apply their own Bible-trained consciences before simply obeying the instruction or guidance of an elder. Submission, he said, was not the same as subjugation.

107 Mr Schofield was cross-examined about the letter sent by the Britain branch to all bodies of elders in Britain on 30 January 1990. The guidance in that letter about reporting to the secular authorities relates specifically to “child abuse”. Mr Schofield had not himself been an elder at that time so his evidence was necessarily indirect. None the less, he said that he had been told by a member of the Legal Department that all victims of sexual abuse should be directed to the relevant authorities if they so wished. I have no doubt about Mr Schofield’s honesty on this or any other matter. But I am unable to place any significant weight on the recollection of a member of the Legal Department who has not given evidence before me and whose recollection is not based on any document in evidence.

Issue 1: Limitation

The law

108 It is now settled that an action for deliberately inflicted personal injury, as well as for negligently inflicted injury, is subject to the primary limitation period in section 11 of the 1980 Act—ie three years from (a) the date on which the cause of action accrued or (b) the date of knowledge if later: *A v Hoare* [2008] UKHL 6; [2008] AC 844.

109 That means that the primary limitation period for the claim arising out of the rape (the vicarious liability claim) expired on 30 April 1993. The primary limitation period for the investigation claim expired some time later. The Claim Form in this case was issued on 8 June 2017, after the agreement of a three-month moratorium on limitation from 6 January 2017 to 6 April 2017. The result is that both the vicarious liability and the investigation claims are time-barred unless I conclude that it would be equitable to allow either or both of those claims to proceed under section 33 of the 1980 Act.

110 Section 33(1) requires the court to consider whether it would be equitable to extend time having regard to the degree to which the provisions of section 11 would prejudice the claimant and the degree to which any decision of the court to extend time would prejudice the defendant. Section 33(3) provides as follows:

“In acting under this section the court shall have regard to all the circumstances of the case and in particular to— (a) the length of, and the reasons for, the delay on the 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 section 11, by section 11A or (as the case may be) by section 12; (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 or 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 promptly 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 plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.”

111 In *A v Hoare*, Lord Hoffmann (with whom Lord Walker of Gessingthorpe, Lord Carswell and Lord Brown of Eaton-under-Heywood agreed) emphasised at para 49 the importance of taking into account the reasons for the delay and giving due weight to the question whether “the claimant was for practical purposes disabled from commencing proceedings by the psychological injuries which he had suffered”. Baroness Hale of Richmond agreed, saying at para 60:

“I fully support the more generous approach to the exercise of discretion which is adopted in particular by Lord Hoffmann. The reasons for the delay are highly relevant to that exercise, as of course at the prospect of a fair trial. A fair trial can be possible long after the event and sometimes the law has no choice. It is even possible to have a fair trial of criminal charges of historic sex abuse. Much will depend upon the circumstances of the particular case.”

112 In *Cain v Francis* [2008] EWCA Civ 1451; [2009] QB 754, Smith LJ (with whom Maurice Kay LJ and Sir Andrew Morritt C agreed) said at para 57: “it does not seem to me that the length of the delay can be, of itself, a deciding factor. It is whether the defendant has suffered any evidential or other forensic prejudice which should make the difference.”

113 In *B v Nugent Care Society (Practice Note)* [2009] EWCA Civ 827; [2010] 1 WLR 516, Lord Clarke MR (giving the judgment of the court) pointed out at paras 14–15 the substantial effect that the decision in *A v Hoare* had had on historic sexual abuse cases—particularly those arising from abuse in care homes:

“14. ... There are two critical points of distinction to which we have already referred. The first is that previously it was necessary for the evidence to cover the whole system being operated in the relevant home over a long period and for the court to consider whether there was a relevant breach of duty. Now no such analysis is required. In order to succeed the claimant has to show the following: (1) that he was assaulted, that is that the alleged abuse occurred; (2) that the defendant was vicariously responsible for the abuse; (3) that the abuse caused the alleged psychological or psychiatric damage; and (4) quantum.

“15. In our opinion, the difficulties of establishing those matters can be overstated. On the claimant’s side the fact of the abuse depends largely, if not entirely, upon the evidence of the claimant and must be set against any evidence available to the defendant. The effect of [*Lister v Hesley Hall Ltd* [2001] UKHL 22; [2002] 1 AC 215] is that in most cases, once abuse by an employee of the home is established, vicarious liability will follow.”

114 In this case, of course, vicarious liability does not simply “follow” from the fact of the rape. At paras 21–22, Lord Clarke MR said this:

“21. ... where a judge determines the section 33 application along with the substantive issues in the case he or she should take care not to determine the substantive issues, including liability, causation and quantum before determining the issue of limitation and, in particular, the effect of delay on the cogency of the evidence. To do otherwise would, as the court said, be to put the cart before the horse.

“22. That is, however, simply to emphasise the order in which the judge should determine the issues. When he or she is considering the cogency of the claimant’s case, the oral evidence may be extremely valuable because it may throw light both on the prejudice suffered by the defendant and on the extent to which the claimant was reasonably inhibited in commencing proceedings. Thus, if the claimant’s case is beset by inconsistencies and the claimant shows himself in evidence to be unreliable, the court may conclude that the delay is likely to prejudice the defendant in the way contemplated in *Nash v Eli Lilly & Co* [1993] 1 WLR 782, namely by being put to the

trouble and expense of successfully defending proceedings and then not being able to recover costs against impecunious claimants. In those circumstances, viewing the matter more broadly, as *A v Hoare* enjoins the courts to do, it may well be that it would not be equitable to allow the claimant to proceed. On the other hand, if the evidence of the claimant is compelling and cogent that the abuse occurred, and it is said that it was the abuse that inhibited him from commencing proceedings, that is surely a compelling point in favour of the claimant.”

115 The Court of Appeal returned to this passage in *JL v Bowen* [2017] EWCA Civ 82; [2017] PIQR P11. Burnett LJ (with whom Sir Ernest Ryder and Lewison LJ agreed) said this at para 26:

“The logical fallacy which Lord Clarke MR was concerned with in para 21 of the *Nugent Care Society* case and Auld LJ in para 74(vii) of the *Bryn Alyn* case was proceeding from a finding on the (necessarily partial) evidence heard that the claimant should succeed on the merits to the conclusion that it would be equitable to disapply the limitation period. That would be to overlook the possibility that, had the defendant been in a position to deploy evidence now lost to him, the outcome might have been different. The same logical fallacy is most unlikely to apply in the reverse situation, especially when the case depends upon the reliability of the claimant himself. That may be illustrated by a simple example. A claimant sues for personal injury ten years after an alleged accident and seeks an order to disapply the limitation period of three years. The defendant has lost its witnesses and records, but advances a defence that the accident did not occur. The judge concludes, without the lost evidence, that indeed the accident did not occur. The burden is on the claimant to prove that it would be equitable to disapply the limitation period having regard to the balance of prejudice. In those circumstances he would not be able to do so. There would be no purpose in extending the limitation period and it would not be equitable to do so. Similarly, a full exploration at trial of, for example, the claimant’s reasons for delay may enable the judge to reach firm conclusions which could have been no more than provisional had limitation been resolved as a preliminary issue.”

116 In *The Catholic Child Welfare Society (Diocese of Middlesbrough) v CD* [2018] EWCA Civ 2342; [2019] ELR 1, Lewison LJ (with whom Rafferty LJ agreed) noted that delay of itself does not preclude disapplication of the limitation period. Rather, “[what] is of importance is what prejudice the defendant has suffered by the delay”.

117 The question whether to extend time under section 33 must be considered for each cause of action separately: *Murray v Devenish (Sons of the Sacred Heart of Jesus)* [2018] EWHC 1895 (QB) at [73].

Mrs B’s submissions

118 For Mrs B, Mr Counsell submits that the mental health problems from which Mrs C has suffered for years—and which are now broadly accepted by the defendants’ expert Professor Maden—are at the heart of her inability to bring this claim earlier. She has suffered from lengthy episodes of depression and, more recently, PTSD as a result of the assault. The rape has significantly increased her vulnerability to further episodes of debilitating depression. The most serious decline in her mental health came in the run-up to and at the time of the criminal trial in 2014, in which she had to give evidence. Mr Counsell emphasised in particular her feelings of shame and guilt, which are of course irrational but all too common in the minds of survivors of sexual abuse. He submits that it is frequently the case that those who have suffered rape and other forms of sexual assault find it “excruciatingly painful to have to relive the events, over and over again, by reporting it to strangers such as the police, social services and lawyers”.

119 Mr Counsell submits that the evidence is not materially less cogent because of the passage of time such that a fair trial cannot take place, nor such that it can be said that the defendants will have suffered significant prejudice in defending this claim. So far as the vicarious liability claim is concerned, the potentially relevant evidence is likely to come from one of a small number of witnesses. Of those only Mrs B has given evidence, but any of the others, with the exception of Tony Sewell, could have been called. As to Tony Sewell, no attempt was made to contact him before his death. So far as the investigation claim is concerned, the evidence established that the records of the judicial committee hearing had been destroyed despite clear guidance that they should be preserved. It was not clear when the records had been destroyed but it was likely soon after the hearing itself. Of the eight witnesses identified by Mr Achonu,

four (FXC's father, Mr McGinty, Mr Barrie Jones and Mr Wood) would not have been able to give useful evidence anyway. As to the others, Tom Brown did not die until two years after the defendants had notice of the claim, but the defendants' solicitors had done nothing to approach him despite the fact that he was now said to be a "key witness".

120 Mr Counsell emphasises the following factors. First, the rape itself is admitted and the evidence includes the account given by Mrs B in her interview and statement to the police. If it had been helpful to them, the defendants could have asked for the transcript of the evidence she gave at trial to be included in the bundle. Second, as to the role and status of elders, there is the evidence of FXC and Mr Schofield. It would have been open to the defendants to call Mark or Mary Sewell. Third, the principal complaint made by Mrs B is not factually disputed. It is accepted that: (i) Mrs B was expected to attend to meetings at which she was questioned by elders about how the rape occurred; (ii) in the second meeting Mrs B had to be present in the same room as Mark and Mary Sewell; (iii) the two-witness rule applied in this case such that no action could be taken against Mark Sewell. Fourth, as to the instruction given by Tony Sewell to Mrs B to be a confidante to Mark, the defendants' own witness Brian Jones said that Mrs B had told him of this instruction at the time when he was tasked with investigating her allegation. Fifth, the defendants were able to call two elders who gave evidence that they were directly involved in the process. They have chosen not to adduce evidence from others also involved. Sixth, to the extent that it is said that the defendants are prejudiced in respect of quantum issues, Mrs B has provided very full medical and employment records. If it is difficult to interpret some of the entries made by her GP, the difficulty is no greater than it would have been a few months after the entries were made.

The defendants' submissions

121 As to the reasons for the delay, Ms Foster submits as follows. Mrs B was 29 years old at the time of the rape. She was advised of her right to report the matter at the time and there was no objective reason for her not to do so. She has not provided any adequate reason for not pursuing her claim at an earlier stage. There was no medical evidence to support the contention that she had not issued the claim earlier because of mental health difficulties. Apart from short lived bouts of anxiety and/or depression, she has suffered no ill health and has always been able to work. There are no psychological reasons why she should not have pursued her claim at an earlier stage. She only became involved in the criminal prosecution when she was approached by the police after CXE reported her abuse. Even after reporting the matter to the police in 2013, she waited more than three years to bring this action. Ms Foster relies on the judgment of Sir Thomas Bingham MR (with whom Beldam and Steyn LJ agreed) in *Dobbie v Medway Health Authority* [1994] 1 WLR 1234, 1244, for the proposition that it is not enough that the claimant has suffered grievous injuries which attract the sympathy of the court if she was culpable for the delay.

Conclusions on limitation

122 I consider first the length of the delay and the reasons for it. On any view, the delay is substantial—the claim form was issued more than 24 years after the expiry of the primary limitation period for the vicarious liability claim. It is for Mrs B to explain the delay. Mrs B's explanation must be taken in stages. At first, immediately after the rape, Mrs B says that she did not report it because she had been taught to forgive a brother who was truly repentant and because she was terrified of bringing shame on Jehovah's name. As to her state of mind after the investigation, she says this:

"In the weeks following my disclosure to the elders about the rape, and their holding me morally responsible for it, I found myself unable to leave the house. I avoided seeing people. The needlessly humiliating way in which the investigation had been conducted, its erroneous conclusion and the knowledge that it seemed that I was universally disbelieved, caused me to have suicidal thoughts and become afraid to leave my home for weeks on end.

"My sense of loneliness, betrayal and despair was heightened due to my reliance on the Jehovah's Witness community and by the fact that I felt scorned and let down by the Elders in whom I had placed so much of my trust.

I couldn't function, I couldn't eat or sleep. The worst part was that nobody could believe me. Maybe a year after the incident, I started going to see a psychiatric nurse, I would just sit there wringing my hands while I was talking to her. The experience of reporting Mark to the Elders and them protecting him reinforced my sense that no one would believe me and doubled the shame and guilt that I felt in relation to the rape."

Describing her reasons for not bringing the claim more quickly, Mrs B says:

“When later I did report the rape to the elders, I was so humiliated and upset by the way it was investigated and by their decision not to take any further action that I felt betrayed. I was told by the Elders not to tell anyone else about it. I obeyed this direction and did not go to the police, as I should have done. I did not think I would be believed anyway, just as everyone else appeared to disbelieve me. Instead I left the congregation and my family.”

123 Mrs B conceded in cross-examination that she had not been told, in terms, not to go to the police. There was evidence that she had been encouraged to go to the police by FXC and possibly by others, though I accept she also felt social pressure not to bring shame on the name of Jehovah by making a complaint to the police against Mark Sewell. But there was nothing to gainsay Mrs B's evidence about the effect on her of the elders' investigation and its outcome. I accept her evidence that she was humiliated and upset and, as a result, felt that she would not be believed if she reported the matter to the police. That was consistent with the medical evidence, which suggests that the investigation itself triggered at least one episode of depression and the trial in 2014 triggered another such episode, with additional symptoms of PTSD. The fact that, for large parts of the period between 1990 and today Mrs B suffered no diagnosed mental illness does not mean that the psychological effects of the rape and investigation were absent during those periods. Indeed, the absence of symptoms requiring specific medical intervention for substantial periods between the rape and the present day is likely to be explained by the fact that during those periods she managed to avoid any concentrated focus on the rape and the subsequent investigation.

124 I do not accept Ms Foster's submission that, in the absence of psychiatric evidence that she was disabled from bringing the claim, “she has not provided any reason for not pursuing her claim, other than that she didn't want to”. There is nothing in the statute, or the case law interpreting it, to suggest that the *only* valid reason for delay in a case of this kind is a diagnosed psychiatric disability covering the entire period of the delay. Section 33(3)(a) is framed in deliberately general terms. It invites focus on the “reasons” for the delay. Mrs B has given evidence of her reasons, which I accept as true: that following the elders' investigation Mrs B felt humiliated, upset and ashamed; and, as a result, she felt that she would not be believed if she raised the matter formally again. I see no reason why that should not count as a good reason for the purposes of the statute, to be taken into account alongside the other factors set out in section 33(3) in so far as they are relevant.

125 The key factor in this case is the effect of the delay on the cogency of the evidence. Here, it is important to consider the vicarious liability claim and the investigation claim separately. I start with the vicarious liability claim. In this case, unlike many civil cases in which sexual abuse is alleged, the fact of the rape is admitted. The principal area of dispute is about the extent to which Mark and Tony Sewell's positions as elders played a part in it. That is something on which the direct evidence could only ever come from a very few witnesses—Mrs B, Mr B, Mark, Mary and Tony Sewell. The defendants could have sought evidence from Mr B or from Mark or Mary Sewell. There is nothing to indicate that they have ever done so. Although Tony Sewell died in December 2015, there appears to have been no attempt to seek evidence from him before that. This was despite the fact that Tony Sewell's request that Mrs B act as Mark Sewell's confidante, and the significance of the fact that it came from an elder, had both featured in Mrs B's evidence in the criminal trial in 2014 and were both prominent in the account given in the letter before claim dated 9 March 2015; and despite the fact that Mr Achonu interviewed other potential witnesses in September 2015.

126 As to the investigation claim, it is common ground that Mrs B was expected to attend to meetings at which she was questioned by elders about how the rape occurred. So far as the first meeting with the investigating elders is concerned, the defendants have been able to call the two elders who they say undertook the investigation. The passage of time has of course had some impact on their ability to recall the precise details of what happened, but those said by the defendants to be the key participants in that initial meeting were available.

127 So far as the judicial committee hearing is concerned, certain witnesses who would have been available to the defendants if the claim had been brought within the primary limitation period are not now available. But that is only the starting point. FXC was right, in my judgment, to say that none of FXC's father, Hugh McGinty, Barrie Jones and John Wood was likely to have been in a position to give material evidence, because none was involved with the judicial committee hearing. David Newman (who chaired the committee) was interviewed before his death. Edward

Lee (another member of the committee) was interviewed twice. It was notable that the defendants did not apply to adduce Mr Achonu's notes of those interviews as hearsay evidence once Messrs Newman and Lee had died. Mr Achonu also disclosed in cross-examination that he had interviewed Arthur Taylor (the other committee member) in September 2015. He remains alive. I cannot speculate about what Messrs Newman, Lee and Taylor told Mr Achonu on those occasions because the defendants have maintained privilege over the notes of the interviews. That is their right but, having elected to do so, they are hardly in a good position to assert that they are materially prejudiced by the delay in bringing the proceedings.

128 Nor is this a case where it can be said that Mrs B's evidence, in its essentials, was so inconsistent as to be obviously unreliable (as in *JL's* case). To the extent that there were disputes about the accuracy of Mrs B's understanding of the religious obligations to which she was subject, the main evidence relevant to the resolution of these disputes came from the teaching materials and, in particular, articles in *Watchtower*, as explained by Mr Schofield. It is difficult to see how the evidence on these matters would have been significantly different had the claim been brought in the early 1990s. In so far as there have been difficulties interpreting some of the entries in Mrs B's medical notes, I agree with Mr Counsell that there is no reason to suppose that the task of interpreting these records would have been much easier even a year or two after the event.

129 In all the circumstances, I am unable to conclude that extending time under section 33 of the 1980 Act would cause significant prejudice to the defendants.

130 Ms Foster, for the defendants, does not suggest that the matters identified in section 33(3)(c) or (d) have any relevance here. As to section 33(3)(e), she submits that Mrs B failed to act promptly both before and after Mark Sewell's trial in 2014. As to the position before the criminal trial, the lack of promptness is explained by the effect the investigation had on Mrs B. As to the position after it, it must be borne in mind that the trial precipitated a significant psychiatric injury. The letter before claim was sent in March 2015. Given that enquiries were made of (some) potential witnesses in the light of that letter, I find it difficult to ascribe great significance to the delay between that letter and the issue of proceedings in 2017. It is not suggested that any separate issue arises under section 33(3)(f).

131 For all these reasons, I conclude for the purposes of section 33(1) of the 1980 Act that it would be equitable to allow the action to proceed in respect of both the vicarious liability claim and the investigation claim.

Issue 2: Are the defendants vicariously liable for the rape?

The law

132 In *Maga v Archbishop of Birmingham* [2010] EWCA Civ 256; [2010] 1 WLR 1441, the claimant had been sexually abused by a priest, Father Clonan, who ran discos for children. The claimant was not a Catholic. Lord Neuberger MR concluded that the Church was nonetheless vicariously liable for the abuse committed by the priest. He said:

"45. First, Father Clonan was normally dressed in clerical garb, and was so dressed, when he first met the claimant. At the very least, this factor at least sets the scene. A priest has a special role, which involves trust and responsibility in a more general way even than a teacher, a doctor, or a nurse. He is, in a sense, never off duty; thus, he will normally be dressed in 'uniform' in public and not just when at his place of work. So, too, he has a degree of general moral authority which no other role enjoys; hence the title of 'Father Chris', by which Father Clonan was habitually known. It was his employment as a priest by the archdiocese which enabled him, indeed was intended to enable him, to hold himself out as having such a role and such authority.

"46. Secondly, Father Clonan's functions as a priest included a duty to evangelise, or 'to bring the gospel to be known to other people ... Roman Catholics and non-Roman Catholics' to quote from the evidence of Monsignor Moran. As a result he was, as Monsignor Moran also accepted, 'obliged to befriend non-Roman Catholics', and 'to gain and be worthy of their trust'. Accordingly, he was ostensibly performing his duty as a priest employed by the archdiocese by getting to know the claimant. The fact that he was getting to know the claimant for nefarious reasons is not really in point, any more than it assisted the school in *Lister's case* [2002] 1 AC 215 that the warden may have been 'grooming' the claimant in that case: Father Clonan developed his relationship with the claimant under the cloak, or guise, of performing his pastoral duties.

"47. Thirdly, given that the claimant was aged 12 or 13 when his association with Father Clonan started, it is significant that Father Clonan was given a special responsibility for youth work at the church. It underlines the point that, when getting to know, when effectively 'grooming', the claimant, Father Clonan was ostensibly carrying out one of his specifically assigned functions in the church.

"48. Fourthly, Father Clonan was able to develop, and did develop, his relationship with the claimant by inviting him to a disco which was on church premises and which he organised as a priest at the church. Thus, the claimant was drawn in to the relationship through the medium of a church-organised function carried on in church premises by Father Clonan, a priest at the church. Fifthly, the relationship was further developed by Father Clonan getting the claimant to help clear up after discos. There is no evidence that the claimant was paid for this work, but it does appear that this work, on church premises at the request of a priest at the church, led to the claimant doing other work for Father Clonan. Thus, Father Clonan's role as priest in the archdiocese gave him the status and opportunity to draw the claimant further into his sexually abusive orbit by ostensibly respectable means connected with his employment as a priest at the church.

"49. It is true that much of the paid work which the claimant subsequently did for Father Clonan (washing his cars and cleaning his houses) was not connected with his priestly role, although it could, to an extent, be said to be ostensibly connected with the evangelising aspect of Father Clonan's job. Sixthly, however, it seems to me that the work which the claimant carried out in the presbytery is of some assistance to his case on vicarious liability. The fact that the claimant was working at the request of a priest on premises owned by the priest's archdiocese, adjoining the church where the priest worked, and which were lived in by the priest is relevant to the issue of vicarious liability for the first three reasons to which I have already referred, namely moral authority, evangelisation, and youth work.

"50. Seventhly, it appears clear that the first incident of sexual abuse, as well as a number of other incidents, against the claimant occurred in Father Clonan's room in the presbytery. It is not merely that the abuse started and continued in the employer's premises where the employee resided because of his employment. It is also that the employee's job, Father Clonan's priestly duty, involved spending time alone with individuals such as the claimant. As Monsignor Moran said, 'the normal course of a priest's work' would involve him '[spending] some time alone with people who were searching for truth'. Again, the fact that Father Clonan was spending time alone with the claimant for illegal sexual purposes is not the point: the opportunity to spend time alone with the claimant, especially in the presbytery, arose from Father Clonan's role as a priest employed as such by the archdiocese."

133 Longmore LJ agreed with Lord Neuberger MR, save that he would not have placed so much emphasis on the Church's duty to evangelise: para 91. He summarised his reasons at para 84:

"What is said in this present case is that while the church would accept responsibility for abuse of an altar boy and (probably) a member of the congregation, this case is different because the victim of Father Clonan's abuse came into his ambit in a non-church manner, by admiring his sporty Triumph car, by taking part in disco evenings to which all were welcome, clearing up afterwards and then doing jobs in the presbytery where Father Clonan lived with Father McTernan. But the progressive stages of intimacy were to my mind only possible because Father Clonan had the priestly status and authority which meant that no one would question his being alone with the claimant. It is this that provides the close connection between the abuse and what Father Clonan was authorised to do."

Smith LJ did not think there was any real difference between Lord Neuberger MR and Longmore LJ and agreed with both: para 96.

134 In *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 AC 1, Lord Phillips of Worth Matravers (with whom Baroness Hale, Lord Kerr of Tonaghmore, Lord Wilson and Lord Carnwath JJSC agreed) noted at para 21 that, when considering the imposition of vicarious liability, it was necessary to ask two inter-related questions:

(i) Is the relationship between the tortfeasor and the party said to be vicariously liable one that is capable of giving rise to vicarious liability?

(ii) Is there a sufficient connection between that relationship and the act or omission of the tortfeasor for vicarious liability to be imposed?

135 The first question depended on whether the relationship was sufficiently akin to that of employer/employee: paras 55 and 60. As to the second, Lord Phillips said this at paras 86–87:

“86. ... Vicarious liability is imposed where a defendant, whose relationship with the abuser put it in a position to use the abuser to carry on its business or to further its own interests, has done so in a manner which has created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse. The essential closeness of connection between the relationship between the defendant and the tortfeasor and the acts of abuse thus involves a strong causative link.

“87. These are the criteria that establish the necessary ‘close connection’ between relationship and abuse. I do not think that it is right to say that creation of risk is simply a policy consideration and not one of the criteria. Creation of risk is not enough, of itself, to give rise to vicarious liability for abuse but it is always likely to be an important element in the facts that give rise to such liability.”

136 In *A v Trustees of the Watch Tower Bible and Tract Society* (“*A v Watch Tower*) [2015] EWHC 1722 (QB), Globe J upheld a claim by a woman, A, against the Britain branch of the worldwide organisation of Jehovah’s Witness and against two congregations of which she had been a member. A had been sexually assaulted when a child between the ages of four and nine by an individual who had at the time been a ministerial servant in her congregation. She claimed, first, that the defendants were vicariously liable for the assaults and, second, that they were vicariously liable for the acts of the elders who had failed to take steps to protect her once they knew that he had sexually assaulted another child in the congregation. Both claims succeeded. (There is no analogue here of the second of these claims, because it is not suggested that the Barry Congregation knew or had reason to know that Mark Sewell might be a danger to Mrs B.)

137 Globe J held as follows at paras 11–19:

“11. The organisational structure of Jehovah’s Witnesses is modelled on first century Christianity as described in the bible. Jehovah’s Witnesses rely on passages from the bible to set their policy and religious practices. This distinguishes them from other religious denominations who use the bible to shape thinking, guide behaviour and teach lessons, but do not use it directly to set policy and religious practices. As a result, written documents, including worldwide monthly Jehovah’s Witness publications such as *Watchtower* and *Awake!*, that describe the policy and religious practices of Jehovah’s Witnesses, often quote biblical references.

“12. Worldwide Jehovah’s Witnesses now comprise about 8 million people who live in many different countries. There is a hierarchical organisational structure. A Governing Body co-ordinates organisational arrangements and doctrinal matters (Acts 15). The Governing Body supervises over 100 branch offices worldwide, each of which is supervised by a branch committee. One of the branch offices is the United Kingdom office based in London. The branch office has a branch committee. The committee oversees districts within the branch and assigns a district overseer to oversee each district. Within each district, there are about 12 circuits. A circuit overseer is assigned to oversee each circuit. Within each circuit, there are about 20 congregations. Within each congregation, there are elders, ministerial servants and members of the congregation.

“13. Notwithstanding its hierarchical organisational structure, in accordance with the model of the early Christian communities as described in the bible, there is no hierarchical structure of setting apart a clergy class from the laity. All members are expected to teach and can lead bible study. Congregational responsibilities are split between ‘overseers and ministerial servants’ (Philippians 1:1). Overseers are also referred to as elders. Generally, there are a number of elders and ministerial servants in each congregation. Members of the congregation are called ‘publishers’ and call each other ‘brother’ and ‘sister’ (Matthew 23:8–12).

“14. Elders are selected for appointment based on scriptural qualifications and will be mature spiritual men who have been baptised for many years, will be viewed as good examples in Christian living and previously will have served as ministerial servants

(1 Timothy 3:1–7 and Titus 1:5–9). However, elders are not considered to be closer to God or superior persons (Job 32:21, 22). They do not adopt an elevating title, such as Father, Reverend or Pastor, or take a superior position with reference to other members because there is only one leader who is Christ (Matthew 23:8–11). As such, they are not required to make any particular pledge or promise of obedience or loyalty to others within the governing structure of the organisation and there is therefore no relationship between an elder and a circuit overseer in the way that there is, for example, between a pastor and a bishop. They are not to be viewed as masters over others, but as fellow workers (Romans 12:8; 1 Corinthians 3:5; 4:1–2) who are appointed to shepherd the congregation of God (Acts 20:28). They therefore have no unique or advanced academic background and are volunteers of the congregation who are appointed to do the work of shepherding and overseeing spiritual matters (*Watchtower* 1 October 1977). Their primary role is to guide and protect the congregation spiritually, including taking the lead in evangelising and presiding over all types of congregational meetings.

“15. Ministerial servants are members of the congregation who are also selected for appointment based on scriptural qualifications which require them to be serious individuals who hold the secret of the faith with a clean conscience (Timothy 3:8–12; 12:13). They provide voluntary practical assistance to the elders and service to the congregation. They care for organisational and physical tasks that must be handled in the congregation. Tasks include keeping the Kingdom Hall clean and tidy, arranging the platform and microphones as circumstances require, manning and controlling the sound system and microphones for the use of the congregation, organising and making available literature for the congregation, serving as attendants at meetings, assisting in emptying collections boxes, keeping accounting records for the money, managing records to help to co-ordinate field service and any other tasks to which the elders may assign them from time to time (*The Organised Book: Organised to Accomplish Our Ministry*, chapter 6, p 55–59).

“16. There is evidence in the case that ministerial servants are not supposed to have any independent pastoral or shepherding role. The evidence comes from a number of past and present elders, particularly from Paul Gillies, who is a trustee of the first defendants, a member of the British branch committee and an overseer. It also comes from Dr Monica Applewhite who has written a report about the structure and governance of Jehovah’s Witnesses. She is an American expert in clinical social work whose previous experience and expertise in relation to Jehovah’s Witnesses is limited to being requested by the Watchtower Society to review three separate Jehovah’s Witness civil liability cases. Whether or not a ministerial servant is supposed to have any independent pastoral or shepherding role is an issue in the case. Specifically, it is an issue whether Peter Stewart was acting in any such role towards the claimant and her family at the material time. In so far as reliance is placed by the defendants upon *The Organised Book: Organised to Accomplish Our Ministry*, chapter 6, p 55–59, it is worthy of note that at p 56 it states ‘their work within the congregation involves non-teaching responsibilities’ (my emphasis) and at pp 58–59 it states that, ‘if there are not enough elders to conduct the congregational book studies, some of the more qualified ministerial servants are used as study conductors to care for assigned groups. They may be assigned to handle parts in the service meeting and the theocratic ministry school and to deliver public talks in the local congregation. Other privileges may be extended to some of the ministerial servants where there is particular need and they meet the requirements for the assignment’.

“17. Jehovah’s Witness meetings are generally held in a place of worship called ‘Kingdom Hall’. They are open to the public. Meetings are held twice each week, once on a weeknight and once on a Saturday or Sunday. On a weeknight, the programme consists of the congregational bible study, the theocratic ministry school and the field service meeting. In the 1980s and early 1990s, the congregational bible study was called the congregational book study and normally occurred in small groups, either at Kingdom Hall or in members’ private homes. The format for that activity was a one hour question and answer discussion of a bible topic using a printed publication of Jehovah’s Witnesses. The theocratic ministry school includes talks from the elders with contributions from members about various bible readings. The field service meeting relates to house to house activities. At a weekend, the programme consists of the public meeting and the *Watchtower* study. The *Watchtower* study is a one hour

question and answer discussion of a bible subject using an article in the *Watchtower* magazine. Generally, an elder takes the lead in teaching at congregational meetings. Members have the opportunity to give comments and to speak for a few minutes during the meetings. Families remain together. There are no separate arrangements for children. Parents are primarily responsible for their own children's secular and spiritual education (1 Timothy 5:8; Deuteronomy 6:6–7). There is no bar, though, on parents seeking additional help from others.

“18. Bible study is conducted in a variety of ways, including group bible study, family bible study, individual study and the door-to-door ministry of field service. Regular door-to-door ministry is expected to be the life of all Jehovah's Witnesses (Acts 20:20). It is not limited to religious leaders or a chosen few, but should be carried out by all (Acts 5:42). Members are instructed to go and make disciples of all people (Matthew 28:18–20). It is performed voluntarily and without pay (Matthew 10:7–10).

“19. Jehovah's Witnesses strive to live by a strict code of moral conduct based on the scriptures. However, when a member of the congregation is accused of committing a sin, the body of elders will assign two elders to investigate if there is evidence that the sin was committed. If there is, the body of elders will appoint a judicial committee of three or more elders to provide spiritual assistance to the person who committed the sin. If they find the individual genuinely repentant they will provide spiritual counsel and reproof to help avoid recurrence of the sin and may restrict the individual from full participation in meetings (Acts 26:20; *Watchtower*, 1976, 1 December 1981, 15 September 1994, 15 July 2007). There may be an announcement to the congregation during a regular scheduled meeting that the individual has been 'reproved', but the sin itself should not be mentioned (*Shepherd the Flock of God*, p 98; *Watchtower*, 1 December 1976). If the reproved individual is an elder or ministerial servant, he will be 'deleted', that is removed, from that position and an announcement of the deletion should also be made to the congregation at a meeting (*Shepherd the Flock of God*, p 42; *Watchtower*, 1 December 1976). If the judicial committee finds an individual is not repentant, he or she may be 'disfellowshipped', that is excommunicated, from the congregation. In that case, an announcement should be made to the congregation that the individual is no longer one of the Jehovah's Witnesses, but again the sin itself would not be mentioned (*Shepherd for The Flock of God*, p 101). The information received by and the deliberations of a judicial committee are supposed to remain confidential (Proverbs 25:9). Those who are disfellowshipped should be 'shunned' by all those who wish to have a good relationship with Jehovah (*Pay Attention to Yourselves and to All The Flock*, 1991 p 103).”

138 Globe J considered whether the defendants in that case (two local congregations of Jehovah's Witnesses) were vicariously liable for the abuse committed by their ministerial servant. On the question of control, he said this at para 63:

“it is apparent from the structure and governance of Jehovah's Witnesses as summarised above and from the evidence from numerous elders, particularly the lengthy evidence of Alan Orton, that being a Jehovah's Witness is a way of life for all members. It is not confined to the attendance at services. It affects every aspect of one's daily life. That is particularly so for those who become elders and ministerial servants. The strict code of moral conduct by which all members are expected to observe and apply to their day-to-day living is enforced by the existence of the judicial committee and its jurisdiction over all aspects of the life of a Jehovah's Witness.”

139 At para 64, Globe J made reference to the fact that allegations of serious sin could be brought before a judicial committee, which could lead to the offender being disfellowshipped. At para 65, he said: “The high level of control over all aspects of the life of a Jehovah's Witness is arguably a closer relationship than that to be found in an employer/employee relationship.”

140 At para 66, Globe J concluded that the organisational structure of Jehovah's Witnesses had “close similarities to the organisational structure of the Roman Catholic Church”. At para 67, he noted that the Britain branch of Jehovah's Witnesses was a charity dealing with large sums of money in pursuit of its religious aims and, at para 68, concluded that its system of organisation was analogous to that of the Catholic Church. He then considered the degree to which a ministerial servant was integrated into the organisational structure of Jehovah's Witnesses. At para 69, he said this:

“A ministerial servant may not be very far up the ladder of the structure but his role is one of great importance. The routine tasks performed by him are necessary and important tasks without which many of the activities of Jehovah’s Witnesses cannot be carried out. He deputises for an elder in the absence of an elder. I am satisfied that, in deputising, he assists the elders, not only with routine administrative tasks but also standing in on occasions with a teaching role, if necessary. One also cannot become an elder without first having been a ministerial servant. As such, a ministerial servant is part and parcel of the organisation and integral to it.”

141 At para 70, Globe J asked whether a ministerial servant could be considered more like an independent contractor than an employee. He answered that question in the negative, because:

“He is a fundamental part of the whole enterprise dedicating himself to the good of Jehovah’s Witnesses. His duties are solely to serve the interests of the organisation. He is constantly working for the good of the organisation of Jehovah’s Witnesses and not for himself.”

142 At para 74, Globe J concluded that, whatever test was applied, the relationship between the congregation and its ministerial servants was one capable in principle of giving rise to vicarious liability.

143 At paras 75–90, Globe J considered the second stage of the analysis: the connection between the acts of sexual abuse and the relationship. At para 77, he relied on *Maga*, which he said was

“illustrative of vicarious liability being established in a religious setting where an individual uses a religious position of responsibility as a means to gain access to children and, at the time of such abuse, he was not performing his specific religious role”.

144 At para 86, Globe J was “satisfied that Peter Stewart’s access to [the claimant’s mother] and, through her, to her children, was as a direct result of Peter Stewart’s known and established position as a ministerial servant”. At para 90, he said this:

“My conclusion in relation to the second stage is that, on the facts as I find them to be, the sexual abuse of the claimant by Peter Stewart was not as a result of the mere opportunity of his presence in the claimant’s company for reasons outside any role he was playing as a Jehovah’s Witness. Whether the abuse took place at or after book study at whoever’s home, on field service, at Kingdom Hall or at the Convention, he was ostensibly performing his duties as a Jehovah’s Witness ministerial servant. I am satisfied that the progressive acts of intimacy were only possible because he had the actual or ostensible status of a ministerial servant that meant no one who saw him questioned his being alone with the claimant. As in the cases of *Lister* and *Maga*, it is that that provides the close connection between the abuse and what he was authorised to do. In the words of Lord Steyn, they were ‘inextricably interwoven’ with the carrying out of his duties. In such circumstances, in my judgment, it is fair and just to hold the defendants to be vicariously liable for his acts.”

145 Next were two cases heard together by the same constitution of the Supreme Court: *Cox v Ministry of Justice* [2016] UKSC 10; [2016] AC 660 and *Mohamud v Wm Morrisons Supermarkets plc* [2016] UKSC 11; [2016] AC 677. At para 2 of his judgment in *Cox*, Lord Reed JSC (with whom Lord Neuberger PSC, Baroness Hale DPSC, Lord Dyson MR and Lord Toulson JSC agreed) said this:

“The scope of vicarious liability depends upon the answers to two questions. First, what sort of relationship has to exist between an individual and a defendant before the defendant can be made vicariously liable in tort for the conduct of that individual? Secondly, in what manner does the conduct of that individual have to be related to that relationship, in order for vicarious liability to be imposed on the defendant?”

146 *Cox* was concerned with the first of these questions. It arose from an accident caused by a prisoner working in a prison kitchen. At para 24, Lord Reed JSC summarised the principle to be derived from the *Catholic Child Welfare* case as follows:

“a relationship other than one of employment is in principle capable of giving rise to vicarious liability where harm is wrongfully done by an individual who carries on activities as an integral part of the business activities carried on by a defendant and for its benefit (rather than his activities being entirely attributable to the conduct of a recognisably independent business of his own or of a third party), and where the commission of the wrongful act is a risk created by the defendant by assigning those activities to the individual in question.”

The *Catholic Child Welfare* case had been decided as it was, Lord Reed JSC said at para 31, because: “the abusers were placed by the organisations in question, as part of their mission, in a position in which they committed a tort whose commission was a risk inherent in the activities assigned to them.” He explained at para 32 why the test was satisfied on the facts of *Cox*:

“The prison service carries on activities in furtherance of its aims. The fact that those aims are not commercially motivated, but serve the public interest, is no bar to the imposition of vicarious liability. Prisoners working in the prison kitchens, such as Mr Inder, are integrated into the operation of the prison, so that the activities assigned to them by the prison service form an integral part of the activities which it carries on in the furtherance of its aims: in particular, the activity of providing meals for prisoners. They are placed by the prison service in a position where there is a risk that they may commit a variety of negligent acts within the field of activities assigned to them. That is recognised by the health and safety training which they receive. Furthermore, they work under the direction of prison staff. Mrs Cox was injured as a result of negligence by Mr Inder in carrying on the activities assigned to him. The prison service is therefore vicariously liable to her.”

147 In *Mohamud*, the question was whether a supermarket was vicariously liable for an assault committed by one of its employees in the supermarket car park. It turned on the application of the second stage of the test for vicarious liability. Lord Toulson JSC (with whom Lord Neuberger PSC, Baroness Hale DPSC, Lord Dyson MR and Lord Reed JSC agreed) said this at paras 44–45:

“44. In the simplest terms, the court has to consider two matters. The first question is what functions or ‘field of activities’ have been entrusted by the employer to the employee, or, in everyday language, what was the nature of his job. As has been emphasised in several cases, this question must be addressed broadly; see in particular the passage in Diplock LJ’s judgment in *Ilkiw v Samuels* [1963] 1 WLR 991, 1004 ...

45. Secondly, the court must decide whether there was sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice which goes back to Holt CJ. To try to measure the closeness of connection, as it were, on a scale of 1 to 10, would be a forlorn exercise and, what is more, it would miss the point. The cases in which the necessary connection has been found for Holt CJ’s principle to be applied are cases in which the employee used or misused the position entrusted to him in a way which injured the third party.”

148 *Ilkiw v Samuels* [1963] 1 WLR 991, to which Lord Toulson JSC referred, was a case in which the Court of Appeal had found a company liable for an injury caused by one of its lorries when the driver (contrary to his express instructions) had permitted an unqualified person to drive it in the course of loading goods. The question whether to impose vicarious liability involved in the first instance:

“determining what would have been the sphere, scope, course (all these nouns are used) of the servant’s employment if the prohibition had not been imposed. As each of these nouns implies, the matter must be looked at broadly, not dissecting the servant’s task into its component activities—such as driving, loading, sheeting and the like—by asking: what was the job on which he was engaged for his employer? and answering that question as a jury would.” (*Ilkiw v Samuels* at p 1004.)

149 Lord Toulson JSC's conclusion on the facts of *Mohamud* was expressed in this way at paras 47–48:

“47. In the present case it was [the employee] Mr Khan's job to attend to customers and to respond to their inquiries. His conduct in answering the claimant's request in a foul mouthed way and ordering him to leave was inexcusable but within the 'field of activities' assigned to him. What happened thereafter was an unbroken sequence of events. It was argued by the respondent and accepted by the judge that there ceased to be any significant connection between Mr Khan's employment and his behaviour towards the claimant when he came out from behind the counter and followed the claimant onto the forecourt. I disagree for two reasons. First, I do not consider that it is right to regard him as having metaphorically taken off his uniform the moment he stepped from behind the counter. He was following up on what he had said to the claimant. It was a seamless episode. Secondly, when Mr Khan followed the claimant back to his car and opened the front passenger door, he again told the claimant in threatening words that he was never to come back to the petrol station. This was not something personal between them; it was an order to keep away from his employer's premises, which he reinforced by violence. In giving such an order he was purporting to act about his employer's business. It was a gross abuse of his position, but it was in connection with the business in which he was employed to serve customers. His employers entrusted him with that position and it is just that as between them and the claimant, they should be held responsible for their employee's abuse of it.

“48. Mr Khan's motive is irrelevant. It looks obvious that he was motivated by personal racism rather than a desire to benefit his employer's business, but that is neither here nor there.”

150 The principles set out in *Mohamud* were applied in *Bellman v Northampton Recruitment Ltd* [2018] EWCA Civ 2214; [2019] ICR 459. There, the defendant company was held liable for an assault committed by its managing director at a hotel to which staff had gone for drinks after a company Christmas party. Applying that approach, Asplin LJ held at para 25 that the company was liable because, although the assault occurred at 3am when everyone was inebriated, it happened when the managing director was lecturing staff about his own managerial authority. Thus, Asplin LJ held:

“It seems to me that, despite the time and the place, Mr Major was purporting to act as managing director of NR. He was exercising the very wide remit which had been granted to him by NR. His managerial decision-making having been challenged, he took it upon himself to seek to exercise authority over his subordinate employees. The lecture itself was concerned with the nature and extent of his authority in relation to NR's business and the exercise of that authority over his fellow employees. He chose to wear his metaphorical managing director's hat and to deliver a lecture to his subordinates. He was purporting to use his position and drove home his managerial authority, with which he had been entrusted, with the use of blows. Looked at objectively, he was purporting to exercise his authority over his subordinates and was not merely one of a group of drunken revellers whose conversation had turned to work. It seems to me that the attack arose out of a misuse of the position entrusted to Mr Major as managing director. He asserted his authority in the presence of around 50% of NR's staff and misused that authority. It was not merely a discussion leading to an altercation between hotel guests and visitors, as the judge described them.”

151 Irwin LJ emphasised that the imposition of liability for violent acts of employees was exceptional, saying this at para 38:

“What was crucial here was that the discussions about work became an exercise in laying down the law by Mr Major, indeed an explicit assertion of his authority, vehemently and crudely expressed by him, with the intention of quelling dissent. That exercise of authority was something he was entitled to carry out if he chose to do so, and, however unwise it may have been to do so in such circumstances, it did arise from the 'field of activity' assigned to him.”

152 Moylan LJ agreed with both Asplin and Irwin LJ.

Mrs B's submissions

153 For Mrs B, Mr Counsell submitted that, so far as the first limb of the test for vicarious liability is concerned, I should reach the same conclusion as Globe J in *A v Watch Tower*. Indeed, since that case concerned a ministerial servant, the present case—which concerned an elder—was a fortiori. The Jehovah's Witnesses exercise a far greater degree of control over the activities of their elders than an employer would over its employees. Elders are at the heart of the congregation because they lead it. They exercise jurisdiction over all aspects of the life of the congregation members, from serious sin to what others might regard as normal activities such as smoking and drinking. An elder does not leave his role and duties at the Kingdom Hall when he goes home. He is expected to behave in a way consistent with his status at all times. Failure to do so can lead—as it did here—to removal as an elder. The organisation of Jehovah's Witnesses is highly structured from its governing body in New York to its branch office in London, to districts (at the relevant time), circuits and congregations. Elders are supposed to act as shepherds to the "sheep-like" ones. They share the aims of the organisation as a whole, which is to "spread the word". Elders are integrated into the structure of the organisation as a whole. In so far as they are assigned privileges, these are to assist and serve the organisation's evangelising purpose, which they share.

154 As to the second stage of the vicarious liability test, Mr Counsell submits that the present case bears similarities to *Maga*. In that case, the "progressive stages of intimacy" were possible only because of the priestly status of the abuser. So here, Mr Counsell submits, all contact between Mrs B and Mr Sewell ultimately stemmed from his role as an elder. The evidence was that members of the congregation were taught to be obedient and submissive to elders. So, his manipulative and bullying behaviour was enabled by his status as an elder. It was his status that enabled him to kiss women on the lips when he greeted them at the Kingdom Hall. It was Tony Sewell's status as an elder that gave authority to his request to Mrs B to act as a shoulder to cry on and help him through his depression. The rape itself occurred after the two couples had been out pioneering. By analogy with Lord Toulson's reasoning in *Mohamud*, Mark Sewell had not "metaphorically taken off his uniform". Furthermore, he had got it into his head that he needed to commit adultery in order to provide a religious ground for divorce from Mary.

The defendants' submissions

155 For the defendants, Ms Foster does not accept that the relationship between the Barry Congregation and either Mark Sewell or Tony Sewell was capable of giving rise to vicarious liability, so that the first stage of the test for vicarious liability was not satisfied. The tort was not committed as a result of any activity being undertaken by Mark Sewell on behalf of the Barry Congregation (or the worldwide organisation), but in the context of a personal friendship entered into by choice between Mr and Mrs B and Mark and Mary Sewell. Mark Sewell's activities as a personal friend of Mr and Mrs B were not part of the "business activity" of the Congregation. The Congregation did not assign Mark Sewell any role with respect to Mrs B that created the risk that he would attack Mrs B. Mark Sewell was not an elder when he met Mrs B and there was no evidence that their relationship was fostered by any of the activities he carried out as an elder or ministerial servant. Rather, the two couples had got to know each other through Mark Sewell's and Mr B's business interests and the relationship was fostered and developed through social visits and holidays which they went on together as friends.

156 At the second stage of the analysis, Ms Foster submits that Mark Sewell was not required by virtue of his position as an elder to enter into a friendship with Mrs B; nor was she required by her position as a member of the Congregation to be friends with him. The duties of an elder are limited to providing spiritual guidance in prescribed circumstances. There was no evidence that Mark Sewell was providing spiritual guidance to Mrs B at any material time. Scriptural teachings of which both Mark Sewell and Mrs B would have been aware specifically cautioned men against associating with women to whom they were not related on a confidential or intimate basis. Any request made by Tony Sewell could not have been reasonably construed by Mrs B as an instruction that she was religiously required to execute. At most, it was a request from a concerned father.

Conclusions: stage one

157 I have considered the two stages of the test for vicarious liability separately. At the first stage, the question is whether the relationship between the defendants and Mark Sewell, one of their elders, was capable of giving rise to vicarious liability. The key questions, to adopt the formulation of Lord Reed JSC in *Cox*, are (i) whether Mark Sewell carried on activities as an integral part of the "business" activities carried on by the defendants and for its benefit and (ii)

whether the commission of the rape was a risk created by the defendants by assigning those activities to Mark Sewell. To my mind, the answer to both questions is “Yes”.

158 To the first question, the answer is clear. Elders are the spiritual leaders of the congregation. To be appointed an elder a publisher must first have served as a ministerial servant and demonstrated that he is spiritually suitable to be an example to others. An elder may be removed if he fails to maintain the high standards expected of him, whether in performance of his duties as an elder or in his personal life. Elders are the principal conduit through which the teachings of the faith, as represented in *Watchtower* and other publications, are disseminated to congregations. Instructions from the worldwide organisation on matters such as the reporting of child abuse are addressed to them. In so far as a congregation of Jehovah’s Witnesses acts as a body, it acts through its elders. An elder is as integral to the “business” of a congregation of Jehovah’s Witnesses as a priest is to the “business” of the Catholic Church.

159 All this is apparent from Mr Schofield’s evidence alone. However, it is consistent with the conclusion reached by Globe J in relation to ministerial servants. Although his conclusions rested on the evidence before him, the evidence before me was not materially different. I accept Mr Counsell’s submission that, if anything, the position in relation to elders is a fortiori.

160 The second question is whether the commission of the rape was a risk created by Barry Congregation by assigning those activities to Mark Sewell. I have concluded that the answer to this question is also “Yes”, for three reasons.

161 First, any organisation that confers on its leaders power and authority over others creates a risk that those leaders will abuse that power and authority. This is as true of a religious organisation as it is of a secular one. There is no doubt that the teachings of Jehovah’s Witnesses confer on elders (who are said to be appointed through the intermediation of Jehovah) considerable power and authority over other publishers, who are enjoined to be obedient and submissive to them, at least when their guidance does not conflict with the Bible.

162 Second, where an organisation makes rules for all aspects of its adherents’ lives, and sets its leaders up as moral and spiritual exemplars, it imbues those leaders with power and authority even outside the confines of their religious activities. The suggestion that publishers should reject instructions from elders that do not accord with Biblical teaching must be seen in light of the specific guidance that “a spirit of independent thinking does not prevail in God’s organisation, and we have sound reasons for confidence in the men taking the lead among us”, that “[the] elders adhere to Scriptural truth” and that “we should not magnify [elders’] human imperfections” (*Watchtower*, 15 September 1989, “Be Obedient to those Taking the Lead”, para 13). An organisation that chooses to give advice of that kind creates a risk that its adherents will mistakenly follow the instructions they are given by elders, even if on a proper analysis they are contrary to the Biblical teaching.

163 Third, sexual abuse is almost always a form of abuse of power. Where (as here) the act of abuse involves physical violence, it will generally be enabled by the relatively greater physical power of the abuser compared to his victim. But acts of sexual abuse rarely happen out of the blue. Often, the perpetrator abuses his own power, or that of others, to engineer a situation in which the abuse can occur, ie to legitimate and enable what Longmore LJ in *Maga* called the “progressive stages of intimacy”. Any organisation that confers on its leaders power over others creates the risk that they will abuse it in that way.

164 This means that the relationship between the defendants and Mark Sewell was capable in principle of giving rise to vicarious liability for acts of sexual abuse perpetrated by him on members of the congregation. Whether the particular act of sexual abuse at issue here, his rape of Mrs B on 30 April 1990, was sufficiently connected to his status as elder is, of course, a different question.

Conclusions: stage two

165 The question at stage two of the inquiry overlaps to some extent with the second question at stage one. It focuses, however, on the relationship between the tort committed by Mark Sewell and his position as elder.

166 This is a less straightforward case than *Maga* or *A v Watch Tower*. There, it was the abusers’ status as a priest (in *Maga*) or ministerial servant (in *A v Watchtower*) that gave them “access” to the children they abused. Were it not for their status, the abusers would not have been permitted to be alone with their victims. Here, the victim was an adult married woman, who was 29 years old. It was her decision to associate with Mark Sewell when they first met and her decision to continue to see him as his behaviour began to deteriorate. But that does not determine the issue. It is possible to imagine clear cases in which a religious organisation would be likely to be vicariously liable for a sexual assault committed by one adult against another. Take, for example,

the case of the priest who assaults an adult woman while hearing her confession; or of the elder who assaults a member of the public while engaged in pioneering. In each case, the assault would be so obviously bound up with the religious duties of the abuser that, depending on the facts, it might be fair and just to hold the religious organisation in question vicariously liable.

167 In the present case, the rape did not occur while Mark Sewell was performing any religious duty. But that is not a necessary ingredient of liability in cases of this kind. The test is more open-textured and requires an analysis of all aspects of the relationship between the tort and the abuser's status. In this case, there are five relevant aspects.

168 First, Mr and Mrs B met Mark and Mary Sewell when Mark was a ministerial servant. I accept that the two couples began to associate in part because Mr and Mrs B perceived them, because of Mark's position, to be of high standing in the community of Jehovah's Witnesses. By associating with them, Mr and Mrs B were practising "good association". Mr B also had aspirations to become a ministerial servant, which he did at the same time Mark Sewell became an elder. So, Mark Sewell's status as an elder was one factor in the couple's developing friendship. This would plainly not be enough on its own to justify holding the defendants vicariously liable for Mark Sewell's torts, but it is a piece of relevant context.

169 Second, another reason why the two couples continued to socialise was because they got on well. In particular, Mrs B found Mark Sewell charming and funny and she and Mr B enjoyed his and Mary's company. But there came a time, probably in late 1989, when Mark Sewell began to cross boundaries and act inappropriately both towards Mary and towards Mrs B. I accept Mrs B's evidence that one important reason why she tolerated this was because Mark Sewell was an elder. This meant both that Mrs B assumed that he would be acting from pure motives and that there could be repercussions if she were to call out his inappropriate behaviour. Mark Sewell's ability to get away with inappropriate behaviour is illustrated by the lack of comment when he greeted women members of the congregation by kissing them on the lips. His own perception of the significance of his status can be seen from Mrs B's evidence, which I accept, of his reaction when confronted by her about his sexual abuse of CXC: "He told us he could do what he liked because he was an elder and that he was not answerable to us."

170 Third, the instruction from Tony Sewell, a senior elder, to Mr and Mrs B to act as confidants to Mark made it difficult to break off the friendship even after Mark's behaviour became seriously concerning. Although Tony Sewell did not specifically say that Mrs B should act as confidante to Mark alone, he implied that by giving the example of his wife (who had confided in a male elder rather than her husband). I reject Ms Foster's submission that, in giving the instruction Tony Sewell was acting qua Mark's father, rather than qua elder. Such a distinction would be unreal in these circumstances, given that, as FXC said and I accept, the teachings of Jehovah's Witnesses, and the authority of the elders, extended to all aspects of a publisher's life, not just those concerned directly with evangelism and with religious services. It is relevant that Tony Sewell finished the meeting with a prayer, deliberately invoking Mrs B's religious obligation to do what he had instructed. In giving his implied instruction to Mrs B to act as confidante to Mark, Tony Sewell had not, therefore, cast off the mantle of an elder; on the contrary, he had deliberately assumed it. The significance of the instruction was not undermined by the fact that it might conflict with the rule that men should not be alone with women to whom they were not related, because, as FXC said and I accept, elders were given more leeway than others in this regard and, by virtue of their status, might be assumed by other members of the congregation to be acting from pure motives. Thus, I accept as true Mrs B's evidence that "had it not been for the fact that Mark was an elder and I had received an instruction from another elder, his father, our friendship with Mark and Mary would have come to an end well before [the rape]".

171 Fourth, it is material that the rape occurred after Mr and Mrs B had been out pioneering — ie performing the central religious duty of Jehovah's Witnesses. That is why Mr and Mrs B and Mark and Mary Sewell were together on the day when the rape occurred. It is also relevant that, as FXC said and I accept, Mark Sewell's house was "an 'approved' venue by the Barry Elders"; and that Mrs B went to the back room of that house, where the rape took place, because she had "decided to go to speak to Mark to convince him that he should go to the elders about his depression" — in other words to convince him to fulfil what she regarded as his duty as one of Jehovah's Witnesses and as an elder.

172 Fifth, on the basis of Mrs B's evidence about what Mark Sewell said to Mr B, which I accept, I find that Mark Sewell had formed the belief that there had to be an act of adultery in order to generate scriptural grounds for him to divorce Mary. The idea of relying on a rape to legitimate a divorce was, of course, a perversion of the beliefs and teachings of Jehovah's

Witnesses, but on the evidence before me it appears to have played a part in Mark Sewell's thinking at the time of the rape. The fact that, in his mind, rape was equivalent to adultery suggests a mindset in which he was entitled to act as he desired and Mrs B would or should submit to him. Such a mindset is utterly contrary to the teachings of Jehovah's Witnesses, but the evidence establishes that his pathological beliefs about his own entitlement to exercise power over others were bound up with the position and status the defendants had given him by appointing him as an elder.

173 Taking these features of the relationship together, the following conclusions can be drawn:

(a) The fact that Mark Sewell held a position in the Congregation (initially, ministerial servant) was an important part of the reason why Mr and Mrs B started to associate with Mark and Mary Sewell.

(b) But for Mark Sewell's and Tony Sewell's position as elders, Mr and Mrs B would probably not have remained friends with Mark Sewell by the time of the rape. There was, therefore, the "strong causative link" referred to by Lord Phillips in the *Various Claimants v Catholic Child Welfare Society* at para 86.

(c) The defendants created or significantly enhanced the risk that Mark Sewell would sexually abuse Mrs B by creating the conditions in which the two might be alone together through (i) Tony Sewell's implied instruction that she continue to act as his confidante (an instruction which carried the authority conferred by the defendants because of his position as an elder) and (ii) investing Mark Sewell with the authority of an elder, thereby making it less likely that Mrs B (or others) would question his motives and emboldening him to think that he could act as he wished with little fear of adverse consequences.

(d) The rape took place in circumstances closely connected to the carrying out by Mark Sewell and Mrs B of religious duties at a venue—Mark Sewell's home—which was "approved" by the elders of the Barry Congregation.

(e) One of the reasons for the rape was Mark Sewell's belief that an act of adultery was necessary to provide scriptural grounds for him to divorce Mary. His mindset, in which he appears to have equated rape and adultery, was closely bound up with his position as an elder.

174 For all these reasons, the rape was in my judgment sufficiently closely connected to Mark Sewell's and Tony Sewell's positions as elders to make it just and reasonable that the defendants should be held vicariously liable for it.

Issue (c): The investigation claim

175 In the light of my conclusion on issue (b), the defendants are liable to Mrs B for any damage that she can show was caused by the rape. There could in principle be an issue about the extent to which the psychiatric injuries suffered by Mrs B were attributable to the conduct of the investigation and hearing, rather than the rape. But that issue would arise only if it could be shown that the conduct of the investigation and hearing constituted an intervening event that broke the chain of causation. Ms Foster's case did not suggest that they were. Any such suggestion would have been unattractive, given that it was the defendants themselves who conducted the investigation and hearing. Logically, the defendants' conduct of these was either in breach of duty or not. If it was in breach of duty, the defendants cannot pray it in aid to break the chain of causation: *Clerk and Lindsell on Torts*, 22nd ed (2017), para 2-138. If not, the investigation and hearing, and any damage flowing from them, were natural and foreseeable consequences of the rape, for which Mark Sewell—and therefore, on my findings, the defendants—were responsible.

176 This makes it unnecessary for me to decide the points in dispute under issue (c) and I do not do so. However, since I have heard argument on them, and in view of their wider importance, I make these observations.

177 There is no case law establishing that a religious organisation which chooses to investigate an allegation against one of its members owes a duty of care to a complainant not to cause her psychiatric harm. The question whether such a duty should be imposed therefore falls to be answered by applying the three-stage test in *Caparo Industries plc v Dickman* [1990] 2 AC 605, bearing in mind the note of caution sounded by Brennan J in the High Court of Australia in *Sutherland Shire Council v Heyman* [1985] HCA 41; 157 CLR 424, para 14, that:

"the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie

duty of care restrained only by indefinable ‘considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed’.”

See also *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4; [2018] AC 736, para 29 (Lord Reed JSC) and *James-Bowen v Comr of Police of the Metropolis* [2018] UKSC 40; [2018] 1 WLR 4021, para 23 (Lord Lloyd-Jones JSC).

178 At the first stage, I would readily accept that it is foreseeable that a rape or sexual assault complainant might suffer psychiatric damage as a result of the conduct of an investigation and/or hearing convened to determine her allegation. In *Yapp v Foreign and Commonwealth Office* [2014] EWCA Civ 1512 at [125], Underhill LJ, with whom Davis and Patten LJ agreed, held that it would be “exceptional” for psychiatric injury suffered by an employee as a result of disciplinary proceedings brought against him by his employer to be foreseeable. The position of a complainant who claims that she has been raped or subjected to serious sexual assault is, however, unusual. Such a complainant, if she is telling the truth, will already have suffered what is likely to be a traumatic and humiliating violation at the hands of her attacker. Rape and serious sexual assault give rise to psychiatric injury in a significant proportion of cases. Any investigation and hearing conducted to determine whether the assault took place are likely to require the complainant to recall and relive the experience in a semi-public forum. Especially if mismanaged, the process affords opportunities for the humiliation caused by the attack to be repeated and magnified and for any psychiatric injury to be exacerbated. These basic facts are obvious and should have been so by the early 1990s, even bearing in mind that understanding of the effects of sexual assault has advanced in the intervening years.

179 These general conclusions can be tested by reference to FXC’s evidence about the investigation and hearing relating to CXC. On FXC’s evidence, CXC, a child who had disclosed that she had been repeatedly sexually abused over a long period by a relative who was also an elder, had to attend a meeting presided over by other elders at which she was required to read out her written account of what had happened to her in the presence of her abuser and his wife. At that meeting, her abuser was allowed to call wholly irrelevant evidence about her alleged relationship with boys in the congregation in an attempt to discredit and undermine her. CXC was then required to attend a judicial committee hearing before a panel of elders only to be told that her allegations (which were by that time already known to be denied by Mark Sewell) were not proven because of the two-witness rule, which was not satisfied because, as a child, she did not count as a witness at all. FXC describes the effect of this on CXC as “devastating”. Because her claim is not before me, I make no findings of fact about what happened in CXC’s case. But if what FXC says is true, she was subjected by the elders (admittedly with the consent of her parents) to an ordeal that was very likely to give rise to psychiatric injury—at least if the allegations she made against Mark Sewell were true, as they have subsequently been shown to be.

180 Turning to the second stage of the *Caparo* analysis, where the requirement of foreseeability is satisfied, the law has for some time recognised the existence of a duty of care owed by an employer not to cause foreseeable psychiatric harm to an employee who is subject to a disciplinary procedure: see eg *Clerk & Lindsell on Torts*, 22nd ed, para 8-87. The present situation is different in two respects: first, the defendants are a religious organisation, not an employer; second, the alleged duty is owed to the complainant, not the person subject to disciplinary proceedings. It is difficult to see, however, that either of these two differences suggests a different result. The religious principles to which Jehovah’s Witnesses commit themselves cover all aspects of their life. The function of the elders was to act as “shepherds” to the congregation. In investigating serious sin and in convening judicial committees to deal with it, they were performing a part of their “shepherding” function for the benefit of the congregation as a whole, including the complainant. By deciding to conduct an investigation and hold a hearing in respect of a complaint of rape or serious sexual assault, rather than (for example) leaving it to the police, it can properly be said that they assumed the responsibility to undertake those activities in a way that did not give rise to foreseeable injury to the complainant. The required proximity is therefore present in the relationship between the defendants and a complainant alleging rape or serious sexual assault.

181 The difficulty arises at the third stage of the *Caparo* analysis, which requires consideration of whether the imposition of liability in this case is fair, just and reasonable. That requires focus on any public policy reasons against imposing liability. Ms Foster argued that there were such reasons, because the imposition of the duty would require the court to determine questions which ought to be regarded as non-justiciable religious matters.

182 At one stage, Mr Counsell submitted that the application by the judicial committee of the “two-witness rule” was itself a breach of duty because the rule had been misapplied. A claim that the rule had been misapplied would, as it seems to me, stray very clearly into non-justiciable territory. Such a claim would inevitably require the court to inquire into the rule’s Biblical origins, ie to pronounce on the true interpretation of the words used by the writers of Matthew’s Gospel and the rule’s other Biblical sources. This is precisely what the Canadian Supreme Court was unwilling to do in *Wall* and what Warby J refused to do at para 73(4) of his judgment in *Otu*. I consider that they were correct, for reasons of practicality and of principle. As to the former, the court is not by training equipped to engage in questions of disputed theological interpretation. As a matter of principle, any attempt to do so would be illegitimate because it would undermine the state’s neutrality between competing religious views.

183 The contention that the two-witness rule should not have been applied at all, which was also part of Mr Counsell’s submission at one stage, raises different and difficult issues. The appropriateness of the two-witness rule as applied by Jehovah’s Witnesses in Australia was considered by the Australian Royal Commission into Institutional Responses to Child Sexual Abuse. The Commission’s Case Study No 29, *The response of the Jehovah’s Witnesses and Watchtower and Tract Society of Australia Ltd to allegations of sexual abuse*, was published in October 2016 under the chairmanship of the Peter McClellan J. At para 7.3 of its report, the Commission recommended that the rule be changed, at least in the context of allegations of child sexual abuse. It said:

“Regardless of the biblical origins of the two-witness rule, the Jehovah’s Witness organisation’s retention of and continued application of the rule to a complaint of child sexual abuse is wrong. It fails to reflect the learning of the many people who have been involved in examining the behaviour of abusers and the circumstances of survivors. It shows a failure by the organisation to recognise that the rule will more often than not operate in favour of a perpetrator of child sexual abuse, who will not only avoid sanction but will also remain in the congregation and the community with their rights intact and with the capacity to interact with their victim.

“A complainant of child sexual abuse whose allegation has not been corroborated by confession by their abuser or a second ‘credible’ eyewitness is necessarily disempowered and subjected to ongoing traumatisation. To place a victim of child sexual abuse in such a position is today, and was 30 years ago, unacceptable and wrong.”

This recommendation was not accepted, because—as Mr Schofield made clear in evidence—the rule comes directly from the Bible and Jehovah’s Witnesses consider that they are therefore not at liberty to disapply or modify it.

184 It is not obvious that a religious organisation which chooses, for scriptural reasons, to adopt a risky procedure for investigating and determining complaints should be held immune from liability when those risks eventuate simply because of the scriptural origin of the procedure. On the other hand, it must be borne in mind that the procedure’s ultimate function is to determine whether the person complained against may remain a member of the religious community or should be expelled from it. Any interference with an organisation’s right to determine for itself who should remain a member would, under article 9 of the Convention, have to be justified as proportionate to a legitimate aim. Moreover, at least when those involved are adults of full capacity, there is force in the argument that by becoming and remaining members of the organisation and/or by making a complaint, they accept that the complaint will be investigated and adjudicated according to the religious rules to which the group as a whole subscribes.

185 It could be said that, even if Mr Counsell’s criticisms of the two-witness are left aside, and that rule is treated as forming part of the framework within which the investigation and hearing had to be conducted, there was scope for the defendants to take steps to ensure that the complainant did not suffer psychiatric damage as a result of the conduct of the investigation and hearing. Although the defendants were clear that the two-witness rule was Biblically derived and could not be altered or modified, they did not say the same about every aspect of the way the investigation and hearing were conducted. Some aspects, such as the decision whether to convene a judicial committee hearing in a particular case and how to manage any such hearing, were matters for the discretion of the elders, applying the guidance given to them by the organisation.

186 But there are also policy arguments against the imposition of a limited duty of that kind. Such a duty might encourage the organisation not to investigate difficult cases, or not to hold hearings in such cases, so as to avoid risking psychiatric harm to the complainant. That has the potential to conflict with the duty to safeguard members of the congregation where there are known allegations of sexual assault or abuse (the duty established in *Maga* and applied by Globe J to Jehovah’s Witnesses in *A v Watch Tower*) by discouraging action which might lead to the expulsion of the perpetrators.

187 In my judgment, it would be preferable for the balancing of these important considerations to be undertaken in a case where it matters to the outcome. Since I have reached the conclusion that it does not matter here, it would be better not to decide the point.

188 This means that it is also not necessary for me to make detailed factual findings about every aspect of the investigation and hearing. However, in case they become relevant on appeal, my findings on the essential points in dispute are as follows:

(a) The identity of the elders who came to Mrs B’s house to ask her questions about the rape does not matter on any view. Although there is no evidence that Eddie Lee or Arthur Taylor (or for that matter Michael Jones or Brian Jones) had any training in carrying out an investigation into allegations of serious sexual assault, there is also no evidence that those who conducted the interview set out to ask deliberately insensitive questions. Nor is there any evidence that they approached their task with any purpose other than to discover the truth.

(b) I accept Mrs B’s evidence that she was asked questions about the position her legs had been in when she was raped, which she found upsetting and embarrassing. This detail was something she mentioned to the police in 2014. It is likely to be accurate. However, any investigation was bound to have to probe details such as these, at least at the initial investigative stage. It was no doubt upsetting that intimate questioning of this sort should have been done by male elders, but that was the inevitable consequence of a belief system that restricts the “shepherding” role to males.

(c) By the time they convened the judicial committee, the elders had already put Mrs B’s allegations to Mark Sewell and he had denied them. This is consistent with a 1991 publication entitled *Pay Attention to Yourselves and to All the Flock*, a handbook for elders (“the Handbook”), which gave guidance about the handling of allegations of serious sin. It contains the following at p 109 under the heading “The Judicial Committee”:

“Before forming a committee, elders determine if the accusation has substance.
 “It must Scripturally be an offense serious enough to result in disfellowshipping.
 “There must be either two witnesses or a confession of wrongdoing.
 “If there is not enough evidence to form a committee but serious questions have been raised, two elders may be assigned to investigate the matter.”

(d) Fourth, Mrs B was not compelled to attend the judicial committee hearing, but felt morally obliged to do so, given CXC’s allegations. Mrs B’s evidence to this effect was consistent with the guidance at p 119 of the Handbook: “Accusers should be willing to assume their responsibility, as was required in Israel. (Deuteronomy 17:6, 7; 19:16–21.)”

(e) Under the guidance applicable at the time, the allegations against Mark Sewell could in principle have been found proven on the evidence of Mrs B and CXC taken together. At p 111 of the Handbook, under the heading “What kind of evidence is acceptable?”, the following appears:

“There must be evidence of two or three eyewitnesses, not just persons repeating what they have heard; no action can be taken if there is only one witness. (Deuteronomy 9:15; John 8:17).”
 “The testimony of youths may be considered; it is up to the elders to determine if the testimony has the ring of truth.”
 “If there are two or three witnesses to the same kind of wrongdoing but each one is witness to a separate incident, their testimony can be considered.
 “Such evidence may be used to establish guilt, but it is preferable to have two witnesses to the same occurrence of wrongdoing.”

This was consistent with the evidence of Mr Schofield. Thus, it could not be said that there was no point in convening a judicial committee hearing.

(f) Under the applicable guidance, there was no need for a rape complainant to confront the accused alone prior to the judicial committee hearing, but if the accused denied wrongdoing

and the matter went to a judicial committee hearing, “the witness may need to testify at the hearing” (Handbook, pp 118–119).

(g) Mrs B did in fact testify at the judicial committee hearing. I accept her evidence that Mark Sewell denied the rape; he said that he could not have penetrated Mrs B because she had said her legs were in a closed position and he had tried unsuccessfully to penetrate Mary when her legs were in that position; Mary said he could not have raped Mrs B because he was impotent when drunk; and both said that Mrs B had sought to take advantage of marital difficulties between Mark and Mary to get close to Mark.

(h) I accept Mrs B’s evidence that David Newman told her the judicial committee’s verdict about a week later. He said that the judicial committee had applied the two-witness rule and found that CXC should not be regarded as a second witness for that purpose because she was a child. This is consistent with FXC’s evidence of what he had been told, separately, about the reasons why CXC’s allegation had been found not proven.

(i) I also accept Mrs B’s evidence that David Newman said that this was a “classic case of wife-swapping”. This was not only wrong but also a grossly insensitive way of expressing the committee’s conclusion, which I am sure contributed to the humiliation and distress felt by Mrs B. But the fact that the committee reached this view after hearing both Mrs B and CXC means that, even if the two-witness rule had not applied, the committee would probably have found Mrs B’s complaint not proven.

(j) Immediately after the judicial committee hearing, Mark Sewell remained a member of the congregation, though he was removed as an elder. Subsequently he was disfellowshipped, not for the rape, nor for his abuse of CXC, but for “brazen conduct” which was likely connected with his admission that he had been drunk and/or with the bad attitude he had displayed at the judicial committee hearing.

(k) As she accepted in cross-examination, Mrs B was not instructed by the elders who carried out the investigation or judicial committee hearing not to report the rape to the police. She may well have been told not to report it by Tony Sewell. However, the main reason why she did not go to the police was that she felt humiliated and upset by the way the investigation was conducted and, having been disbelieved by the elders, did not think she would be believed by the police.

Issue (d): To what extent were the psychiatric injuries for which Mrs B seeks compensation attributable to (i) the rape and/or (ii) any breach of duty in relation to the investigation?

189 It is agreed that Mrs B suffers from recurrent depressive disorder (ICD-10 F33). Her psychiatric history can be summarised as follows. In 1984, after the birth of her second child, she suffered post-natal depression. This was apparently short lived, as she never returned to see her GP about it. She then suffered further episodes of depression in 1991, 1993, 1994, 1996 and 2014.

190 Dr Roychowdhury and Professor Maden agree in their joint report that “rape is a traumatic event that is likely to cause psychiatric injury in a person of average mental fortitude”. They agree that the rape in this case increased the chance that Mrs B would suffer a further episode of depression from 50% (the risk applicable to a patient who has suffered from one episode of depression in the past) to 70%. Professor Maden accepted under cross-examination that the prior risk was probably somewhat less than 50% (because post-natal depression is less predictive of further episodes than other kinds of depression) and that Mrs B’s current risk of suffering a further episode is probably around 90% (because the risk increases with each subsequent episode and because the risk of depression increases with age).

191 Both experts agree that the causation of depression is multi-factorial. As a matter of law, what Mrs B has to show in respect of each psychiatric injury is that the rape materially contributed to it: see *Clerk and Lindsell on Torts*, at paras 2-32 to 2-34. Dr Roychowdhury and Professor Maden agree that the rape was directly or indirectly the major cause of the episodes of depression in 1991, 1993, 1994 and 2014. Dr Roychowdhury considers that the same is true of the episodes in 1996 and 2010. Professor Maden disagrees about this, because the episode in 1996 coincided with the breakdown of Mrs B’s first marriage and the episode in 2010 coincided with breakdown of her second marriage and the illness and death of her father, events which—he says—are likely to have caused a depressive episode even had the rape not taken place.

192 This dispute is of narrow scope and has little bearing on the damages to which Mrs B is entitled. However, I have concluded that Dr Roychowdhury’s analysis is to be preferred to Professor Maden’s. Events such as the break-up of a relationship and the death of a parent are common triggers for depression, but a person’s resilience to events such as these types of events may be affected by her pre-existing psychological state. In this case, given the agreed position that the rape materially increased Mrs B’s vulnerability to further episodes of depression, and given the difficulty of separating the factors applicable to any particular episode, logic supports

Dr Roychowdhury's view that the rape made Mrs B less resilient to other life events and therefore contributed materially to each of the subsequent episodes. Having heard Mrs B's evidence, I also accept that the rape was instrumental in her decision to leave the Jehovah's Witness community, which precipitated the break-up of her first marriage, and contributed to the emotional and sexual difficulties which led to the breakdown of her second marriage. This lends support to the second mechanism of causation advanced by Dr Roychowdhury.

193 There was also initially a dispute about whether the symptoms Mrs B experienced in 2014—before, during and after Mark Sewell's trial—could support a diagnosis of PTSD. Dr Roychowdhury said that they could. Professor Maden initially thought not. However, after hearing Mrs B and Dr Roychowdhury give evidence, he accepted that the symptoms described (which included flashbacks, intrusive memories, avoidance behaviour, emotional blunting and hypervigilance) made a diagnosis of PTSD appropriate, if the court accepted that Mrs B had in fact suffered those symptoms. I accept that Mrs B gave accurate evidence about the symptoms she had suffered. It follows that there is no dispute between the experts that a diagnosis of PTSD was appropriate.

194 Neither Dr Roychowdhury nor Professor Maden suggested that it was possible to assess whether or if so to what extent the injuries were attributable to the investigation and hearing, rather than the rape itself. In my view, this does not matter because, even if the injuries can be said to have arisen from the investigation and hearing, these were themselves either natural sequelae of the rape or matters which do not break the chain of causation. Either way, the defendants are responsible for them: see para 175 above.

195 I accordingly conclude that the episodes of depression suffered by Mrs B in 1991, 1993, 1994, 1996, 2010 and 2014 were all attributable (in the relevant sense) to the rape, as was the PTSD suffered in 2014, some of the symptoms of which have continued to date.

Issue (e): How much should Mrs B be awarded in damages?

196 I deal here with the matters in dispute on which I heard submissions. I hope that the parties will then be able to agree an order, reflecting my findings on these disputed issues and those elements of the claim that are not disputed. If there remain any items in dispute I will decide them on the basis of written submissions.

General damages for pain, suffering and loss of amenity

197 Mrs B describes her current symptoms as follows:

"I suffer from episodes of anxiety and panic attacks which occur on a daily basis including the sensation of having 'butterflies in my stomach' and upsurges of panic which are triggered by certain events. I have memories, flashbacks and nightmares of the abuse—experience these a few times a month. The flashbacks can be triggered by anything and happen at any time. If, for example, I pass Mark and Mary's house I might start thinking about what happened and have a panic attack. Sometimes intimacy can trigger a panic attack because I hate the feeling of being confined. When I have nightmares I have a picture of Mark and Mary in my mind. Sometimes I'm arguing with them and sometimes I'm friends with them. My husband has told me that I have called out their names. I wake up very panicky or sweaty. I find that I lose my temper and become irritable generally. I have difficulties with sleep and appetite. After everything that has happened, I still feel guilty and ashamed about what happened."

Mrs B's evidence as to the effects on her was supported by that of her husband HXB.

198 The dispute between Dr Roychowdhury and Professor Maden about the severity of Mrs B's depressive episodes was, again, narrow. Professor Maden's view was that Mrs B never suffered an episode in which her depression was more than mild. Dr Roychowdhury considered that at least two episodes should be seen as of moderate severity.

199 Professor Maden's view was based in part on his view that Mrs B was exaggerating her symptoms in the account she had given to him. That in turn was based on a comparison of what she said in evidence with what was documented in the medical and other records. In some cases—for example, on the question of her return to work in 2014—the documentary evidence gave a false picture, because it suggested that she had been able to return to work immediately after the conclusion of the trial. In fact, it became clear in evidence that although she had returned to work briefly, she had been unable to continue for more than about a week. More generally, I consider that in her evidence to the court Mrs B gave an accurate picture of her symptoms and was not exaggerating. These factors, together with the results of the PHQ-9 questionnaire

administered in 2012, suggest that Dr Roychowdhury was correct to say that at least two episodes could appropriately be regarded as moderate.

200 Translating a medical diagnosis into an award for pain, suffering and loss of amenity is not a precise exercise, particularly in a sexual assault case. I have had regard to the *Judicial College Guidelines for the Assessment of Damages in Personal Injury Cases*, 15th ed (2019) (“the Guidelines”). Chapter 4 deals with psychiatric and psychological damage in general. In her introduction to the *Guidelines*, Lambert J made clear that consideration was being given to the inclusion in the next edition of a separate sub-category of psychiatric injury for victims of sexual abuse, so as to reflect the characteristics commonly seen in injuries caused by such abuse, which included: “breach of trust, the inability to form or maintain emotional and sexual relationships, the impact on education, and the effect on the victim of the, often, long interval before the fact of the abuse is reported.”

201 The inclusion of a separate category would be consistent with a recommendation of the Independent Inquiry into Child Sexual Abuse in its Accountability and Reparations report, published on 19 September 2019 for a new “freestanding section” in the Guidelines for cases of child sexual abuse. Such a category was said to be desirable so as to take into account:

“the nature and severity of the abuse itself, any short-term and long-term physical, emotional and psychiatric or psychological injuries, and the general effect of the abuse on the claimant’s capacity to function throughout their life. The latter may include the ability to sustain personal and sexual relationships, to benefit from education and to undertake paid employment.” (Part G.3: Recommendations, Recommendation 5.)

Whilst this was dealing specifically with child sexual abuse, these points appear equally applicable to adult sexual assault cases such as the present.

202 At present, however, the Guidelines have not been amended. The Preamble to Chapter 4 includes the following:

“In part (A) of this chapter some of the brackets contain an element of compensation for post-traumatic stress disorder. This is of course not a universal feature of cases of psychiatric injury and hence a number of the awards upon which the brackets are based did not reflect it. Where it does figure any award will tend towards the upper end of the bracket. Cases where post-traumatic stress disorder is the sole psychiatric condition are dealt with in part (B) of this chapter. Where cases arise out of sexual and/or physical abuse in breach of parental, family, or other trust, involving victims who are young and/or vulnerable, awards will tend to be at the upper end of the relevant bracket to take account (A)(vii) below.”

203 The factors to be taken into account are:

“(i) the injured person’s ability to cope with life, education and work; (ii) the effect on the injured person’s relationships with family, friends and those with whom he or she comes into contact; (iii) the extent to which treatment would be successful; (iv) future vulnerability; (v) prognosis; (vi) whether medical help has been sought; (vii) claims relating to sexual and physical abuse usually include significant aspect of psychiatric or psychological damage. The brackets discussed in this chapter provides a useful starting point in the assessment of general damages in such cases. It should not be forgotten, however, that this aspect of the injury is likely to form only part of the injury for which damages will be awarded. Many cases include physical or sexual abuse and injury. Others have an element of false imprisonment. The fact of an abuse of trust is relevant to the award of damages. A further feature, which distinguishes these cases from most involving psychiatric damage, is that there may have been a long period during which the effects of the abuse were on diagnosed, untreated, unrecognised, or even denied. Awards should take into account not only the psychiatric effects of the abuse on the injured party but also the immediate effect of the abuse at the time that it was perpetrated, including feelings of degradation. Aggravated damages may be appropriate. Cases of prolonged and frequent physical and sexual abuse of a child over many years by a person in a position of trust, involving penetrative violation, are likely to fall into (A)(a) or (B)(b) and reflect aggravated damages, leading to an award towards the top end of the bracket.”

204 Mr Counsell submits that Mrs B's injuries fall into the "moderately severe" bracket for psychiatric damage generally ((A)(b)) and also into the "moderately severe" bracket for PTSD ((B)(b)). He invites me to make an award both for depression and for PTSD, which he submits are "two separate psychiatric injuries", albeit he concedes it would be "wrong simply to aggregate whatever figure the court arrives at for each bracket". He submitted that £75,000 was the appropriate figure. In addition, he submitted there should be an award of aggravated damages to mark the violation and humiliation suffered by Mrs B and the disgraceful way Mark Sewell denied the rape. He suggested an additional award of £25,000 under this head.

205 Ms Foster agreed that the award should fall within the "moderately severe" bracket and submitted that there should be a global award reflecting the entire injury suffered. This was not a case where it could be said that there were two separate injuries. The award should take account of the fact that the injury was deliberately inflicted and of all the circumstances, so that a separate award for aggravated damages was not appropriate. Overall, Ms Foster suggested that a figure of £50,000 would be appropriate.

206 In my judgment, it would be wrong in principle to regard the recurrent depressive disorder and PTSD as two separate injuries. As the Preamble to Chapter 4 of the Guidelines makes clear, they are properly regarded as part and parcel of the total psychiatric injury suffered and fall to be assessed under part (A) of the guideline. Looking at the symptoms alone, the appropriate category would be (A)(b) (£17,900 to £51,460). In my judgment, without considering any element of aggravated damages, they would be nearer the top than the bottom of that category, given in particular the duration of the symptoms and their effect of Mrs B's depressive symptoms on her relationships with her first and second husband, the presence of PTSD in 2014 (impacting on all aspects of her life), the persistence of some of the symptoms of PTSD afterwards and the very high chance of recurrence.

207 I have considered the comparator awards relied upon by Mr Counsell in his Appendix 2. Those were cases where the assaults or abuse were more prolonged than the single instance of rape in Mrs B's case. On the other hand, there were in my judgment five factors justifying an award substantially higher than would be justified if the symptoms had arisen from (for example) a negligently caused injury. (Whether this is characterised as an award of aggravated damages, as the Guidelines suggest may be appropriate, or as compensation for the degradation and humiliation suffered—the approach preferred by the Court of Appeal in *Richardson v Howie* [2004] EWCA Civ 1127; [2005] PIQR Q3—does not seem to me to matter.) First, Mark Sewell was a manipulative bully who used his position as an elder to engineer the situation in which the rape could take place. The rape itself was a gross abuse of the trust which Mrs B placed in him as an elder and as a friend. Second, Mark Sewell then compounded the violation by denying the rape, which meant that Mrs B felt obliged to give evidence against him at the judicial committee hearing in circumstances where he was shielded from an adverse finding by the two witness-rule. This magnified the degradation and humiliation caused by the initial attack. Third, Mark Sewell's denial also led to the judicial committee concluding falsely that this was a case of "wife-swapping", which was yet a further humiliation for Mrs B, because of the moral opprobrium which that attracts in the religious community within which Mrs B then spent most of her life. Mrs B suffered an extreme but entirely understandable reaction to this. Fourth, the experience of not being believed by the elders (for which Mark Sewell and the defendants were responsible) also led her to think that she would not be believed if she went to the police. That drew out to more than 20 years the period before the matter was properly investigated. Fifth, when the police did become involved and the matter went to trial in 2014, Mark Sewell required Mrs B to give evidence again, in circumstances where he must have known that the experience had the potential to cause serious psychiatric injury and did in fact cause such injury. Taken together, these features justify a significant increase in the award that would otherwise have been appropriate.

208 Overall, I consider that the appropriate award is £62,000. If it were necessary to make separate awards for the psychiatric injury and for aggravated damages I would apportion £40,000 to the former and £22,000 to the latter.

Special damages

209 As it was presented to me, Mrs B's claim for loss of earnings was based on a contention that, but for the psychiatric injuries attributable to the rape, she would have retrained and become a teacher. She bases that claim on a comment made to her headteacher by a school inspector who observed her working as a teaching assistant. She had never previously thought she had the ability to become a teacher but has thought of it often since.

210 The difficulty with this part of Mrs B's claim is that, on her own evidence, had it not been for the rape, she would have remained one of Jehovah's Witnesses, probably until 2009. The significance of that date, she says, is that some Jehovah's Witnesses believed that Armageddon would occur in that year; and when it did not, many (including friends of hers) became disillusioned and left the organisation. Mrs B was clear that, while she remained one of Jehovah's Witnesses, she would not have taken full-time employment and would not have become a teacher. This means that, on her own case, Mrs B would not have even considered becoming a teacher until 2009 at the earliest. By that time, Mrs B was 49 years old. She was not (and is not) a graduate. To become a teacher she would have needed to acquire a degree or equivalent and a post-graduate teaching qualification. In principle, she could have combined part-time study with employment (possibly as a teaching assistant). But even if she had done so, and had been successful in obtaining the necessary qualification, she would then have needed to obtain employment. By this time, she would have been well into her 50s and would be in competition with other newly qualified teachers.

211 It is never too late to retrain and I very much hope that, if Mrs B still wishes to become a teacher, she is not dissuaded by anything I say here from seeking to do so. For what it is worth, it is my impression that she is both intelligent and capable and the school inspector's comment is some evidence that she has some of the skills required. The claim she has made, however, would require a factual finding that, but for the rape, she would already have sought to obtain a degree or equivalent, a postgraduate teaching qualification and employment and that she would have succeeded in all three respects. Given her financial position, she would have had to do all this while working. There is no evidence before me on the basis of which I could properly find that it was likely that she would have done any of these things, let alone all. This part of Mrs B's claim is, therefore, at best speculative. I therefore reject Mrs B's claims for compensation for both past and future loss of earnings in so far as they are based on the contention that, but for the rape, she would have become a teacher.

212 In respect of past loss of earnings, Mr Counsell accepts that the number of "imponderables" means that he cannot seek past loss of earnings on the multiplier/multiplicand approach. Instead, he seeks a lump sum on the basis upheld by the Court of Appeal in *Blamire v South Cumbria Health Authority* [1993] PIQR Q1. That decision shows that there are some circumstances where it may be appropriate to award a lump sum by way of damages for loss of earnings where it is difficult to quantify loss more precisely. It does not suggest that it is ever appropriate to award damages absent evidence that the injury gave rise to *some* loss of earnings. Where, as here, a claim for loss of earnings is predicated on a contention that, but for the injury, the claimant would have obtained other, better paid employment, the claimant must establish that. If she cannot, it is no more appropriate to make an award on a lump sum basis than on the traditional multiplier/multiplicand approach.

213 In the schedule of loss, it was said that a *Blamire* award could be made

"to reflect the fact that her condition has caused or contributed to her inability to maintain employment in one field for very long and to her repeated changes of occupation. Had she not been abused, the claimant would have been likely to have secured and maintained long-term employment without significant breaks".

214 The difficulty with this contention, which was in any event not positively advanced by Mr Counsell in submissions, is that there was no evidence from Mrs B or otherwise to support it. Mrs B gave detailed evidence, which I accept, on the effect of the rape and the psychiatric injuries it caused on her personal life, but she did not suggest any similar effect on her ability to work, which she continued to do, with some breaks, sometimes on a full-time and sometimes on a part-time basis. In so far as she changed jobs, or altered the pattern of her work, she explains this by reference to other events in her life (eg the move to Cyprus in 1998 with the man who was to become her second husband, the move back to Cardiff and birth of her second daughter in 1999, the move to Cornwall after her father's stroke in 2005, the move back to Barry in 2007 to be close to her first daughter, the move to Bridgend in 2014 and the move back to Barry in 2016 to be nearer to her sister and children). She is now working in a full-time position as a receptionist in a care facility. Although Mrs B had to take six months off work in 2014, before and during Mark Sewell's trial, she received full pay during this period. Taking all of this into account, I am not satisfied that, but for the rape, Mrs B would have been more remuneratively employed.

215 Finally, Mr Counsell submits that there should be an award to compensate Mrs B for the handicap which her injuries will cause her in future in the labour market, applying the principle in *Smith v Manchester Corpn* (1974) 17 KIR 1. The making of such an award requires the court

to be satisfied: first, that there is a “real” or “substantial” risk that the claimant will lose her current job before the estimated end of her working life; and second, that the claimant will suffer financial disadvantage if that risk materialises, having regard to the factors (both favourable and unfavourable) which in a particular case will affect her chances of getting another equally well paid job: see *Moeliker v A Reyrolle & Co Ltd* [1977] 1 WLR 132, 142A (Browne LJ).

216 Even if there were a risk that Mrs B might lose her present employment, her employment history demonstrates that she has had little difficulty securing employment despite her ongoing recurrent depressive illness. I would not, without clear evidence, conclude that a history of such illness would in and of itself be likely to dissuade potential employers from offering employment. The period of six months spent out of work (but on full pay) in 2014 was atypical, but it was precipitated by a uniquely stressful event, which brought back the trauma of the original attack (the trial). There was nothing before me to suggest that there was any likelihood of another such event occurring. I would therefore reject the claim for a *Smith v Manchester* award.

Conclusion

217 For these reasons:

(a) It is equitable to extend time to allow both the vicarious liability and the investigation claims to proceed.

(b) The defendants are vicariously liable for the rape of Mrs B by Mark Sewell.

(c) It is not necessary to decide whether the defendants owed Mrs B a duty of care in the conduct of the investigation into her complaint or whether, if so, they breached that duty.

(d) The psychiatric injuries for which Mrs B seeks compensation were attributable to the rape.

(e) Mrs B should be awarded £62,000 by way of general damages. The disputed claims for special damages, in so far as they are dealt with in this judgment, fail.

218 There will, therefore, be judgment for the claimant in an amount to be assessed following discussion between the parties and, if necessary, short, written submissions on any remaining disputed issues.

Order accordingly.

CATHERINE MAY, Solicitor