

1 Thursday, 6 December 2018
 2 (10.30 am)
 3 THE CHAIR: Good morning, everyone, and welcome to Day 9 of
 4 this public inquiry hearing. Mr Skelton?
 5 MR SKELTON: Chair, just before we start, I wanted to make
 6 a very small correction to a point that Mr Cook-Hurle
 7 made yesterday. I think he said at one point that
 8 A194/F41 was abused at St Vincent's, whereas in fact he
 9 was abused at St Aidan's. I just wanted to make that
 10 clear and correct the transcript.
 11 Our first witness is Mr Darren Martland.
 12 MR DARREN MARTLAND (sworn)
 13 Examination by MR SKELTON
 14 MR SKELTON: Could you first describe your title, please?
 15 **A. Hello, good morning. My name is Darren Martland. I am**
 16 **the acting deputy chief constable at Cheshire Police,**
 17 **Cheshire Constabulary.**
 18 Q. You are represented by counsel today, I think?
 19 **A. Yes, that's me, yes.**
 20 Q. Can I ask, have you been attending the hearings? Has
 21 anyone on your behalf attended the hearings prior to
 22 today?
 23 **A. No.**
 24 Q. Thank you. Could you explain your role as a senior
 25 police officer and your history to this point?

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1 Could you explain, first of all, what the approach
 2 would have been to victim care, say, 20 years ago, and
 3 how that might have changed in modern policing practice,
 4 please?
 5 **A. I can't give definitively 20 years ago. What I can say**
 6 **is today there has been a significant cultural change in**
 7 **the policing approach to how we deal with it. Victims**
 8 **are put very much at the forefront of the investigation.**
 9 **In enquiries, victim support/safeguarding are our**
 10 **primary concern. And also making sure any -- an**
 11 **allegation, when a crime is made, is recorded as**
 12 **a crime.**
 13 **Prior to that, going back to the early '90s,**
 14 **certainly when I started my policing career, there was**
 15 **very much a focus on investigation, in outcomes, in**
 16 **bringing people to justice, et cetera, and whilst it's**
 17 **not to say that the victims were not given due care and**
 18 **support, I don't think it was certainly to the degree**
 19 **that it is now.**
 20 Q. Do you think your force and other police forces had as
 21 many relationships with local organisations --
 22 Social Services, counselling organisations, therapeutic
 23 organisations -- that you might do in the modern era?
 24 **A. No, certainly not when I started my policing career.**
 25 **They were more ad hoc, informal -- there were**

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1 **A. Certainly. Just very briefly, I commenced my current**
 2 **role as the acting deputy chief constable**
 3 **in August 2017, where I have general responsibility for**
 4 **operational policing in the Cheshire Constabulary.**
 5 **Prior to that, I joined Cheshire Police in 2017 as an**
 6 **assistant chief constable. My policing career started**
 7 **in 1990, in Merseyside. I then moved to**
 8 **Cheshire Constabulary in 1999 and, on promotion --**
 9 **I then moved back to Merseyside Constabulary on**
 10 **promotion to superintendent in 2006. I then passed the**
 11 **Strategic Command course. I went to Cumbria**
 12 **Constabulary in June 2015. I then transferred to**
 13 **Cheshire Constabulary again in January 2017.**
 14 Q. Have you worked as a detective in these sorts of crimes?
 15 **A. No. Some time ago, more than 20 years ago, I was**
 16 **a reactive detective, but not for a significant period**
 17 **of time.**
 18 Q. What is a reactive detective?
 19 **A. It would be what we call a general detective in a CID**
 20 **office.**
 21 Q. I am going to ask you first of all about historical
 22 practices in respect of investigating child sexual abuse
 23 allegations, so that you can explain how they may have
 24 changed over the last 20 years since the index events at
 25 the home in question, St Aidan's.

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1 **relationships there, relations there, but certainly now**
 2 **it's a more structured, governed arrangement.**
 3 Q. So when a victim now reports an allegation of non-recent
 4 child sexual abuse, so an adult reporting an historical
 5 event, could you just briefly talk me through the
 6 process of how they are handled and signposted to
 7 support?
 8 **A. Once a report is made -- it depends very much on the**
 9 **circumstances. We, in Cheshire, have a Public**
 10 **Protection Directorate, PPD, which is a team of**
 11 **specialist detectives and they are based, some within**
 12 **the headquarters and others within the four areas, local**
 13 **authority areas, across Cheshire. It depends very much**
 14 **on the circumstances. If it was an historic allegation**
 15 **and it was a one-off -- one isolated allegation, it**
 16 **would either be allocated to the PPD detective in the**
 17 **PPD or alternatively possibly a detective in a general**
 18 **CID office.**
 19 **Once the contact has been made, there would be**
 20 **a number of records that would be made. Firstly, we**
 21 **would record the contact what we call command and**
 22 **control incidents. So we would normally despatch an**
 23 **officer -- there is a record made in an IT system. We**
 24 **would then, if it was an adult who was reporting, they**
 25 **would be visited, usually, by a uniformed officer who**

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1 would make an initial assessment, speak to them, and
 2 then they would, if there is a vulnerability or
 3 a safeguarding issue there, then they would ask for
 4 consent to submit what we call a VPA, which is
 5 a vulnerable person record -- sorry, vulnerable person
 6 assessment, which is basically the signposting into --
 7 there are different terms across the country, but we
 8 call it a "front door" in Cheshire, which is --
 9 effectively -- other forces called it a "MASH",
 10 a Multi-Agency Safeguarding Hub, which is the route into
 11 Social Services.

12 Q. Does a victim who reports these sorts of crimes have
 13 a single point of contact or one or two officers that
 14 they can maintain a relationship with who will advise
 15 them throughout the investigation?

16 A. **Certainly, yes. Once the investigation has commenced,**
 17 **then generally, assuming there are no particular**
 18 **problems with the officer concerned, has to be removed,**
 19 **et cetera, then we would do our utmost to maintain**
 20 **continuity and have one single officer investigating the**
 21 **crime and remain with the victim throughout the**
 22 **investigation.**

23 Q. Is that person responsible for ensuring that they get
 24 the support that they need, or is that passed to another
 25 part of the investigative team?

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1 the 20 years ago, that that may not have necessarily
 2 been the case in the way it will be in the modern era?

3 A. **Certainly from my experience, no, I don't think -- it**
 4 **certainly wasn't as structured as it is now. There are**
 5 **key -- there is an almost template approach that**
 6 **officers are required to take in relation to recording**
 7 **a crime. Referrals to -- via the VPA and also victim**
 8 **needs assessments. They have been relatively recent in**
 9 **their introduction, certainly the last 20 years or so.**

10 Q. So would it have been left to the discretion of
 11 individual investigating officers to assess the needs
 12 and support required by a particular witness 20 years
 13 ago?

14 A. **Yes, I think that's fair to say. There was support**
 15 **available, but certainly not to the degree it is now.**
 16 **I think the answer to your question is yes.**

17 Q. What kind of things were available?

18 A. **I know there were various signposting to various**
 19 **charities and various support agencies. I know, for**
 20 **example, ISVAs have been available for some years. So**
 21 **there have been agencies and certainly local -- through**
 22 **local authorities. I'm not absolutely certain what that**
 23 **was certainly 20 years ago.**

24 Q. Could you just talk me through, please, Operation Emily,
 25 which I think is the principal operation that

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1 A. **It's more of a rounded team approach, but certainly the**
 2 **investigating officer does have a primary responsibility**
 3 **to make sure appropriate -- if the adult victim wishes**
 4 **to do so, then there are certain referral mechanisms**
 5 **available to them, whether it be Cheshire CARES,**
 6 **RASAC -- in our force, it's Rape and Serious Sexual**
 7 **Abuse Support Centre -- or any other forms of support**
 8 **available. So the answer is probably yes, the**
 9 **investigating officer will be the one who would ensure**
 10 **that the victim was made aware of what support was**
 11 **available.**

12 Q. How long will that support be given? If, say,
 13 a decision is made not to proceed with that person's
 14 allegations, either because they aren't going to result
 15 in a successful prosecution or because there simply
 16 isn't any need because there are so many other victims
 17 and witnesses who come forward, will they still get
 18 support after that point?

19 A. **Yes. My understanding is, as long as the victim**
 20 **requires it.**

21 Q. Likewise, therefore, after a trial, which may result in
 22 a conviction or an acquittal, there will still be
 23 support available for victims after that point?

24 A. **Yes, if it's the wishes of the victim, yes.**

25 Q. Again, I think your answer is, in respect of

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1 investigated allegations made against people at
 2 St Aidan's?

3 A. **Certainly. May I refer to my statement?**

4 Q. Please do. I think it's -- for reference, it's
 5 OHY006311. The bit you're referring to I think is on
 6 page 3?

7 A. **Thank you. Briefly, the investigation commenced from**
 8 **a complaint from one individual in relation to -- in**
 9 **1994, albeit the allegations predated that. They were**
 10 **going back some time, back to the '70s, against**
 11 **St Aidan's Children's Home, which is located in Widnes,**
 12 **which is in the north of Cheshire. The operation was**
 13 **given the operation name Operation Emily.**
 14 **I'm not -- I can't be clear of exactly how it came**
 15 **into fruition, but, clearly, the operation and the**
 16 **magnitude of the allegations necessitated that**
 17 **a dedicated team was set up.**

18 Q. Can you describe how it became clear or how it
 19 snowballed into such a major investigation? Because
 20 I think, as you say, it starts off at a relatively low
 21 level. At what point did it become apparent that you
 22 were dealing with a much wider problem?

23 A. **It's very difficult for me to say, having not had the**
 24 **details, but certainly looking at the number of subjects**
 25 **reported as -- persons reported as nominals -- 2,246.**

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<p>1 The number of persons identified as suspects, 60 people. 2 That would have been quite a significant investigation. 3 Q. Who is a nominal? 4 A. The term "nominal" in here -- in policing nuance, it's 5 normally the term "nominal" would be somebody of 6 interest. In these circumstances, it's a little bit 7 different. It will basically mean anybody within the 8 remit of the inquiry. So it would include victims, 9 witnesses, it could also include police officers as 10 well, in this context. 11 Q. Would that mean that the police had had contact with 12 that many people or that there are that many people that 13 you have associated with the investigation, some of whom 14 you will have had contact with? 15 A. The latter. 16 Q. So 60 persons identified as suspects, and in fact 17 I think you give the rest of the statistics there: 18 10 suspects arrested and 10 suspects charged; 19 22 interviewed under caution; 10 deceased offenders by 20 this time, because you were dealing with events some 21 years before? 22 A. Yes, that's correct. 23 Q. Could you just describe the results of the investigative 24 process on the rest of that page, please? 25 A. Certainly. 20 cases resulted in NFA, so that's an</p> <p style="text-align: center;">Page 9</p>	<p>1 abbreviation for "no further action". That's a decision 2 made by the Crown Prosecution Service having police 3 refer the file to them. 18 cases resulted in NFA, or 4 "no further action", and that would be the decision of 5 the SIO, or the senior investigating officer. 6 Q. That's a decision not to progress it to the CPS to take 7 a final charging decision? 8 A. That's correct. 9 Q. Then in fact you secured, or the CPS secured, four 10 convictions based on the police investigation? 11 A. That's correct. 12 Q. Three cases were discontinued and three entered not 13 guilty -- three received not guilty verdicts? 14 A. Yes, that's correct. 15 Q. Do you know the duration of the operation? 16 A. I'm afraid I don't, no. 17 Q. But is it right to say that further investigations have 18 still gone on since that time? 19 A. Yes, that is correct. There have been further 20 allegations made as recent as 2014. There have been 21 five further allegations by individual people. 22 Q. Could you describe how those have evolved over the last 23 four years? 24 A. Certainly, again, it is within my statement, in 2014 an 25 allegation of sexual abuse was made by a former --</p> <p style="text-align: center;">Page 10</p>
<p>1 sorry, was made against a former staff member of 2 St Aidan's. It's transpired that the person the 3 allegation was made against is deceased. Therefore, no 4 further action was taken by Cheshire Police. In 2016, 5 a separate allegation was made against the same deceased 6 former staff member, so, again, no further action was 7 taken. In 2017, a victim made an allegation of abuse 8 against another former staff member of St Aidan's. On 9 review of Operation Emily records, it was found the 10 suspect had previously been charged of committing 11 offences, but charges had been stayed at court and, as 12 such, no further action was taken by Cheshire Police. 13 In 2017, a separate victim made allegations of abuse 14 against two former staff members, and that's the only 15 investigation, as it stands today, which is still 16 ongoing. 17 And in 2018, another former resident of St Aidan's 18 made an allegation of abuse against a former staff 19 member, who is now deceased. The victim did not wish to 20 engage in prosecution, so no further action has been 21 taken by Cheshire Constabulary on that case. 22 Q. So, as you say, within the last four years, several 23 allegations have been pursued, but only one, I think, is 24 now still ongoing and may result, or may not result, in 25 a prosecution?</p> <p style="text-align: center;">Page 11</p>	<p>1 A. That's correct. 2 Q. Focusing on the support provided during Operation Emily 3 to those people who came forward, can you explain, if 4 you are aware, how the police actually offered support, 5 counselling and so on to those witnesses that were 6 involved in the investigation? 7 A. It's very difficult to give a definitive answer to that 8 question. The reason, there are very, very limited 9 records. When we have looked at policy logs, policy 10 files, they tend to focus very much on the 11 investigation, policy decisions by the investigator and 12 any kind of resource or ancillary issues. There is very 13 little reference to any kind of support or care for 14 victims. 15 Q. Are you unable to say in any particular case what would 16 have been provided to a particular victim/survivor? 17 A. Yes, that's fair to say, not with any degree of 18 accuracy, no, I couldn't say. 19 Q. Generally speaking, would you have expected there to 20 have been some counselling and support provided to 21 victims during this period of time, so it's from 1994 22 onwards, in the context of prosecutions? 23 A. I can certainly answer from -- I was in a police force 24 in 1994 and I'd worked in CID. It tended to be, rather 25 than a bespoke or a specialised team, it tended to be</p> <p style="text-align: center;">Page 12</p>

<p>1 particular individuals within a CID office that would 2 pick up an enquiry such as this, and while I would hate 3 you to think that there was absolutely no compassion or 4 empathy shown whatsoever, I'm sure there absolutely was, 5 but what I can say is the way it's been documented has 6 left me in a position where I'm unable to give you any 7 details. I am aware that there were support services 8 available, but I can't give you the extent or how they 9 were utilised.</p> <p>10 Q. Do you know the names of the persons that were 11 convicted?</p> <p>12 A. No, I don't.</p> <p>13 Q. Presumably, that's something you could readily identify?</p> <p>14 A. Yes, I could, yes.</p> <p>15 Q. The issue of criminal compensation. Two aspects to it, 16 broadly speaking. One is the Criminal Compensation 17 Board or Authority, as it subsequently became, and the 18 other are criminal compensation orders, the latter 19 coming into force in the early 2000s. So far as the 20 former is concerned, what would have been the police 21 policy towards alerting the existence of a route to 22 compensation?</p> <p>23 A. Going back to the 1990s on that?</p> <p>24 Q. Yes.</p> <p>25 A. I really can't say with any degree of accuracy. For my</p> <p style="text-align: center;">Page 13</p>	<p>1 own personal involvement, certainly as a police officer 2 at that stage, it would have been to be contacted by the 3 CICB, as was, asking for information. In terms of 4 actually providing information of the availability of 5 CICB, as was then, I honestly can't gather any 6 recollection of how we did it at that time.</p> <p>7 Q. How is it now done?</p> <p>8 A. We now have -- certainly in Cheshire, we have the Public 9 Protection Department which consists of detectives 10 trained to what's called PIP 2 level standard. As part 11 of their training, they are made aware of CICA and its 12 need to be discussed with the victim at point of 13 contact. If you look on the back of the witness 14 statement, the MG11, it does make reference to any 15 particular evidence being used or made available for 16 a CICA. So officers are told or are advised to 17 certainly make the victim aware of the availability of 18 CICA.</p> <p>19 Q. At what stage would they be advised to make them aware 20 of it? Certainly some evidence has been given that 21 a relatively passive role is taken towards CICA during 22 the course of an investigation. So a leaflet may, for 23 example, be given, it may be mentioned, but there won't 24 be any active encouragement to bring an application 25 until the end, so as to avoid compromising the</p> <p style="text-align: center;">Page 14</p>
<p>1 prosecution if it goes ahead?</p> <p>2 A. I think that's probably fair to say, yes. I think 3 certainly CICA, when you look at some of 4 the documentation that's available, the focus tends to 5 be very much on acquisitive crimes injuries, rather than 6 abuse cases. So I think whilst it would be mentioned at 7 the first point of contact with the victim and it's 8 referred to on the MG11, the back of the MG11, 9 I certainly don't think -- there may be some confusion 10 on the part of police officers that you cannot make 11 a CICA -- you cannot start the ball rolling, so to 12 speak, at any point, which of course you can. But 13 certainly our understanding as police officers is it 14 usually comes after any criminal prosecution.</p> <p>15 Q. There is a danger, though, isn't there, that if there is 16 a two-year time limit for bringing a claim then -- and 17 the prosecution trundles on, for whatever reason, that 18 you could time out if you are not aware of it?</p> <p>19 A. Certainly reading through my statement, I think that's 20 an issue we need to pick up, certainly for our 21 constabulary, possibly for the broader police service, 22 just in terms of making it clear. I think the wording 23 in my statement suggests that the actual contact 24 wouldn't take place until the end of the process. That 25 is not the case. It should be that the victims are made</p> <p style="text-align: center;">Page 15</p>	<p>1 aware of it at the first point of contact. That is what 2 certainly officers are trained to do now under PIP 3 accreditation. But in terms of how it's managed through 4 the process, I think that's more difficult to give 5 a definitive answer to.</p> <p>6 Q. The process itself, it requires an application which can 7 now be done online?</p> <p>8 A. That's correct.</p> <p>9 Q. Will any of the investigative team officers or 10 a victims' advocate or some similar person assist with 11 the application process, if that's needed?</p> <p>12 A. I think the answer to the question is, certainly from 13 police officers, I'd certainly like to think so. But 14 certainly in Cheshire, we have the two support services, 15 Cheshire CARES and RASAC who are probably better 16 equipped and able to offer advice, guidance and support 17 in terms of the practicalities of accessing and 18 completing any kind of referral. Once the claim has 19 been submitted, then there is a procedure which Cheshire 20 Constabulary follow in how we manage the claim.</p> <p>21 Q. So you will, obviously, respond to requests for evidence 22 or information from the CICA?</p> <p>23 A. Yes, there is an NPCC protocol which we will follow. 24 I can describe it, if you wish me to do so.</p> <p>25 Q. We have already heard evidence of that, thank you.</p> <p style="text-align: center;">Page 16</p>

1 **A. Fine.**
2 Q. But that is implemented so that you will provide
3 statements, for example, as appropriate, to the
4 authorities so they can assess the nature of the crime,
5 et cetera?
6 **A. That's correct. There's a dedicated team which will**
7 **co-ordinate that.**
8 Q. But you've mentioned that your team, the two teams you
9 mentioned, including RASAC, would assist with
10 applications. Do you know that they do so or do you
11 think they would do so?
12 **A. I think -- the answer is, I think that they would --**
13 **I certainly have been advised that they would do so.**
14 Q. May I ask you about criminal compensation orders -- as
15 I say, a more recent development than the CICB, which
16 had been around for many years. Now, in the modern era,
17 it is the obligation of the court, after a conviction,
18 to consider whether or not it is appropriate to make an
19 award of a criminal compensation order against the
20 convicted person. Do you know -- just taking broadly
21 the question -- how often those sorts of orders are
22 made?
23 **A. No, I don't. I couldn't answer that question.**
24 Q. Specifically in relation to child sexual abuse cases,
25 have you come across any examples of such an order being

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1 **A. I think at my rank -- I have not been involved in it for**
2 **some time. I know that certainly officers who deal with**
3 **this, certainly the PPD, are far more aware of it, of**
4 **the legislation's requirements, certainly than I am.**
5 **There is far greater awareness now than there certainly**
6 **was previously.**
7 Q. Lastly, the issue of civil compensation. Again, that's
8 not something which the police can directly facilitate,
9 but they can alert and signpost, et cetera. In the
10 present day, will officers bring to the attention of
11 a witness or victim who is going through the
12 investigation process, possibly towards a prosecution,
13 the possibility that they can -- or the possibility they
14 could bring a civil claim?
15 **A. Yes, my understanding is they are trained to certainly**
16 **make the victim aware of the availability of a claim.**
17 Q. How would that be done?
18 **A. I would assume it would be -- the officer in the case,**
19 **the investigating officer, or potentially one of**
20 **the support agencies, either Cheshire CARES or RASAC,**
21 **would make the victim aware during the course of**
22 **proceedings.**
23 MR SKELTON: Thank you. Chair, those are my questions for
24 this witness.
25 THE CHAIR: Thank you. We have no questions. Thank you

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1 made against an accused?
2 **A. Not personally. I don't have specific knowledge, no.**
3 Q. Do you know of any such orders, not personally, but just
4 generally, do you keep data on those sorts of things?
5 **A. I don't know the answer to that question, I'm afraid.**
6 **I would imagine so, but I can't say definitively.**
7 Q. Or whether it's part of the officers' training to
8 consider that as a possibility? Obviously, there is the
9 MG19 form which raises it, but do you happen to know if
10 officers then will pursue it with the victim and
11 ascertain their wishes, for example, as to the need for
12 compensation?
13 **A. I can't say definitively. I know officers are aware of**
14 **the availability of the MG19 and the compensation order,**
15 **which is -- can be completed by them in order to**
16 **submit -- with the prosecution file. So officers are**
17 **aware of compensation. Having looked at that order,**
18 **it's not specific. It makes reference to road traffic**
19 **collisions, assaults, injuries, that kind of thing, as**
20 **opposed to any kind of CSA specifically.**
21 Q. Do you think your own personal lack of knowledge of
22 these things is indicative, really, of a force-wide
23 issue, that actually people -- or your officers -- will
24 not necessarily be aware this is an option in the
25 context of a prosecution?

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1 very much.
2 (The witness withdrew)
3 MR SKELTON: Chair, the next witness is Deputy
4 Chief Constable Serena Kennedy.
5 MS SERENA KENNEDY (sworn)
6 Examination by MR SKELTON
7 MR SKELTON: Ms Kennedy, may I start by asking you your rank
8 and professional background, please?
9 **A. I am Detective Chief Constable Serena Kennedy. I'm**
10 **currently from Merseyside Police. I joined the police**
11 **in 1993. I joined Greater Manchester Police.**
12 **I transferred to Cheshire Constabulary in 2014 and**
13 **I transferred to Merseyside Police in 2017.**
14 Q. I think you may have said "Detective Chief Constable"?
15 **A. Sorry.**
16 Q. You have promoted yourself, I think?
17 **A. I'm Deputy Chief Constable.**
18 Q. Yes, thank you. Just as I asked the previous witness,
19 do you have a background in investigating the types of
20 crimes that give rise to these particular issues that we
21 are looking at?
22 **A. So I've not personally been involved in investigations,**
23 **but I was head of the Public Protection Directorate**
24 **in -- 2015, I was appointed, it was a newly formed**
25 **directorate, so I was, as I say, the detective**

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1 **superintendent in charge of that branch.**
 2 Q. As I asked the previous witness -- and, effectively, I'm
 3 going to ask you very similar questions to see how your
 4 force deals with the same issues --
 5 **A. Okay.**
 6 Q. -- are you able to explain how victims would have been
 7 supported through the investigation process at the time
 8 when St Vincent's Children's Home was being investigated
 9 by your force?
 10 **A. Specifically in relation to St Vincent's, which was**
 11 **under the Operation, first of all, Van Gogh and then**
 12 **Operation Care, the SIO at the time did have -- there**
 13 **was a specific policy entry around providing --**
 14 **referring victims in to somebody from Liverpool City**
 15 **Council from the Social Services Department, and it was**
 16 **the responsibility of Liverpool City Council to provide**
 17 **support to those victims.**
 18 Q. Could you explain in a bit more detail how that service
 19 would have been accessed and whether it would always
 20 have been offered and accessed by those that you were
 21 interviewing and looking after?
 22 **A. I can only comment in relation to this specific**
 23 **operation, and the detail is limited, other than that**
 24 **there was a policy entry by the SIO at the time that any**
 25 **victims should be referred through into Liverpool City**

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1 raising the question of criminal injuries compensation,
 2 the application to the CICB/CICA?
 3 **A. Again, going back to the policy entry, so there was an**
 4 **aide-memoire produced for officers, and in relation to**
 5 **the CICA, or CICB as it was then, it was a policy entry**
 6 **that that wouldn't be -- it wouldn't be mentioned to**
 7 **victims.**
 8 Q. So in fact, it was just simply not dealt with at all at
 9 that stage in order to preserve the integrity of
 10 the prosecution?
 11 **A. I can't comment as to why. All I can reference is the**
 12 **aide-memoire, which at point 3 references that CICB or**
 13 **other compensation is not an issue to be discussed, but**
 14 **actually the victims were handed a helpline card. My**
 15 **assumption -- and it is purely an assumption -- is that,**
 16 **via that helpline card -- and, unfortunately, we can't**
 17 **find a copy of that helpline card -- is that either that**
 18 **helpline card referenced the CICB or the helpline**
 19 **card -- to access services, it was the service that**
 20 **would provide that support around CICB.**
 21 Q. As you say, the aide-memoire, which I don't have
 22 a document reference for at present, but you have a copy
 23 I think in front of you. It says specifically:
 24 "CICB or other compensation is not an issue to be
 25 discussed."

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1 **Council. I don't know how that referral mechanism**
 2 **worked at that time. I'm unable to answer that part of**
 3 **the question.**
 4 Q. Could you please put the operation into context for us,
 5 in terms of the size of it, when it was initiated?
 6 **A. So I'm not sure when it was initiated. But what I can**
 7 **say, in terms -- if I can just make reference to my**
 8 **notes. From the paperwork that we have been able to**
 9 **find in relation to St Vincent's, we have recorded**
 10 **45 victims and 20 suspects, but some of those suspects**
 11 **have offended against multiple victims.**
 12 Q. Likewise, in respect of your predecessor who gave
 13 evidence, do you know the outcomes of the operation?
 14 **A. There's a variety of different outcomes. I'm aware that**
 15 **some of the suspects were deceased, and some of**
 16 **the suspects, no further action was taken against them,**
 17 **and a couple of them did progress through the criminal**
 18 **justice process.**
 19 Q. To successful convictions or to acquittals?
 20 **A. The one that I'm aware of was to a successful**
 21 **conviction.**
 22 Q. What was that person's name?
 23 **A. Stanton.**
 24 Q. Stanton. Thank you. At that time, during the course of
 25 that operation, what was your force's policy towards

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1 So it is not simply the criminal injuries
 2 compensation, it is any form of compensation, by which
 3 one can reasonably infer civil compensation as well.
 4 **A. Yes.**
 5 Q. It doesn't give any particular caveats. It doesn't say,
 6 "Until the end of the investigation" or, "Until the end
 7 of the prosecution", it is just, full stop. Is the
 8 implication, then, that actually the officers during the
 9 course of that investigation, at least, would simply
 10 never mention it at any stage?
 11 **A. I don't feel able to comment on that. As I say, because**
 12 **I have not been able to access what was on the helpline**
 13 **card and whether there was any reference to the**
 14 **different forms of compensation that are available,**
 15 **whether it was on the helpline card or whether the**
 16 **agreement was between the police force at the time and**
 17 **the service that was providing the help, that they would**
 18 **discuss CICB or other compensation forms, but I just --**
 19 **I have just not got that information because we have not**
 20 **been able to find a copy of the helpline card.**
 21 Q. The issue of criminal compensation orders. As I say,
 22 they came into force in the early 2000s. Again, are you
 23 able to assist on whether or not, historically, they
 24 have been used generally and specifically in respect of
 25 these types of offences?

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1 **A. No, I have not got that information.**
 2 Q. Having been a detective yourself, presumably during the
 3 era in which they came into force, would you have any
 4 personal familiarity with ever assisting in getting the
 5 information before the court to allow such an order to
 6 be made?
 7 **A. My discussion, because I wasn't -- didn't become**
 8 **involved, I wasn't an SIO investigating officer in**
 9 **crimes of this nature, but certainly it was something**
 10 **that, as a junior officer, we did discuss with victims,**
 11 **on how they could access CICB at the time, and how to**
 12 **contact Citizens Advice Bureau, but I can't say,**
 13 **referencing it into this, crimes of this nature.**
 14 Q. I think the CICA/CICB, there is obviously a distinction
 15 between the court order and the authority which can make
 16 an order?
 17 **A. Yes.**
 18 Q. Dealing with the court orders first, do you have any
 19 experience of assisting with getting information before
 20 the court or assisting with the CPS to raise the issue
 21 before the court?
 22 **A. Not that I can recall.**
 23 Q. So far as the CICA is concerned, what is the present-day
 24 policy for raising this with victims and survivors?
 25 **A. So on the back of the MG11 form, there is reference to**

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1 applications, but any other issues, presumably?
 2 **A. Absolutely, yes.**
 3 Q. Are they the ones that have responsibility in your force
 4 for signposting support services?
 5 **A. So what would happen if this was reported now, a VPRF**
 6 **form would be filled in, which is a vulnerable persons**
 7 **referral form, and that would access -- go through our**
 8 **MASH and then the service would be accessed via our RASA**
 9 **service, which is our Rape and Sexual Assault Centre**
 10 **based in Bootle, and the ISVA's provision would come**
 11 **from there. Also, local authorities do have some access**
 12 **to some ISVAs, but the coordination would come through**
 13 **our MASH.**
 14 Q. What kind of support is available through your referral?
 15 **A. Can I just reference my statement, please?**
 16 Q. Please.
 17 **A. So we would provide a leaflet to the victim that would**
 18 **outline the services that they can access via our SARC,**
 19 **our Sexual Assault Referral Centre, or via RASA.**
 20 **There's a variety of services that can be accessed and,**
 21 **I have to say, you know, it's built around the needs of**
 22 **the victim, so it's not a standard package. We have the**
 23 **flexibility to meet the needs of that victim. So**
 24 **there's advice, there's medical advice available,**
 25 **there's advice in relation to sexual health, drug and**

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1 **the CICA, so the officer, when they take a written**
 2 **statement, should go through the back of that form, line**
 3 **by line, with the person that they've taken the**
 4 **statement from, and, as I say, there is specific**
 5 **reference to the CICA.**
 6 **If a video interview is done or an audio interview**
 7 **is done with a witness, then you still go through the**
 8 **back of the MG11 because you would still get a signature**
 9 **from the victim or the witness. So it's through the**
 10 **back of the MG11, and that's part of the officers'**
 11 **training.**
 12 Q. In terms of providing assistance, so not simply
 13 signposting it by way of written information or indeed
 14 a conversation, but actually helping, is that available
 15 to victims and, if so, who provides it?
 16 **A. It is available for victims, but it's not something that**
 17 **the officer would do themselves. That would be through**
 18 **the -- accessed -- in the cases of this nature, would be**
 19 **the independent violence -- sexual violence adviser.**
 20 Q. ISVAs, they have sometimes been called?
 21 **A. ISVAs, yes.**
 22 Q. That person would be a sort of dedicated adviser during
 23 the duration of the witness's contact with the force?
 24 **A. Yes.**
 25 Q. And would assist with not simply those sorts of

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1 **alcohol services if it's relevant, reference in to GP's**
 2 **referrals if that's relevant, even as far as if the**
 3 **event that the victim has suffered has created problems**
 4 **around housing, there will be support via the SARC and**
 5 **the RASA in relation to housing. So it's quite**
 6 **a wide-ranging support that is provided to victims, but**
 7 **it is absolutely wrapped around the needs of**
 8 **the individual victim.**
 9 Q. Sometimes criminal prosecutions don't go ahead, for
 10 whatever reason; they are discontinued. "No further
 11 action", I think as the last witness said, either by the
 12 officer, the SIO, or the CPS. Sometimes they go ahead
 13 and, for whatever reason, they are stopped during the
 14 course of the trial. Sometimes they do go to the full
 15 trial and either result in acquittal or conviction.
 16 Is there a particular point at which you are no
 17 longer able to resource support for victims who may have
 18 come forward?
 19 **A. This service is provided to the victim by RASA, which**
 20 **are a third party. They are not employed by the police.**
 21 **So they are able to access that service as long as they**
 22 **need that service. Victims can also access it if they**
 23 **have not reported to the police, so they can self-refer**
 24 **into those services. So it's there for as long as the**
 25 **victim needs that service.**

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<p>1 Q. It's funded by whom?</p> <p>2 A. It depends on -- so there's a mixture of funding</p> <p>3 available. So the SARC, some of that is a commissioned</p> <p>4 service by NHS England, which the Police and Crime</p> <p>5 Commissioner pays part of, the local authorities pay</p> <p>6 part of, so there's a funding formula, and likewise for</p> <p>7 the RASA, again, it is a charity, but it's also</p> <p>8 funded -- some of them are commissioned services, so</p> <p>9 some of it will come out of the community safety</p> <p>10 partnership grant.</p> <p>11 Q. The issue of civil compensation. I have asked you about</p> <p>12 criminal compensation and signposting for that. Civil</p> <p>13 compensation is a separate issue. Do officers raise</p> <p>14 that with complainants, witnesses, and, if so, when?</p> <p>15 A. So in relation to civil, it's not something that the</p> <p>16 officers themselves would raise. The staff are there to</p> <p>17 investigate the criminal investigation. If they were</p> <p>18 asked about it, in my experience, the advice given would</p> <p>19 be to speak to the ISVA about it, seek independent legal</p> <p>20 advice about it, or reference to the Citizens Advice</p> <p>21 Bureau.</p> <p>22 Q. Why would it not be raised by the officer directly?</p> <p>23 A. Because they would focus around actually the</p> <p>24 investigation. They would discuss the ICA as per the</p> <p>25 MG11, but civil compensation is not something they would</p> <p style="text-align: center;">Page 29</p>	<p>1 particularly raise themselves.</p> <p>2 Q. I think you have appended a form to your second</p> <p>3 statement, which is MSP000164_007. Could you just</p> <p>4 explain what this form is, please?</p> <p>5 A. Sorry ...</p> <p>6 Q. It should come up on screen, if that's easier.</p> <p>7 A. Oh, right, yeah. So that's the back of the MG11 form,</p> <p>8 which I have referenced is where the officer would fill</p> <p>9 that in with the victim or the witness and they would go</p> <p>10 through each of those consent issues with the victim</p> <p>11 line by line.</p> <p>12 Q. You can see at paragraph (f) in the box:</p> <p>13 "I consent to the statement being disclosed for the</p> <p>14 purposes of civil proceedings if applicable, eg,</p> <p>15 childcare proceedings, CICA."</p> <p>16 That's not quite signposting the service or</p> <p>17 possibilities to other people, it's just saying, "I will</p> <p>18 allow it to happen"?</p> <p>19 A. Yes.</p> <p>20 Q. But presumably there's more signposting than that done</p> <p>21 during the course of contact with the witness?</p> <p>22 A. In relation to CICA?</p> <p>23 Q. Yes.</p> <p>24 A. That is what -- that is the minimum that an officer</p> <p>25 would raise with them, and obviously in terms of</p> <p style="text-align: center;">Page 30</p>
<p>1 the training that our officers receive, the training</p> <p>2 that our officers receive for dealing with the nature of</p> <p>3 these offences, they get additional training, and that's</p> <p>4 something that would be discussed on their training.</p> <p>5 Q. Other senior officers who have given evidence have</p> <p>6 offered leaflets which may be given out to everybody who</p> <p>7 walks into a police station, or may be available at</p> <p>8 least to everyone, and one of them is</p> <p>9 a Ministry of Justice leaflet which explains the sort of</p> <p>10 access to services as a victim and the support for</p> <p>11 victims, which does raise the issue of criminal</p> <p>12 compensation. Does your force use that?</p> <p>13 A. I have to say, I'm not aware. I don't know.</p> <p>14 Q. Thank you. In your second statement, if I may, just the</p> <p>15 final page, I will just take you to that, just to</p> <p>16 clarify, going back to operation care, please. In your</p> <p>17 statement, the first page of it is MSP000164. Then</p> <p>18 I think you have a substituted page on the final page,</p> <p>19 which is page 5.</p> <p>20 A. Yes.</p> <p>21 Q. Could you explain what the position was during</p> <p>22 Operation Care, so far as signposting these things were</p> <p>23 concerned, and specifically in respect of the problem</p> <p>24 with the Home Office Select Committee and criticism?</p> <p>25 A. So a letter was -- part of the decision by the SIO was</p> <p style="text-align: center;">Page 31</p>	<p>1 rather to actually personally interview every child that</p> <p>2 we identified had been resident at the home, was to</p> <p>3 write to those children informing them of</p> <p>4 the investigation and inviting them to make contact with</p> <p>5 the investigation team if they had anything to tell.</p> <p>6 And then, at the conclusion of the victim's case,</p> <p>7 a further letter would be sent to them advising them</p> <p>8 that they may be entitled to compensation and advising</p> <p>9 them to contact a solicitor.</p> <p>10 In the early 2000s, this practice was examined by</p> <p>11 the Home Office Select Committee and was criticised as</p> <p>12 bad practice, but there's no evidence actually that we</p> <p>13 found, when we have reviewed the St Vincent's case, that</p> <p>14 that occurred within Operation Care.</p> <p>15 Q. May I just explore this in a bit more detail. First of</p> <p>16 all, just going back to Operation Care, it seemed that</p> <p>17 it wasn't -- you were actually looking to find people</p> <p>18 that may have evidence about these things. That was the</p> <p>19 approach, which has occurred in many of these group</p> <p>20 investigations?</p> <p>21 A. So I understand, yes.</p> <p>22 Q. Secondly, writing to people to say they may be entitled</p> <p>23 to compensation seems to contradict the document which</p> <p>24 you have provided, which says, "Never raise the issue",</p> <p>25 it doesn't say, "Raise it at the end", it just says,</p> <p style="text-align: center;">Page 32</p>

<p>1 "Don't raise it". Do you know how that contradiction 2 has arisen? 3 A. I am only surmising, but this was an investigation that 4 took place over a number of years. I understand that it 5 started in the mid to late 1990s and was not finalised 6 until the early to mid 2000s. The SIO that made the 7 policy decision, which I have referenced, with the "do 8 not discuss" was one SIO, and the reference here, where 9 the SIO has written to the children and then written 10 back to them, is a different SIO. So I can only assume 11 it's a change in SIO and, as things have developed, as 12 national practice has changed, as there's been learning, 13 the subsequent SIO has made an alternative policy 14 decision. 15 Q. It says: 16 "This practice was examined by the Home Office 17 Select Committee." 18 Is that the practice of writing at the conclusion to 19 raise the issue? Is that what's being referred to 20 there? I'm just trying to work out exactly what is 21 being said? 22 A. Yes, I think so. 23 Q. What was bad about it? What was the Select Committee 24 saying was bad practice? 25 A. I'm assuming that actually not discussing the issue of</p> <p style="text-align: center;">Page 33</p>	<p>1 compensation until the end of the trial was the issue, 2 and actually it should be referenced much earlier on in 3 the investigation process. 4 Q. Which is what now occurs? 5 A. Yes. 6 Q. I understand. Thank you. Are there any other issues 7 about the question of support or signposting to 8 compensation which you would like to address now? 9 A. I don't think so. 10 MR SKELTON: Thank you. Thank you, chair, that concludes my 11 questions. 12 THE CHAIR: Thank you. We have no further questions. 13 (The witness withdrew) 14 MR SKELTON: Chair, we now have some reading to be done, 15 until the mid-morning break. 16 Statement of MS NORMANDIE WRAGG (read) 17 MR BARTH: Thank you, chair. I am going to read the witness 18 statement of Normandie Wragg, who is currently the chief 19 executive officer of Nugent Care. The reference is 20 NUG000004. As I said, Normandie Wragg is the chief 21 executive officer of Nugent Care. She has worked in 22 Health and Social Care Services since 1994. She is 23 a professionally qualified counsellor and she has been 24 employed by Nugents since October 2013 and has held her 25 present post since October 2015. Turning to</p> <p style="text-align: center;">Page 34</p>
<p>1 paragraph 7, she addresses the topic of insurance: 2 "Nugent has comprehensive insurance in place, with 3 a range of insurance policies. We annually review our 4 coverage and levels of indemnity with our brokers, 5 Howdens. Nugent does not self-insure in respect of any 6 class of risk. 7 "All claims for child sexual abuse, (CSA) are 8 covered by our insurance so that we have no financial 9 interest in the outcome of any CSA claim. The only 10 exception would be where a claim related to the events 11 preceding 29 December 1960 in whole or in part. 12 I understand that the limit of indemnity of our public 13 liability insurance prior to that date was £500 so that 14 Nugent would be responsible for any cost over and above 15 that figure. Four or five CSA claims that have been 16 intimated over the years (including one in the AB & Ors 17 group action) predated 29 December 1960 in whole or in 18 part, but I am informed that no compensation payment was 19 made in any of those claims, all of which were 20 repudiated or withdrawn. 21 "Details of our insurance arrangements are appended 22 to this statement at exhibit NW/1. As can be seen, they 23 include insurance for public/products liability, 24 employer's liability, professional indemnity, directors' 25 and officers' liability, commercial and combined</p> <p style="text-align: center;">Page 35</p>	<p>1 property risks, and car fleet." 2 In relation to process upon notification of a claim, 3 the relationship with insurers and lawyers and recent 4 claims history, Ms Wragg says this: 5 "All claims relating to allegations of CSA, like 6 other claims against Nugent, are forwarded to our 7 insurers by Howdens. Details of our process and 8 procedures are set out in our claims procedure which is 9 appended at exhibit NW/2. All matters are then dealt 10 with by the relevant insurers and their appointed 11 solicitors. We provide such assistance and information 12 as our insurers and the solicitors request. 13 "We expect insurers to handle all claims and to be 14 made aware of progress. There is a well-established 15 line of communication between Nugent and our lawyers. 16 I understand that all CSA claims against Nugent have 17 been dealt with by a specialist team of lawyers at 18 Hill Dickinson LLP (who recently transferred to 19 Keoghs LLP in 2017). 20 "Our governing body receives brief quarterly update 21 reports on the number of live cases. However, it is 22 important to emphasise that we have no financial 23 interest in any claim. It follows that, in practice, 24 the handling of claims is primarily a matter for 25 insurers and the appointed solicitors. The key</p> <p style="text-align: center;">Page 36</p>

<p>1 decisions in each claim are made by insurers. 2 "Year on year, the number of claims being received 3 by Nugent has fallen overall, with only two received in 4 the year 2017/18. Neither of those related to CSA." 5 Turning to the litigation concerning St Aidan's and 6 St Vincent's: 7 "I am aware that this investigation will be 8 considering long-running group litigation against Nugent 9 concerning the St Aidan's and St Vincent's homes. I did 10 not work for Nugent at that time that that litigation 11 was ongoing. Therefore, I have only a very limited 12 knowledge of the litigation and the police 13 investigations into St Aidan's and St Vincent's that 14 preceded the litigation. The only information that 15 I have was provided to me by Mrs Barbara Taylor, our 16 former head of quality assurance, who as part of her 17 role was responsible for assisting Hill Dickinson in the 18 locating of documents and witnesses for the purpose of 19 investigating the claims. Mrs Taylor has now retired. 20 "Nugent was formerly known as Catholic 21 Social Services and then renamed as Nugent Care Society 22 at some stage in the 1970s. At all relevant times for 23 the purposes of the CSA claims in the litigation, Nugent 24 owned and operated both St Aidan's and St Vincent's. 25 St Aidan's was a former approved school and then</p> <p style="text-align: center;">Page 37</p>	<p>1 a children's home with education on the premises (CHE) 2 on Norlands Road, Widnes, Cheshire, which closed 3 in December 1981. St Vincent's was a former approved 4 school and then a children's home with education on the 5 premises on Raven Meols Lane, Formby, Merseyside, which 6 closed in the late 1980s. 7 "A number of claims were made against Nugent arising 8 out of allegations of CSA at these two institutions. 9 They resulted in long-running and complex group 10 litigation in which Nugent was represented by 11 Hill Dickinson. 12 "As previously stated, I also understand that at no 13 stage did Nugent have any financial interest in the 14 outcome of the litigation because it was insured for the 15 claims in question. The key decisions made in the 16 litigation were made by Nugent's insurers with the 17 benefit of legal advice. I am unable to make any 18 further comment upon the litigation or the way in which 19 it was conducted. However, I am aware that Nugent's 20 relevant insurers (Royal & Sun Alliance) will be 21 producing a statement to address the history of 22 the litigation in detail. 23 "The current position regarding CSA and claims. 24 "In common with childcare services generally across 25 the country, Nugent has changed its policies, procedures</p> <p style="text-align: center;">Page 38</p>
<p>1 and practice beyond all recognition over the years. 2 Work in the field of childcare has been influenced 3 directly by the events that gave rise to litigation, 4 such as that being considered in this investigation, and 5 similar cases up and down the country. As the inquiry 6 will know, external requirements imposed upon Nugent and 7 all other providers of care for vulnerable people, and 8 in particular children and young people, are far greater 9 and much more stringent than at the time of the events 10 which gave rise to the claims in the group litigation. 11 "I shall set out below a description of our current 12 practice, together with our key drivers for improvement. 13 Where appropriate, I attach evidence of our processes 14 and procedures as examples of the transparency we strive 15 for in order to prevent terrible events of abuse from 16 happening again. As an organisation, we are constantly 17 trying to strike the right balance between openness to 18 enable children and others to report safeguarding 19 concerns and rigorous action to prevent CSA." 20 Ms Wragg then goes on between paragraphs 20 and 47 21 to set out the developing of a culture of safeguarding, 22 the internal governance and processes, and the external 23 governance processes and influences. Continuing at 24 paragraph 48: 25 "Where a civil claim is received concerning someone</p> <p style="text-align: center;">Page 39</p>	<p>1 who is still working for Nugent, then we follow our 2 procedures regarding allegations against professionals. 3 A non-recent civil claim is taken as seriously as an 4 allegation about recent conduct. Each claim is assessed 5 on its particular circumstances and appropriate 6 safeguarding procedures are followed as necessary. We 7 always inform statutory agencies where there are 8 concerns about possible CSA taking place, whether past 9 or present." 10 Then concluding at paragraph 50: 11 "Finally, as the CEO of Nugent, I wish to state on 12 behalf of my organisation that it will always be 13 a matter of the greatest regret for us that we know that 14 children were abused whilst in our care. We have 15 nothing but sympathy and compassion for those who 16 suffered so appallingly at the hands of individuals who 17 should have been caring for them, but instead did 18 exactly the opposite. No child should ever have to 19 suffer what those children went through and, as an 20 organisation, we want to do everything we can to make 21 sure that such events will never happen again to those 22 in our care." 23 Chair, I propose we take the mid-morning break now. 24 THE CHAIR: Thank you, Mr Barth. We will return just before 25 quarter to 12. Thank you.</p> <p style="text-align: center;">Page 40</p>

<p>1 (11.27 am) 2 (A short break) 3 (11.46 am) 4 THE CHAIR: Mr Skelton? 5 MR SKELTON: Chair, the next two witnesses are Peter Garsden 6 and Paul Durkin, who were the solicitors who acted for 7 the claimants in the St Vincent's and St Aidan's 8 litigation. Mr Durkin is flying back to the 9 United Kingdom today and we have made contact with him, 10 but he is still in transit, rapidly on his way to the 11 inquiry. We hope he will be here soon. But may 12 I suggest, to give him time to prepare himself to give 13 evidence and to confer with Mr Garsden, that we rise for 14 an early lunch now and reconvene at 1.30 pm? 15 THE CHAIR: Yes, we will do that. Thank you, Mr Skelton. 16 MR SKELTON: Thank you. 17 (11.46 am) 18 (The short adjournment) 19 (1.30 pm) 20 MR SKELTON: Chair, the next and final witnesses today are 21 Peter Garsden and Paul Durkin. 22 MR PETER GARS DEN (sworn) 23 MR PAUL DURKIN (sworn) 24 25</p> <p style="text-align: center;">Page 41</p>	<p>1 Examination by MR SKELTON 2 MR SKELTON: Mr Garsden, may I ask you first to explain your 3 professional background? 4 MR GARS DEN: I qualified as a solicitor in 1981, so I've 5 been qualified for 37 years, I think. I've been dealing 6 with child abuse litigation for claimants since 1994. 7 I think that's nearly 25 years. And in 1998, I helped 8 set up and am President of the Association of 9 Child Abuse Lawyers. I'm presently at Simpson Millar 10 Solicitors in Manchester and I'm head of department. We 11 deal exclusively -- there's, I think, about ten of us 12 and we deal exclusively in child abuse litigation for 13 claimants. 14 MR SKELTON: Thank you. Mr Durkin? 15 MR DURKIN: I'm a solicitor qualified in 1991. A background 16 in general litigation, and specialising in child abuse 17 litigation since 2000. I currently work at Switalskis 18 as part of a dedicated team dealing with non-recent 19 abuse cases. 20 MR SKELTON: There was a period of time when you two worked 21 together? 22 MR DURKIN: Sorry, between 2000 and 2015, I worked at 23 Abney Garsden McDonald with Peter. 24 MR SKELTON: Mr Garsden, may I first ask about the early 25 days of child abuse litigation and the status of</p> <p style="text-align: center;">Page 42</p>
<p>1 the law. Just in summary, in the early days, there was 2 a problem with limitation, in that the courts generally 3 said that these sorts of cases were assaults and 4 therefore a six-year fixed limitation period applied 5 with no discretion, and one of ways that lawyers found 6 a way around that was by identifying systemic 7 negligence, negligence by the overall institution, not 8 just by the abuser, which would attract a three-year 9 period with discretion to extend. 10 MR GARS DEN: Yes, that's correct. When we first started 11 dealing with these cases, there were issues with the law 12 because of a case called Stubbings v Webb, which said 13 that abuse of children was not personal injury, which 14 was rather odd, and it meant that we had to argue the 15 cases on the basis of systemic negligence, which meant 16 that we had to argue that the children's homes had 17 allowed abuse to take place because of a breakdown in 18 their systems of management, which meant that they 19 didn't vet sex offenders properly, they let them become 20 care workers and were negligent in the way that they ran 21 the home, they didn't listen to complaints, et cetera, 22 et cetera, et cetera. 23 The law of limitation, as you say, meant that it 24 wasn't possible to sue an individual abuser in assault, 25 because the time limit was six years from 18, ie, 24.</p> <p style="text-align: center;">Page 43</p>	<p>1 So we had to bring proceedings in negligence against the 2 home owner in systemic negligence, and there was 3 a famous case where somebody sued their abusive 4 stepfather and lost, but succeeded against the mother 5 because the mother had been negligent in not responding 6 to complaints. 7 MR SKELTON: Which, on the face of it, to a layperson, is an 8 irrational way of going about finding liability. 9 MR GARS DEN: It was referred to in our group action as 10 a "Lewis Carroll story" and referred to when the law 11 changed in 2008. 12 MR SKELTON: In A v Hoare? 13 MR GARS DEN: Yes. 14 MR SKELTON: You, I think, Mr Garsden, set up the North West 15 child abuse litigation? 16 MR GARS DEN: I did. 17 MR SKELTON: You were lead solicitor for several years, as 18 I understand it? 19 MR GARS DEN: Yes. What happened was, I was acting for 20 a client who alleged abuse at a children's home in 21 Warrington, and I looked for other claimants because 22 there was a police investigation going on. It turned 23 out there were many victims at that particular 24 children's home, not only that children's home, but also 25 two other children's homes owned by Nugent Care, called</p> <p style="text-align: center;">Page 44</p>

1 St Vincent's and St Aidan's, a home owned by National
 2 Children's Home called Danesford, and I can't remember
 3 the numbers, but there were, I think, about 47 claimants
 4 at St Aidan's and a lesser number at St Vincent's. So
 5 I became lead solicitor designate for all those
 6 claimants, and I helped to co-ordinate all their
 7 solicitors, because there were quite a few solicitors
 8 involved, acting for them and we issued writs in the
 9 five homes in about 1997 and set up what became known as
 10 the North West Child Abuse Cases, which encompassed
 11 those five children's homes --
 12 MR SKELTON: Just to be clear, St Aidan's and St Vincent's
 13 were run by Nugent Care Society, so they were
 14 defending -- and they were insured by RSA?
 15 MR GARDSEN: They were.
 16 MR SKELTON: There was Greystone Heath and Dyson Hall, which
 17 were run by Liverpool City Council?
 18 MR GARDSEN: Correct.
 19 MR SKELTON: Were they insured or were they self-insuring?
 20 MR GARDSEN: I think they were self-insured. It's sometimes
 21 a mystery to us as to whether -- as to what the
 22 insurance status is, but I'm fairly sure that they
 23 weren't insured, no.
 24 MR SKELTON: Lastly, Danesford, which you mentioned, which
 25 was run by the National Children's Home.

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1 MR SKELTON: Can I ask you to stay a little bit closer to
 2 the mic or move it slightly, because your voice is
 3 a little bit faint? Thank you.
 4 The formation of the group then was by clients
 5 walking into your office, was it, or was there some
 6 process of advertising endorsed by the court?
 7 MR GARDSEN: Well, right at the beginning, we took advice
 8 from leading counsel who was the same leading counsel,
 9 Richard Maxwell, who had been involved in the
 10 North Wales cases. In the North Wales cases, they had
 11 managed to secure themselves a public inquiry, so
 12 leading counsel advised right from the outset that we
 13 should try and get a public inquiry because we were
 14 arguing systemic negligence, so it's very important that
 15 we had documents of system and management, and the only
 16 way we could get them was by either the defendants
 17 volunteering them, and they certainly weren't doing
 18 that, or public inquiries could force them to disclose
 19 them and examine the system of management at a public
 20 inquiry.
 21 So I set about the task of raising awareness of
 22 the need for a public inquiry, which one can only really
 23 do -- well, as this one -- through politicians and the
 24 media. So as part of my tactics for the whole group,
 25 I was trying to persuade parliament to give me a public

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1 MR GARDSEN: Correct.
 2 MR SKELTON: They were insured by Ecclesiastical?
 3 MR GARDSEN: The Methodist, in those days, but yes.
 4 MR SKELTON: Methodist?
 5 MR GARDSEN: The Methodist Insurance Company, but they are
 6 part of Ecclesiastical, yes.
 7 MR SKELTON: So you had three defendants in respect of five
 8 institutions?
 9 MR GARDSEN: Correct.
 10 MR SKELTON: Can you remember the total number of claimants
 11 that you ended up with? I think it's been mentioned
 12 about 120. Is that right?
 13 MR GARDSEN: It was 120 at Greystone Heath. There were 120
 14 across St Vincent's and St Aidan's and at Dyson Hall
 15 there were about 20. Your maths is probably better than
 16 mine. Whatever --
 17 MR SKELTON: 260.
 18 MR GARDSEN: Yes. Across the five homes, yes.
 19 MR SKELTON: Thank you. Does that accord with your
 20 recollection, Mr Durkin, because I think you became lead
 21 solicitor at some point, in around 2000; is that
 22 correct?
 23 MR DURKIN: Yes. I was the lead solicitor for St Aidan's,
 24 St Vincent's and Danesford. And a colleague dealt with
 25 the Liverpool claims, Greystone Heath and Dyson Hall.

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1 inquiry. They never actually did, because there were
 2 police prosecutions ongoing at that time. So the
 3 response I got was, "We will give you a public inquiry
 4 when the prosecutions are over", but in the process of
 5 that, there was quite a lot of publicity. I also
 6 contacted the police to try and liaise with them.
 7 MR SKELTON: There are two forces involved, I think you've
 8 heard the officers, or the senior officers who are now
 9 in post giving evidence this morning, Cheshire and
 10 Merseyside. Did you have any particular dealings with
 11 one or both of them?
 12 MR GARDSEN: Initially, I was dealing with Cheshire and
 13 I tried to explain that, whereas they were normally used
 14 to dealing with defendant's solicitors in a criminal
 15 matter, we were acting for claimants, we were both on
 16 the same side and we were both pursuing similar issues
 17 so we ought to work together, so that if I came across
 18 any complainant who hadn't been to the police, I would
 19 refer them to the police, and the police, at an
 20 appropriate time, would make the complainant witnesses
 21 aware that there was a civil action ongoing at that
 22 time, because, as I've learnt over the years, the
 23 interaction between civil solicitors and the police is
 24 a tortured one and can cause conflict.
 25 MR SKELTON: You heard the evidence this morning. It is

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<p>1 fair to say there was a slightly mixed impression of how 2 to approach the question of interaction with solicitors. 3 MR GARS DEN: Yes. 4 MR SKELTON: And possibly a change during the course of 5 the police investigation, a softening of the approach. 6 What would you say in response to that? 7 MR GARS DEN: Well, it was -- things were very raw in those 8 days. We were all learning because there weren't any 9 such cases, and the way in which the accused would use 10 compensation as a method to try and defeat criminal 11 prosecutions was certainly not anticipated, but as soon 12 as the criminal trials arose, it became a live issue and 13 the complainants, or my clients, the claimants, were 14 cross-examined on the basis that, you know, "You're only 15 in it for the money and you're telling lies". So the 16 way in which procedurally we worked with each other 17 changed, and it wasn't until I think the Home Affairs 18 Select Committee looked at it in 2001 that we all came 19 under a forensic analysis as to how we had behaved. 20 MR SKELTON: What did they actually say? 21 MR GARS DEN: Well, they actually criticised, unfairly, in my 22 view, what they called as trawling, which to my mind was 23 the normal process of police investigation. 24 The police told me, when I first contacted them in 25 1994, that they recognised that when one claimant came</p> <p style="text-align: center;">Page 49</p>	<p>1 along and said he had been abused by somebody who was in 2 the childcare arena, that it was highly unlikely that it 3 was that one isolated case. So they realised that, as 4 he'd been in the childcare arena for over 20 years, it's 5 likely that he had abused countless children who had 6 been at the children's home. So they saw it as their 7 duty to try and contact, with the cooperation of 8 the local authority, who provided them with registers, 9 all the children that went to that home, and they had 10 a dip sampling system whereby they would select, say, 11 50, and if they got a reasonable number of complaints, 12 they may look for more. That system was turned on its 13 head and criticised by the alleged falsely accused who 14 said that they were the victims of what they termed as 15 reverse police methods, and the Home Affairs Select 16 Committee criticised that trawling method, which meant 17 that, after 2001, the police stopped investigating in 18 that proactive way, and it wasn't until the Savile 19 situation and sexual exploitation, when they realised 20 that they hadn't been investigating properly, and that 21 policy, which I didn't agree with and which I pleaded 22 with the lead chief constable not to undertake, came 23 back in 2008 to bite them, and now, of course, the 24 system has gone back to proactive policing, in the way 25 it should do.</p> <p style="text-align: center;">Page 50</p>
<p>1 MR SKELTON: What about the issue of civil lawyers and their 2 engagement with the police investigations? 3 MR GARS DEN: Well, once again, it was suggested that I was 4 working hand in glove with the police, and they were 5 passing me cases, which simply wasn't true. But that 6 was used by those who were accused as a method of 7 undermining prosecutions and undermining police 8 investigation. 9 MR SKELTON: Is it still an issue now? 10 MR GARS DEN: It is. It is. But, I mean, now the police 11 will take a very distant position from us. We often -- 12 we need police evidence for our civil cases because of 13 data protection issues. We can't get access to that 14 information and we often have to bring applications for 15 non-party disclosure against the police which they can 16 test, even though we're acting for the same claimants. 17 MR SKELTON: But generally speaking, they're resistant 18 during the course of the investigation, up to the point 19 where it's discontinued or followed through to trial. 20 Afterwards, presumably, it's an even more 21 straightforward matter to get police statements? 22 MR GARS DEN: I wish it was. It is quite easy to get police 23 statements for your clients, but we want not only those 24 statements, we need to contact the other complainants, 25 because they're corroborative witnesses. We also need</p> <p style="text-align: center;">Page 51</p>	<p>1 to see unused material, because they often have a lot of 2 material which we don't see and can't know anything 3 about unless they give us disclosure. So that 4 historical tension is problematical in all our cases. 5 MR SKELTON: Has it not resolved, in terms of the process 6 now, that actually you know what you're applying for, 7 the police know the basis on which they can resist or 8 accept, and the judge knows the settled law in respect 9 of third party disclosure? 10 MR GARS DEN: I wish it was that straightforward. When I've 11 discussed it with Operation Hydrant, their attitude has 12 often been that we're on a fishing expedition and that 13 if we tell them exactly what we want, then they will 14 consider it. The problem is, we don't know what they've 15 got, so how can we ask for what is there that we don't 16 know exists? 17 MR SKELTON: Hydrant is an operation run by which force? 18 MR GARS DEN: It's the national operation run, I think, in 19 Norfolk, I think it's the Chief Constable of Norfolk 20 that's in charge of it. They are the coordinating 21 operation in charge of all the historical child abuse 22 investigations throughout the country. So that if there 23 are two operations which need to communicate with each 24 other, they will facilitate that communication and 25 assist.</p> <p style="text-align: center;">Page 52</p>

<p>1 MR SKELTON: Returning to the North West group, what was the 2 funding arrangement that led you to bring the actions? 3 MR GARDEN: They were all Legally Aided. In those days, 4 means assessments were a lot more generous than they are 5 now. And I think -- what percentage would you say, 6 Paul, were Legally Aided, would you say? 7 MR DURKIN: 98 per cent. 8 MR GARDEN: 98 per cent. Because all the claimants were 9 the product of children's homes and often had a criminal 10 career, so they were, in majority, without funds, a lot 11 of them were on benefits, some of them were in prison, 12 and they largely all qualified. 13 MR SKELTON: Just a simple point: does the availability of 14 public funding facilitate the ability to make a claim or 15 would you, do you think, looking back, have been able to 16 take on a group of that size, over 200 claimants, on 17 conditional fees? 18 MR GARDEN: I think financially it would have been 19 enormously difficult. The existence of public funding 20 meant that for a small firm like mine funding lots of 21 staff to run these cases meant that interim payments 22 from the Legal Aid Agency enabled us to not only fund 23 the action until we won 14 years later -- you can just 24 imagine that sort of cash flow problem -- but also to 25 fund appeals as and when we needed them, because, as you</p> <p style="text-align: center;">Page 53</p>	<p>1 know, in these cases we went to the Court of Appeal 2 twice and had several High Court contested hearings. 3 Without Legal Aid, I think it would have been an 4 entirely different matter. 5 MR SKELTON: Just to be clear, you would have had to have 6 fund 14 years' worth of litigation, multiple procedural 7 hearings in the High Court, at least two trials in the 8 High Court and two appeals in the Court of Appeal out of 9 your own pockets? 10 MR GARDEN: It would have been extraordinarily difficult. 11 It would have been Brockovich -- what's the name of 12 the film, that sort of situation? -- Erin Brockovich. 13 MR SKELTON: There may not be a simple answer to this, but, 14 broadly speaking, what were the claimants' motives for 15 bringing these claims? Obviously civil justice can only 16 really deliver compensation, money. You don't 17 necessarily get an explanation, an apology or even your 18 day in court. What did these claimants want? 19 MR DURKIN: I think it's wrong to generalise with claimants. 20 All claimants are individual. They approach cases 21 differently. I do think, from my experience, that the 22 vast majority, if not all, wanted a voice, they wanted 23 to be believed, they wanted to get their account out 24 there. 25 Back in 2000, I wouldn't routinely ask the clients</p> <p style="text-align: center;">Page 54</p>
<p>1 why they were coming forward. I'd assume that they were 2 wanting to make a claim for compensation. I now always 3 ask them very early on why they're bringing a claim, why 4 they're instructing me, so they can then understand what 5 the process is and I can understand what they want to 6 get out of the process. Very, very frequently, they say 7 the money is secondary, it is not about the money, "What 8 happened to me was wrong and I want justice. I want 9 things to be put right", and it's a very amorphous thing 10 they want, but compensation isn't a primary motivator, 11 in my experience. 12 MR GARDEN: In fact, these days, because of the way the 13 insurers have lobbied to make claimants guilty 14 individuals who aren't deserving of anything, if you 15 forgive my outspoken attitude, clients will come to us, 16 and the first thing they will say, almost 17 apologetically, is, "This isn't about compensation", as 18 though that's a dirty word. 19 MR SKELTON: When you say "lobbying", what do you mean? 20 MR GARDEN: Well, the insurers have invested, as 21 I understand it, £4 million or £5 million into 22 persuading the media that there is a compensation 23 culture and there are individuals who invent claims and 24 are fraudulent, particularly whiplash injuries, and the 25 reason, so I read, that was done is because insurance</p> <p style="text-align: center;">Page 55</p>	<p>1 premiums have come down and there isn't as much money in 2 it. So if they can take out the claimant lawyers by 3 their lobbying, then they will do that. 4 I know it's not a topic of this inquiry, but I'm 5 just trying to illustrate that victims of child abuse 6 who are very deserving of a lot more than they get are 7 being apologetic when they first ring us up, and say 8 that it's not about the money. I mean, it isn't to 9 them, genuinely; it's about seeking truth and justice. 10 Often they want to have their abuser prosecuted if they 11 haven't been prosecuted through the criminal courts, and 12 we have to explain we can't do that, that's for the 13 police. 14 But often when they have failed prosecutions, they 15 go to the civil process to try and get some justice, and 16 that's why -- 17 MR SKELTON: Even though that process doesn't necessarily 18 deliver it; it may just deliver some money by 19 settlement? 20 MR GARDEN: That is the problem. I have learnt a lot this 21 week, listening to claimants, victims, survivors, give 22 evidence, and what we thought we were able to deliver 23 for them, which is money, is not actually what they 24 want. They want their day in court. 25 MR SKELTON: Do you think there is a sense in which some</p> <p style="text-align: center;">Page 56</p>

1 people say they don't want money but they may also
 2 actually want some compensation? I mean, if, for
 3 example, you have suffered a grievous injury and that's
 4 left you psychologically unable to work, then clearly
 5 people are entitled to be put, as the law tries to do,
 6 back in the position they would have been had the injury
 7 not occurred. So for some people, it must be about
 8 money, mustn't it?
 9 MR GARSDEN: I don't think it's about money, no, I don't.
 10 I think they deserve it and I think, when they get it,
 11 they often give it away to their family as compensation
 12 for what their fractured personality has put their
 13 family through in terms of psychological suffering.
 14 I think B19 said that very graphically yesterday when he
 15 gave evidence. I have heard it over and over again, and
 16 I believe that's true.
 17 I think there should be a system of compensation.
 18 I think people feel guilty about being paid money and
 19 that is largely because of the campaign that I've told
 20 you about. And, as a personal injury lawyer, I think
 21 it's very wrong, because when I first started doing this
 22 work, that wasn't the way, in the 1980s.
 23 MR SKELTON: Just to be clear, is this something you have
 24 read about or is this something you actually know about
 25 directly?

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1 want to give evidence and they want to be believed. And
 2 they want to be recognised as somebody who has been
 3 wronged, and that wrong put right in some way.
 4 MR SKELTON: You've described very strongly the state of
 5 mind of many of the people that were coming to you
 6 seeking justice and to initiate civil claims. As
 7 a solicitor, or both as solicitors, what support can you
 8 provide them during the litigation process?
 9 MR DURKIN: I think it's very important to give the client
 10 support, first and foremost, and to put them at the
 11 centre of the claim and to make sure that they
 12 understand what the process is. One of the most
 13 important things is establishing a relationship of
 14 trust, because these people, as you've heard, have had
 15 difficult childhoods, they have been let down by people
 16 in authority, and I'm always very, very careful not to
 17 be another person in authority that might let them down.
 18 So I personally take a lot of time developing that
 19 relationship of trust with them, involving them in the
 20 claim, so they know what is involved and what's required
 21 of them, and also so they know what the outcomes are
 22 likely to be, good or bad.
 23 I think only by doing that can I really be fair to
 24 the claimant because -- Peter says clients want their
 25 day in court. Some clients say they want their day in

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1 MR GARSDEN: This is something I have read about in a report
 2 that was prepared for the Law Society by an individual
 3 who had done some research. It's not a half-baked
 4 theory, no. And I wish I could remember the name of
 5 the consultant who wrote it.
 6 MR SKELTON: That may be something that you can help us to
 7 find in due course.
 8 MR GARSDEN: Yes, I can.
 9 MR SKELTON: Staying with the issue of accountability and
 10 justice, a number of victims and survivors have talked
 11 about having their day in court. First of all, what do
 12 you think that really means for them, when the reality
 13 is that the day in court may mean cross-examination with
 14 some degree of robustness about issues which are
 15 traumatic and not necessarily what they want, which is
 16 an explanation from the abusers?
 17 MR GARSDEN: I think -- I can only quote B19, who said that
 18 he wanted to be believed because he had complained about
 19 his abuse many, many years ago, and, as was common with
 20 care leavers or people in the care system, they tried to
 21 complain and were disbelieved and called liars, and so
 22 did -- is it F42 said the same? Not only was he called
 23 a liar when he was young, he was continually called
 24 a liar in the course of litigation, which is tragic. So
 25 they want to be -- they want to speak their truth, they

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1 court, but I know that they don't want their day in
 2 court because it's such a rigorous forensic process.
 3 It's probably the last thing that they want to face, in
 4 reality.
 5 So with my clients, I do my best to establish that
 6 relationship of trust, maybe get to know their family if
 7 it's coming up to a trial, support the wife and give
 8 them the time to open up to me and to trust me.
 9 MR SKELTON: Do you both find that these sorts of cases take
 10 comparably more time than might ordinarily happen in
 11 a personal injury action? I appreciate you're both
 12 specialists and this is what you do, but do you know
 13 that the amount of client care time that you have to put
 14 in is greater than in another form of action?
 15 MR GARSDEN: Considerably more. However, clients do vary.
 16 Some of them are on the phone all the time and need
 17 reassurance, and the litigation becomes their life, and
 18 we have to support them. It's important to allow them
 19 always to be in control. I think that's fundamental.
 20 Because when they're a child, they have been controlled
 21 by somebody else, an abuse of power, so it's very
 22 important to, on the one hand, guide them through the
 23 litigation, but on the other hand, give them -- let them
 24 be involved and let them believe that they are in
 25 control of the process.

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<p>1 However, when I first started doing this work in 2 1994 to about 1998, I made the mistake of thinking that 3 I could become a bit of a campaigner, that I could not 4 only be a lawyer, but I could do more than that and, 5 unfortunately, that affected my health, and it was 6 something that was a mistake, and it's what -- one of 7 the things that led me to set up the Association of 8 Child Abuse Lawyers, because we, as lawyers, need 9 support ourselves, and not only do we have to support 10 our clients, we have to keep healthy, because there is 11 such a thing as secondary trauma, which, for the unwary, 12 can affect you. I think we have all been affected by 13 the evidence that's been given this week, and that's 14 a good example, and, you know, that affected me quite 15 badly yesterday, and I think, you know, we have to look 16 after our staff -- Paul is a very good example of 17 somebody who has been doing it for a long, long time who 18 is exactly the right person for this type of work, 19 because you have to be, on the one hand, empathetic, you 20 should never be sympathetic, but on the other hand, you 21 have to look after yourself, and the clients need 22 somebody who they can rely upon and we have to make sure 23 that we are lawyers and we are not trying to be 24 counsellors as well. 25 So we are very careful to signpost our clients to</p> <p style="text-align: center;">Page 61</p>	<p>1 the appropriate services, and, fortunately, there are 2 a lot more of those types of people around now than 3 there were when we first started. And, you know, we 4 have support groups who they can join. It's a lot more 5 available through the NHS now than it was. But I was 6 reading a letter yesterday that the Ecclesiastical have 7 now set up a support service for anybody going through 8 child abuse litigation. I can't remember the name of 9 it. But that's the sort of thing that we need. We need 10 people who are going to support our clients on a human 11 level so that we can get on and do the legal side. 12 MR SKELTON: Often your clients will be asked to see 13 a psychiatrist instructed by you on their behalf, and 14 sometimes one instructed by the defendant. The 15 psychiatrist may recommend a course of treatment in his 16 or her conclusions to the report. Are your clients able 17 to action that recommendation in any instances? 18 MR DURKIN: That really depends on the funding. It's 19 routine for the psychologist or psychiatrist to make 20 recommendations for therapy. Clients can go to their GP 21 and try to access services through the NHS. I think 22 that's pretty difficult. So I think more often than not 23 they run into a dead end and it's only if the claim 24 settles and they receive some compensation that they can 25 use some of that money to access private therapy.</p> <p style="text-align: center;">Page 62</p>
<p>1 As Peter says, the Ecclesiastical recently, and very 2 refreshingly, have offered therapy during the process. 3 I came across that only two or three weeks ago. Very 4 welcome, and I was surprised. 5 So, in short, in my experience, clients through the 6 litigation process other than with their GP get very 7 little support. There is the voluntary sector, these 8 various self-help groups, and people do sometimes go to 9 those, but very little. 10 MR SKELTON: One of the things that you will routinely claim 11 for is therapy, so the psychiatrist will recommend 12 24 sessions of cognitive behavioural therapy or some 13 such treatment for a diagnosis of PTSD or other 14 conditions, and then funding is not available, 15 necessarily, so you're claiming £2,500 in order for that 16 to happen. 17 MR GARDEN: Yeah, the problem is funding that. In an ideal 18 world, when the psychologist or the psychiatrist, 19 usually the psychologist, recommends different types of 20 therapy, they need that then, and they need to be 21 rehabilitated whilst they're going through the process, 22 because they have the stress of the litigation, not only 23 their own problems. Whenever we write to them, they're 24 reminded of that abuse, and it triggers them into 25 further symptomology. So they need that help there and</p> <p style="text-align: center;">Page 63</p>	<p>1 then and, really, the insurers should be paying for that 2 there and then on an interim basis. But it's not 3 happened in my experience. 4 I know Tracey Storey said she'd come across it in 5 litigation, but certainly I haven't, and I don't know if 6 you have, Paul. 7 MR DURKIN: I have had the recent experience with the 8 Ecclesiastical. Other than that, this is a litigation 9 process. It's adversarial. The defendants are saying 10 they're not responsible. So in my experience, 11 defendants don't make interim payments for therapy. To 12 them, it would be an admission of liability. 13 MR SKELTON: So usually, I think it is right to say that an 14 interim payment of damages is made when liability is not 15 in dispute, or at least the extent of liability is not 16 wholly in dispute. So there may be some admission that 17 gives rise to an obvious award of damages and you're 18 getting it early, knowing it's coming. In most of your 19 cases, there's no guarantee of getting anything? 20 MR DURKIN: Exactly. 21 MR GARDEN: Mmm. 22 MR SKELTON: I think Ms Erwin-Jones said yesterday that 23 actually she has started to give interim payments -- 24 I say "she", obviously her firm representing, usually, 25 local authorities has started giving interim payments.</p> <p style="text-align: center;">Page 64</p>

<p>1 Are you saying that's not your experience even with 2 local authority defendants? 3 MR GARDSEN: We have a lot of claims against Manchester City 4 Council and that is not my experience with them. 5 However, I think the approach should be that, 6 notwithstanding any dispute on liability, some sort of 7 counselling should be allowed for these individuals 8 because they are being pushed through the litigation 9 process, which, in itself, is psychologically damaging. 10 The problem that we have is that our clients often 11 can't take the process any further and discontinue their 12 claims because of the stressful nature of what they're 13 going through. We often start claims and then the 14 clients can't deal with it. So with that psychological 15 support, we could keep them engaged. 16 MR SKELTON: The Ecclesiastical scheme is not an interim 17 payment scheme, it is just a scheme to provide on an 18 ex gratia basis, is it? 19 MR GARDSEN: I understand that. 20 MR SKELTON: Notwithstanding that liability may still be in 21 dispute? 22 MR GARDSEN: I think so. 23 MR DURKIN: I have very limited experience of a recent claim 24 where liability hadn't been admitted, but it was 25 a strong claim and I think there was an understanding</p> <p style="text-align: center;">Page 65</p>	<p>1 between myself and the Ecclesiastical that it was going 2 to settle. There was -- I can't remember. I don't 3 think there were any offers to settle. But out of 4 the blue, if you like, there was this offer for therapy 5 because this particular client was finding it very 6 difficult, he had engaged with the police investigation, 7 he dropped out of that, simply because he couldn't 8 continue with this prosecution. He was -- he was 9 a witness against an individual who'd already been 10 convicted, and his only remedy was a civil claim, and in 11 that case the Ecclesiastical did make an offer for 12 therapy because I made the point that he couldn't 13 continue with the police investigation and they picked 14 up on that and offered therapy. 15 MR SKELTON: Turning back, then, to the North West 16 litigation, the child abuse litigation, there were two 17 other defendants beyond RSA and Nugent Care Society. 18 Did they depart relatively early on in the overall 19 process? 20 MR GARDSEN: Yes, they did. We started in 1997 with 21 High Court writs. In 2000 or 2001, I think it was 2000, 22 the Danesford defendant, represented by NCH, the 23 Ecclesiastical, announced that they wanted to settle all 24 the claims, and we set about a settlement process which 25 resulted in awards being agreed and all the claimants</p> <p style="text-align: center;">Page 66</p>
<p>1 settling very early on. 2 Liverpool had more claims, I think it was 120, at 3 Dyson Hall and Greystone Heath. They settled all their 4 claims in 2004. I think there was a recognition on 5 behalf of Liverpool, who were not represented by 6 insurers, they taking instructions from the Director of 7 Social Services, that -- I hope I don't misrepresent the 8 position -- that dreadful things had happened to 9 children in their care and they felt they had 10 a responsibility to do the right thing by them and not 11 put them through the mill. Certainly that was the 12 message -- is that fair, Paul? 13 MR DURKIN: Yes, absolutely. 14 MR GARDSEN: Which was very welcome from us as, I suppose 15 you could say nascent child abuse lawyers in those days, 16 that we weren't having to go through to a full trial. 17 However, Nugent Care fought on until 2010. 18 MR SKELTON: Can I explore why there's a difference of 19 approach? First of all, can I understand whether 20 there's any difference, as far as you were concerned, in 21 terms of the types of allegations, the strength of 22 the cases and the limitation question in respect of the 23 ones that settled compared to the ones that fought? 24 MR GARDSEN: I don't think so. Do you, Paul? 25 MR DURKIN: No, they're identical.</p> <p style="text-align: center;">Page 67</p>	<p>1 MR GARDSEN: No. I mean, I think the similarities are, they 2 were all abused in a very similar way. I'm afraid the 3 methods that were employed are very similar amongst sex 4 offenders. 5 They all went to children's homes. A similar number 6 of the sex offenders, the care workers, at the 7 children's homes went through criminal prosecutions and 8 were convicted. And the types of individuals that were 9 claiming were also very similar, they were the products 10 of the criminal process and sent by the magistrate's 11 court, as you will probably remember, to children's 12 homes for doing things wrong, had a similar background 13 and experience, similar demographic. Some of 14 the claimants went to more than one home, didn't they, 15 Paul? 16 MR DURKIN: Mmm. 17 MR GARDSEN: Some of them went to not only Greystone Heath 18 but also Danesford, Greystone Heath and St Vincent's and 19 St Aidan's. They moved around. Sometimes we wondered 20 why those individuals went from home to home and were 21 abused at more than one home. But, no, the 22 circumstances were identical, weren't they? 23 MR DURKIN: Yes, completely -- the only difference was the 24 attitude of the defendant towards settlement. 25 MR SKELTON: Again, I would like to stay with that subject</p> <p style="text-align: center;">Page 68</p>

<p>1 for a bit. First of all, one of them is a local 2 authority. We have heard from a local authority, 3 Tower Hamlets, in this inquiry, in the context of 4 St Leonard's that, effectively, they felt in that 5 particular case it was the right thing to do. They had 6 an obligation to look after the children, they failed in 7 that obligation and they wanted to see them right 8 somehow. That didn't mean they didn't negotiate the 9 damages with some degree of rigour, but nevertheless, it 10 settled without a trial. So that's a local authority 11 approach. Do you think, in the context of the Liverpool 12 County Council, that represents the same attitude? 13 MR GARS DEN: I'm not so sure that Liverpool were as quick to 14 put forward that sort of settlement process, but I think 15 they would have been had they not been part of this 16 group of other defendants, because, of course, you know, 17 Nugent Care made this application to strike out the 18 whole proceedings on the grounds we called the claimants 19 AB & Ors, and they felt almost obliged to go along with 20 that because that was what was happening to the group. 21 MR SKELTON: You did say, I think, they settled in 2004. 22 MR GARS DEN: Yes. 23 MR SKELTON: So seven years? 24 MR GARS DEN: Seven years, yes. 25 MR SKELTON: Did they participate much during the course of</p> <p style="text-align: center;">Page 69</p>	<p>1 that when a lot of these applications and trials were 2 being made in respect of you and Nugent Care. 3 MR GARS DEN: When they say they participated, I think they 4 weren't the first to join in. I think there was an 5 application by Nugent Care to strike out the whole group 6 action, all five homes, because it was void. The second 7 people to join in were Danesford, and then Liverpool 8 followed suit because the other defendants were doing 9 it. So they were the third in line. 10 I mean, they filed defences, but they weren't as 11 proactive or as involved, I think, as -- 12 MR SKELTON: I don't want to go ahead too far into the 13 litigation, but what precipitated the settlement by 14 Liverpool? Why did it suddenly occur in 2004? 15 MR GARS DEN: I think the case had reached the stage -- Paul 16 will correct me if I am wrong -- where all the pleadings 17 had been filed: full particulars of claim, full 18 defences, some disclosure, and there had been 19 a directions order by the High Court. I think it had 20 reached a stage where either they were going to settle 21 or they were going to fight. I think it had reached 22 that sort of tactical point, where they had to make 23 a decision: either they were going to trial or they 24 weren't. And they decided they would settle. 25 MR SKELTON: The chronology, and I will just give the</p> <p style="text-align: center;">Page 70</p>
<p>1 reference for this, that I think is exhibited maybe to 2 your statement, Mr Garsden, originally, is 3 INQ003530_002. Then on page 4 you will see between the 4 dates of 10 April 2003 and 19 May 2004 that there were 5 six round-table meetings with Liverpool defendant to 6 settle claims, mostly successful. 7 MR GARS DEN: Yes. 8 MR SKELTON: So the process was actually quite a protracted 9 one but concluded, for the most part, by mid 2004. 10 MR GARS DEN: Yes, that's correct. There were a series of 11 round tables. There were 120 claimants. So the process 12 of settling all the claims, which were not 13 straightforward, was time consuming. 14 MR SKELTON: Just focusing -- leaving aside Liverpool, you 15 have two other insurers -- one, the 16 Methodist/Ecclesiastical and the other RSA. Why does 17 one decide to settle and the other fought? 18 MR GARS DEN: This is anecdotal and results from 19 a conversation I had with a partner of the solicitors 20 who was representing the insurers. At a very early 21 stage, in around 1997, because I used to work with him 22 and he used to be my boss, so he bought me lunch and we 23 talked about the Danesford cases, and he told me that 24 because the Methodist Insurance Company, who were his 25 clients, had moral compunctions about the group</p> <p style="text-align: center;">Page 71</p>	<p>1 litigation, and because of what happened, and because 2 they were a faith-based organisation, they wanted to do 3 the right thing by the claimants. 4 MR SKELTON: So the insurer was faith based or the insurer's 5 client was faith based? 6 MR GARS DEN: Well, the insurer, the Methodist Insurance 7 Company, is -- it's like a mutual association, I think, 8 and -- correct me if I am wrong, I'm probably straying 9 a bit from my subject matter, but it's composed of some 10 of the religious organisations and the religious 11 organisations are their clients. He told me that he 12 wanted to set up some sort of settlement process whereby 13 we would value damages and put them in categories at 14 a very early stage in the litigation. However, when 15 I wrote to him and asked him to confirm that, the case 16 was passed on to somebody else and it turned into 17 litigation, but that was -- what I'm saying is that that 18 was a very early indication that this insurance company 19 had a moral compunction, and to me, as a new child abuse 20 lawyer, that was good news. 21 MR SKELTON: Its attitude was different, notwithstanding 22 that its defences were, at least hypothetically, exactly 23 the same as the other defendants? 24 MR GARS DEN: Yes. I mean, they joined in with the 25 application to strike out the whole proceedings when we</p> <p style="text-align: center;">Page 72</p>

<p>1 issued writs, and they filed defences, but at a very 2 early stage -- or maybe they didn't. Maybe they didn't 3 file defences, actually -- or did they? I can't 4 remember, I'm sorry. But at a very early stage, they 5 made an indication, in 2000, that they wanted to settle. 6 I say "early", in a 14-year group action, it was after 7 three years, but the first two years had been taken up 8 with an application to strike out the whole group on the 9 grounds that it was a nullity. So in procedural terms, 10 it was quite early on. 11 MR SKELTON: Did they all join in in that application or was 12 that driven by one of the defendants? 13 MR GARDSEN: Well, that application was made by Nugent Care, 14 saying that AB & Ors were a nullity, the procedures were 15 void and they all should be struck out, the whole lot, 16 and then Danesford joined that shortly after it had been 17 made by Nugent Care and Danesford -- sorry, and 18 Greystone Heath sort of went along with it. I don't 19 know whether they actually filed an application, but 20 they -- I think they joined in the application. I can't 21 remember, it was procedurally -- 22 MR SKELTON: As you say, it was about the technicality of 23 not naming the claimants, I think, that you'd actually 24 given them different -- you'd used letters instead of 25 their actual names to protect their identities.</p> <p style="text-align: center;">Page 73</p>	<p>1 MR GARDSEN: Yes. 2 MR SKELTON: The defendant in this case thought that was 3 inappropriate because it's contrary to open justice to 4 have secret parties litigating. 5 MR GARDSEN: Yes. 6 MR SKELTON: So they identified that as a technical error 7 which made the whole thing a nullity, as you say, which 8 means that the claim has no legal standing? 9 MR GARDSEN: They're. They were -- we didn't put a list of 10 names with the writ because if we'd done that, it could 11 have been inspected by the media and the media were very 12 interested in this group litigation at the time, they 13 were all over it. In fact, I know they did make 14 enquiries in the High Court in Manchester. So we didn't 15 file that list. We kept that list separate and we 16 served it on the defendants to say who the claimants 17 were. 18 MR SKELTON: If they'd won that application, would that have 19 been the end of it, or would you have been able to sort 20 of rise phoenix-like from the failure and regroup and 21 start again? 22 MR GARDSEN: We had to serve additional writs, which we did. 23 It's somewhere on the chronology. I can't remember when 24 it was. But we sought leading counsel's advice. 25 Richard Maxwell suggested that we file a second set of</p> <p style="text-align: center;">Page 74</p>
<p>1 writs as an insurance policy in case the first lot went 2 down. 3 We tried -- our application was to amend the first 4 set of writs to append these lists of names, but with 5 some sort of anonymity provisions. And then there were 6 the second set of writs. So we had an insurance policy, 7 in case it all went wrong. 8 MR SKELTON: Without getting lost in the sort of thickets of 9 1990s procedural law, is there a possibility that 10 issuing further sets of writs for the same people could 11 have ended up being an abuse of process, so in fact you 12 could have lost? 13 MR GARDSEN: Well, yes. I think there was a case called -- 14 I can't remember -- which suggested that if you tried to 15 issue a writ outside -- or amend a writ outside of 16 the limitation period, you had to try limitation all 17 over again. I am remembering back -- somebody is 18 nodding. I think probably that is correct. But, yes, 19 it is a possibility that the whole thing could have gone 20 down, and I was deeply, deeply worried about that. 21 MR SKELTON: Can you just describe your views of that as 22 a tactic at that stage, and also try and set it in 23 context and whether or not that sort of thing was really 24 going on at that time because issues of anonymity for 25 claimants, which now everyone is familiar with who works</p> <p style="text-align: center;">Page 75</p>	<p>1 in the court system dealing with vulnerable people and 2 children, back then it wasn't so common. So wasn't it 3 fair enough to take that point? 4 MR GARDSEN: It was a technical point. It was typical of 5 litigation at the time, that simply wouldn't be 6 tolerated these days. Technical points were more 7 common. However, you know, I'd been to see the district 8 judge after the issue of the writs, explained why I had 9 done this, and he gave me tacit permission -- I hadn't 10 served the defendants with -- and told them what I was 11 doing, for which I was criticised, but I had told the 12 court what I was doing. That was deemed not to be the 13 right way of going about it. I should have notified the 14 defendants. 15 To my mind, it was a tactical application that 16 lasted two years, it wasted two years of the litigation, 17 which they lost, which to my mind was a complete waste 18 of time and was designed to frustrate the claimants, 19 worry the claimant lawyers and it was a tactical game, 20 without putting too fine a point on it, which didn't 21 succeed. 22 MR SKELTON: If that's right, and it cost time and it cost 23 money, the litigation did get back on track. Did it 24 make any difference to the claimant cohort? If time 25 progresses in the face of aggressive applications --</p> <p style="text-align: center;">Page 76</p>

<p>1 from your perspective, aggressive applications -- do 2 claimants lose the will to continue? 3 MR GARDEN: Oh, they do. It is a great testament to all 4 the claimants in this case that they stayed with it for 5 14 years of litigation. When you bear in mind how 6 vulnerable and damaged they were and how the process of 7 the litigation was constantly triggering them into 8 remembering their past abuse, although some of them did 9 fall by the wayside, I think it's fair to say, in the 10 early days, nonetheless it's a testament to them that 11 they stayed with it. 12 MR SKELTON: I think it's fair to recognise that the tactics 13 that may have been used then to try and take technical 14 points wouldn't necessarily be raised by defendants now, 15 so some of this is just of its time, it's fair to say. 16 MR GARDEN: I think that's a fair point, yes. I think, 17 however, if I'm being truly cynical, I would say that if 18 it was allowed, then those points would still be taken. 19 It's only because the climate of litigation has changed 20 and what judges will tolerate has changed that those 21 points aren't taken now, because this is an adversarial 22 process and I can't blame defendants for taking whatever 23 points they can. 24 MR SKELTON: That is the key, isn't it? So if limitation is 25 available and it is a strong defence and it will knock</p> <p style="text-align: center;">Page 77</p>	<p>1 out a claim which will otherwise cost an insurer or any 2 defendant a lot of money, they are entitled to take it, 3 aren't they? 4 MR GARDEN: They are. But I think there is an extra layer 5 to this type of litigation, because of the type of 6 claimants they are, how vulnerable they are, and how 7 easily affected they are by the way in which the 8 litigation proceeds. 9 MR SKELTON: But staying with the issue of limitation, 10 parliament has put in place a statute which is still in 11 place since 1980 which effectively gives the court 12 discretion to apply equitable principles, so principles 13 of justice and fairness, to the question of whether 14 a claim should proceed based on the totality of 15 the evidence presented to the court. So what is the 16 nature of the account given; is there documentary 17 evidence available; are there corroborative witnesses; 18 how old is the claim and why hasn't it been brought 19 sooner? All of those factors, the court must look at 20 and balance that against the claimant's right to have 21 his or her case tried and get justice. Isn't that 22 a fair system? Mr Durkin? 23 MR DURKIN: Well, it's a system. I think these are special 24 cases because the claimants are vulnerable, they come 25 forward after 20, 30, 40 years. Many of the reasons why</p> <p style="text-align: center;">Page 78</p>
<p>1 they haven't come forward are as a result of the abuse 2 they have suffered, which is the fault of the defendant. 3 The invasive, investigatory nature of looking at 4 limitation is very harsh on a claimant, which, in 5 itself, is a massive discouragement, a claimant that 6 faces a trial of limitation, say, as a preliminary 7 issue, is going to have their life examined as well as 8 the evidence surrounding the claim. 9 I think for non-recent abuse cases it's a blunt 10 tool. The Limitation Act 1980 predates child abuse 11 claims. 12 MR SKELTON: It is a blunt tool. If the courts recognise 13 these issues, as I think Ms Erwin-Jones yesterday 14 recognised, so the courts are aware that child sexual 15 abuse victims have suffered experiences which may make 16 disclosure and indeed engagement with any form of system 17 or authority difficult, why aren't the judges best 18 placed to evaluate all of those factors in the context 19 of individual claim rather than applying an even blunter 20 instrument of getting rid of limitation altogether? 21 MR GARDEN: I think you have to look at the way in which it 22 has been approached in other jurisdictions, and 23 certainly in the State of Victoria in Australia there is 24 a memorandum of good practice that says that limitation 25 should only be taken in the very exceptional cases.</p> <p style="text-align: center;">Page 79</p>	<p>1 I think you also have to look at the procedural document 2 that the Ecclesiastical Insurance Company has published, 3 which says the same. I think you also have to look at 4 what the insurers say, which is that limitation will 5 only be taken in exceptional circumstances. That's not 6 our experience. Our experience is it's used in every 7 case to argue down settlements and fight cases. 8 But I think it's recognised, as it is in Scotland, 9 that to punish a victim of abuse for delaying, when, 10 psychologically, they're unable to deal with the thing 11 because they're so traumatised by it, is like punishing 12 a victim twice. I think Lady Baroness Hale said that in 13 one of the Supreme Court cases, that if you have an 14 abuser who threatens a child that if he ever says -- 15 tells anybody what happened, either dreadful things will 16 happen to him or he won't be believed, and if he then 17 tries to make a complaint and is disbelieved, and then 18 he's in the care of the local authority and if, you 19 know, 35 years later, he tries to go to court and argue 20 his case and the same local authority who employed his 21 abuser again says, "You're too late and also telling 22 lies", it's punishing him for being abused, and that, 23 logically, cannot be right. 24 MR SKELTON: So do you think that, in summary, the 25 judiciary, the court system, has not yet caught up with</p> <p style="text-align: center;">Page 80</p>

<p>1 the way society should now view, and in some cases is 2 now viewing, these victims and survivors? 3 MR GARDEN: I do, and there have been some worrying 4 limitation decisions recently which have gone the wrong 5 way, and cases have been lost, similar to survivors we 6 heard -- F42, who had definitely been abused, but was 7 defeated on limitation; and B19, who was believed by the 8 High Court judge but found to be too late. I mean, how 9 can that be fair? I can't see it. 10 MR SKELTON: Mr Durkin, do you want to answer that question 11 as well? 12 MR DURKIN: I'm not convinced the judiciary is, at the 13 moment, capable of dealing with these cases properly. 14 A judge would probably come across one of these cases 15 once in their career, I would have thought. There 16 aren't that many child abuse trials. Most claims settle 17 or discontinue. The law -- it is an exercise of 18 discretion, so it can go either way, which is a massive 19 risk for the claimant and a potential success for the 20 defendant. 21 The quite nuanced, sophisticated, psychological 22 functions of individuals isn't always expressed. The 23 defendants concentrate on forensic points of loss of 24 documentation, they deploy medical experts that then say 25 people's memories are clouded and affected by time and</p> <p style="text-align: center;">Page 81</p>	<p>1 that, with the benefit of hindsight, people don't have 2 a clear account. So the judicial approach to limitation 3 when it's examined in a courtroom with a defendant 4 expert and a claimant expert and a person trying to 5 desperately try to explain why they didn't come forward 6 is a clumsy, crude approach in which I think 7 a misjustice -- injustice can occur. 8 As Peter says, recently, there's been a run of very 9 unhelpful claims -- cases for claimants which has put 10 a little bit of pressure upon us, to be honest, in the 11 claimant community. We are having to look more 12 seriously at claims we can take on, we have to advise 13 clients as to the judicial wind, if you like. 14 I'm not convinced that section 33 is the correct 15 instrument to deal with these claims in a compassionate 16 way. 17 MR SKELTON: Thank you. Chair, may I suggest that we have 18 our mid-afternoon break now? 19 THE CHAIR: Yes. We will return at 2.45 pm. Thank you. 20 (2.31 pm) 21 (A short break) 22 (2.47 pm) 23 MR SKELTON: Two and a half years into the action, the 24 defendant, Nugent Care, applied to have limitation tried 25 as a preliminary issue in front of the then judge.</p> <p style="text-align: center;">Page 82</p>
<p>1 First of all, the question of whether limitation should 2 be applied for as a preliminary issue. Isn't it correct 3 that the courts have said, if it can be done fairly at 4 an early stage to try limitation, which may be 5 a complete defence to an action, particularly a group 6 action, it ought to be done because it saves costs and 7 it gives certainty sooner in the procedure rather than 8 later, and it also prevents a trial going ahead which 9 may in fact be unfair? 10 MR GARDEN: Not according to precedent. There is a stream 11 of cases, starting with the judgment in the Forde Park 12 case, actually, that we have already heard about, saying 13 that limitation in child abuse cases should not be tried 14 as a preliminary issue because the issues of limitation 15 and liability are so intrinsically linked together that, 16 if it is tried as a preliminary issue and the defendants 17 lose, it means that the claimant will have to give 18 evidence twice and if limitation is tried as 19 a preliminary issue, it is an artificial construct 20 because there is no time wasted -- sorry, there is no 21 time saved by trying it as a preliminary issue because 22 to try a child abuse case properly and fairly you have 23 to have full disclosure, full expert evidence and you 24 have to have evidence from the claimant. 25 So you save no time, but you risk the claimant</p> <p style="text-align: center;">Page 83</p>	<p>1 giving evidence twice. So there are a number of leading 2 precedents which say that it should not be tried as 3 a preliminary issue, starting with Forde Park and there 4 are others. We used to have a list of about ten cases 5 which say that it shouldn't be done. But in normal 6 personal injury actions, yes, you are right. 7 MR SKELTON: In Bryn Alyn, hadn't the Court of Appeal said, 8 if you can, you should? 9 MR GARDEN: No, that was an obiter comment of one judge 10 that is often quoted by the defendants as justification 11 for -- I think the words were that the court ought to 12 strain to do it if at all possible. But it was an 13 obiter comment by one judge, not a leading judgment, and 14 was against the remainder of precedent. I wish I could 15 remember all the cases now, but there are many of them. 16 MR SKELTON: Put simply, in the cases of non-recent child 17 sexual abuse, it's the wrong approach to take because 18 you're retrying the same issues twice because they're so 19 intricately linked and that is simply unfair to the 20 claimant? 21 MR GARDEN: That is correct. However, the defendants are 22 still arguing that it should be done. 23 MR SKELTON: What, from your perspective, are they trying to 24 achieve by that if the reality is that the trial itself 25 then becomes quite full blown? The idea of trying</p> <p style="text-align: center;">Page 84</p>

<p>1 limitation as a preliminary issue is presumably to save 2 time and costs, but actually trying it, because it's so 3 intricately linked with the claimant's evidence, doesn't 4 necessarily save as much cost as it might? 5 MR GARSDEN: No, that's right. It's a tactical move. If 6 you look at the cases where limitation has gone the 7 wrong way and been successful for the defendants, a very 8 high proportion of those cases are where limitation was 9 tried as a preliminary issue and the case, in my view, 10 wasn't completely tried. It was tried -- certainly in 11 the St Aidan's and St Vincent's case, the benefit of 12 not -- of trying limitation as a preliminary issue would 13 have been that the defendants did not have to call the 14 abusers to give evidence, because what actually happened 15 was, right at the last minute, with no warning, they did 16 call two of the St Aidan's abusers at the trial. One of 17 the abusers -- or some of the abusers had died and 18 couldn't be interviewed, and the judge in B19's case 19 dismissed the abuser's evidence, which he found very 20 unconvincing. 21 But obviously, an abuser giving evidence in the same 22 courtroom as a claimant is psychologically damaging and 23 in the family courts, certainly these days, claimants 24 will probably be able to give evidence in a separate 25 location, so they didn't have to meet.</p> <p style="text-align: center;">Page 85</p>	<p>1 MR SKELTON: Can I try and understand what you mean by the 2 tactic, then. So the tactic is to have a trial which 3 (a) will knock out things early but (b) will avoid them 4 having to deploy or expose what evidence they have? 5 MR GARSDEN: It isn't an attractive defence to go to court 6 and say to a claimant, "You're a liar. It never 7 happened. And here are the abusers who say that it 8 never happened". That isn't attractive to a High Court 9 judge. 10 If, on the other hand, you go to court and say, "The 11 claimant is inconsistent in his evidence. It happened 12 a long time ago. A lot of the witnesses are dead. And 13 there aren't many documents to support what happened, 14 and time has passed and memories have faded", that's 15 a much more attractive defence and is more appealing by 16 its technicality than the latter. 17 MR SKELTON: Why can't we trust the court to see through an 18 unfair argument which doesn't actually present to the 19 court the totality of the relevant evidence and allow 20 a full evaluation of the index issues? 21 MR GARSDEN: Because part of the case is missing. 22 MR SKELTON: But aren't they told that? The judge must know 23 that when he or she is making an assessment. So they 24 know that they are missing something and ought to 25 properly, if they are being fair, to be wary of that</p> <p style="text-align: center;">Page 86</p>
<p>1 affecting the judgment. 2 MR GARSDEN: Well, the reason it has been consistently 3 refused in case after case is because it doesn't do 4 justice and it risks the claimant -- for risk of 5 repeating myself, it risks the claimant having to give 6 evidence twice and there being two hearings. 7 So it's only a convenience if the defendants win. 8 It's not a convenience if the defendants lose. Because, 9 firstly, very little time is saved -- in fact, no time 10 is saved and more time is taken, and you have to have 11 two trials: one on limitation, which the claimants win, 12 and a second one on liability at a later date. So time 13 isn't saved and more time is taken and nothing is 14 achieved other than a technical, tactical manoeuvre. 15 MR SKELTON: Do you agree or disagree with that, Mr Durkin? 16 MR DURKIN: I'd agree. Of course the mere application of 17 limitation as a preliminary issue can take a long time, 18 there can be arguments about that. So that's a delaying 19 factor. 20 But I think, for these claims to be dealt with 21 properly and thoroughly, the whole of the evidence needs 22 to be examined, including the evidence that's going to 23 be potentially brought by the defendant in terms of 24 the abusers. That, as Peter says -- if limitation is 25 dealt with as a preliminary issue, that rather delicate</p> <p style="text-align: center;">Page 87</p>	<p>1 and difficult problem for the defendants, ie, bringing 2 the abuser to give evidence, is avoided. I think 3 defendants do shy away from bringing the abusers to give 4 evidence, and they do shy away from directly saying that 5 the claimants are liars. So it's easier all round for 6 the defendants to try to, again, knock out a claim on 7 a technicality. 8 MR SKELTON: What happened in this case when the application 9 was made in 2001, the first application to have it heard 10 as a preliminary issue? What did the court decide to 11 do? 12 MR GARSDEN: The court decided -- I think it was 13 Douglas Brown J -- that limitation should not be tried 14 as a preliminary issue. The judgment agreed with the 15 Forde Park case, where Ablett J said that limitation 16 should not be tried as a preliminary issue because the 17 claimant would have to give -- could have to give 18 evidence twice and very little time would be saved. 19 Same arguments that have been used in subsequent cases. 20 MR SKELTON: Didn't it turn out to be the case, though, 21 eventually, that limitation was effectively dealt with 22 on a preliminary basis by subsequent judges? 23 MR GARSDEN: I think to explain it is quite difficult, 24 because it was quite a tortuous, technical process, but 25 the defendants made at least four applications to have</p> <p style="text-align: center;">Page 88</p>

<p>1 limitation tried as a preliminary issue, the first 2 application having been refused. The first time I think 3 was in 2004, and then again in 2004 at a subsequent case 4 management conference. 5 Eventually, when the case -- the test cases came to 6 court -- and Paul will have to correct me, because he 7 was dealing with it -- the test cases came before 8 Mr Holland, Judge Holland, Holland J. At that time, 9 partway through that hearing, there was a decision of 10 the Court of Appeal in the case of Catholic 11 Care v Home Office which changed the whole way in which 12 limitation should be dealt with. It's not going to help 13 anybody if I try and explain the technicality of it, 14 but, basically, because limitation had changed, he had 15 to decide against the claimants, because of the way the 16 law changed halfway through. The claimants then 17 appealed to the Court of Appeal. The Court of Appeal 18 said that, because -- by the time it came to the Court 19 of Appeal, the law had changed again -- 20 MR SKELTON: And was potentially about to change in 21 A v Hoare, which -- 22 MR GARDSEN: Well, I think it had changed in A v Hoare by 23 the time it came to the Court of Appeal and the Court of 24 Appeal then sent it back to the High Court judge, 25 Holland J, again, to try limitation on the new basis.</p> <p style="text-align: center;">Page 89</p>	<p>1 So it wasn't so much an application for limitation 2 to be tried as a preliminary issue, it was a consequence 3 of -- I'm sorry, this is very tortuous -- the way in 4 which the law changed whilst those cases were 5 proceeding. Is that right, Paul? 6 MR DURKIN: My recollection -- it is tortuous -- 7 MR SKELTON: It might help both of you, if I may, to take 8 you to page 4 of the document which was previously on 9 screen, which is INQ003530. I think it is the latter 10 half of that that you can see summarised what Mr Garsden 11 has just explained. So that there was a trial of 12 the test cases in November 2006, permission to appeal 13 granted in May 2007, but A v Hoare came out and then 14 after that the cases went back, the Court of Appeal 15 referred the cases back to Mr Justice Holland for 16 consideration. I think that's what you're saying. 17 MR GARDSEN: That's right. 18 MR SKELTON: Does that accord with your recollection? 19 MR DURKIN: It does. The trial in 2006 started as 20 a six-week trial on all issues, not limitation as 21 a preliminary issue. So we had experts lined up to 22 argue systemic negligence, witnesses in terms of 23 corroboration, et cetera. And my recollection is that 24 it became apparent that this case of A v Hoare, and 25 Young, was making its way through to the Court of Appeal</p> <p style="text-align: center;">Page 90</p>
<p>1 or the Supreme Court, I forget which, and for that 2 reason, the arguments in terms of systemic negligence 3 were not dealt with, but limitation was dealt with as 4 a preliminary issue in respect of the three claimants. 5 MR SKELTON: Did Mr Justice Irwin then take over around this 6 time and then he became the managing trial judge? 7 MR DURKIN: Yes, after the first Court of Appeal decision. 8 MR SKELTON: If you go over to the next page, please, you 9 can see on the third row, 13 to 23 January, a hearing 10 before Mr Justice Irwin. Could you describe what that 11 hearing was about? 12 MR DURKIN: From memory, that would have been a case 13 management hearing to select cases and to have the 14 matter listed for trial. At that point, we -- as 15 a claimant lawyer, I was pressing the matters to -- any 16 cohorts of claims to be heard. 17 MR SKELTON: But there's a decision there, I think: 18 "After hearing arguments on limitation as 19 a preliminary issue, orders for a full trial in the 20 cases of [redacted] and with leave to the defendants to 21 appeal." 22 Is that another example of what Mr Garsden was 23 saying and there was an application to hear it as 24 a preliminary issue again after it had come back on 25 a different footing?</p> <p style="text-align: center;">Page 91</p>	<p>1 MR GARDSEN: Yes. 2 MR DURKIN: I honestly can't remember the number of times 3 that the defendants made an application for limitation 4 to be dealt with as a preliminary issue, but it's safe 5 to say that every time there was a case management 6 conference, that issue was aired. 7 MR SKELTON: Again, and I hope I'm not overpressing the 8 point, if you have a cohort of this size and limitation 9 is one of the only issues which really attaches to every 10 single claim, isn't it right for an insurance company to 11 major on that defence which attaches to everybody rather 12 than to fight on each individual basis whether the abuse 13 took place, whether the causation of injury is made out, 14 the quantification of damages? 15 MR DURKIN: Well, limitation is individual to each case, so 16 there would be no generic application on a cohort of 17 cases. 18 MR GARDSEN: I think it's also fair to say that, following 19 A v Hoare, the argument narrowed and moved from systemic 20 negligence to whether or not the abuse happened, which 21 is where it is now. 22 So an examination of the credibility of 23 the claimant, because there is much less to argue about, 24 is a lot more acute, and the credibility of the claimant 25 and how reliable he or she is as a witness is very much</p> <p style="text-align: center;">Page 92</p>

<p>1 tied in with limitation because if the claimant gives 2 good and consistent evidence, he's more likely to 3 succeed on limitation because the evidence is good and, 4 despite the passage of time, it's still reliable, than 5 a claimant who doesn't make a good witness. 6 So the focus is narrowed considerably, and it's an 7 illustration of arguments that cross over from liability 8 and limitation, which means that you shouldn't try it as 9 a preliminary issue separately, because it isn't 10 separate, and I think Sarah Erwin said the other day 11 that a lot has been talked about limitation being 12 a bolt-on and separate, and it isn't, and that's what 13 the Court of Appeal and Supreme Court have said: it's 14 tied in with the whole case. So you can't separate it. 15 It's artificial and wrong and it has led to cases 16 failing when it's been tried that way. 17 MR SKELTON: The case went back up to the Court of Appeal in 18 the summer of 2009. What was the result of that appeal? 19 MR DURKIN: It was an important decision that broadly helped 20 define the way limitation should be dealt with in 21 historic child abuse cases, so the focus was away from 22 date of knowledge to the use of section 33 discretion. 23 The Court of Appeal -- I think it was a three-day 24 hearing -- examined the law in some detail and gave 25 quite helpful guidance in terms of how that should be</p> <p style="text-align: center;">Page 93</p>	<p>1 dealt with. 2 MR SKELTON: Is it fair to say that that case still provides 3 some assistance to all practising in this field? 4 MR DURKIN: It does, yes. 5 MR SKELTON: That process from the original trial to the 6 Court of Appeal judgment took nearly three years of 7 judicial intervention. 8 MR DURKIN: Well, the trial in January -- the appeal was 9 then dealt with in May 2009 -- was expedited, so I think 10 the judiciary understood that it was an issue that 11 needed clarifying post Hoare. 12 MR SKELTON: What I'm trying to understand, really, is 13 whether or not you can really lay the blame for this 14 time on any particular party and whether, to some 15 extent, it was really because the law was changing and 16 this case was one of the key changes. 17 MR DURKIN: Yes, I would agree, yes. 18 MR SKELTON: So time was lost because of that process -- 19 MR DURKIN: Yes. 20 MR SKELTON: -- and the House of Lords changing the law 21 entirely in respect of limitation? 22 MR DURKIN: Yes. 23 MR GARDEN: That having been said, it would have been open 24 at any time for a settlement to be proposed because of 25 the enormous cost of the litigation.</p> <p style="text-align: center;">Page 94</p>
<p>1 MR SKELTON: I think Mr Justice Holland had tried to and had 2 successfully encouraged the parties to mediate; is that 3 correct? Presumably, during that process you were still 4 trying to negotiate, as is your obligation. I mean, 5 throughout the litigation, were you still attempting to 6 negotiate with RSA? 7 MR DURKIN: Attempting to negotiate with the defendant 8 solicitors. We made part 36 offers across the board. 9 I can't recollect that many or any part 36 offers were 10 accepted. I think it was pretty much a period of 11 stalemate. 12 MR SKELTON: Were you getting any offers back from the 13 defendant? 14 MR GARDEN: I remember one particular type of offer which 15 sticks in my mind, which is we were making a part 36 16 offer that, "You should discontinue your entire claim on 17 the grounds that we don't claim any costs against you", 18 which wasn't what I'd call an offer, but was something 19 that was frequently said. 20 MR SKELTON: Known as a "drop hands" offer. 21 MR GARDEN: Yes. 22 MR DURKIN: A drop hands offer with a Legally Aided client, 23 so it wasn't remotely attractive. 24 MR SKELTON: Could you explain why? 25 MR DURKIN: The defendants were litigating against Legally</p> <p style="text-align: center;">Page 95</p>	<p>1 Aided clients, so if they won, they would stay pay their 2 own legal costs. They can't claim the costs, except, 3 I think, in very unusual circumstances. 4 MR SKELTON: So they are not actually giving anything, you 5 mean? 6 MR GARDEN: No. 7 MR DURKIN: Exactly. 8 MR SKELTON: Just going back to the point, settlement 9 negotiations I think had gone on successfully with the 10 other defendants by this stage. Were there any offers 11 at all of financial compensation for the Nugent Care 12 claimants? 13 MR DURKIN: I can't say for certain that there were no 14 offers. With the passage of time, I can't remember. 15 But my recollection is it was a real period of 16 stalemate, the law was in a state of flux, and we were 17 just facing some tough times in keeping the claimants 18 going, in keeping the litigation going, keeping the 19 funders on board, the Legal Aid Agency. 20 MR SKELTON: You did, I think, have a mediation with a QC 21 specialising in these sorts of injuries, broadly 22 speaking, and, without betraying privileged information 23 or confidences, why did that not succeed? 24 MR DURKIN: Well, my recollection of that is that 25 Mr Justice Holland was struggling, really, to case</p> <p style="text-align: center;">Page 96</p>

<p>1 manage the number of claims that were in front of him. 2 You can probably see from the chronology that there were 3 a lot of case management conferences, with probably not 4 that much progress. 5 I honestly can't remember if the mediation was 6 ordered or suggested, but the mediation went ahead with 7 Mr Wingate-Saul for a day in Manchester. Perhaps 8 naively, I was optimistic. I saw this as a way of 9 breaking through, defining the issues, seeing what 10 claims are capable of settlement. My recollection is 11 that, at the end of the day, the claimants' lawyers, we 12 were told by the defendants that the defendant had no 13 instructions from the insurers to settle any claims and 14 the mediation stopped, if you like. 15 MR SKELTON: So it went back to the court, and I've taken 16 you through in fairly basic terms, it's fair to say, the 17 chronology of the initial decisions, the appeal, further 18 decision, further appeal. Ultimately, it landed back 19 with Mr Justice Irwin for another trial, the final trial 20 that took place, and I think that's by February 2010, 21 which I think is the last lap, as it were. 22 MR DURKIN: It is. 23 MR SKELTON: By that stage, what were the issues that the 24 judge was confronted with? 25 MR DURKIN: Well, the individual cases that were tried, so</p> <p style="text-align: center;">Page 97</p>	<p>1 there were issues of limitation, liability, causation 2 and quantum. 3 MR SKELTON: It was done by reference, I think, to three 4 lead cases; is that correct? 5 MR DURKIN: It was, yes. 6 MR SKELTON: Is it right that in respect of at least one of 7 them there was no challenge to whether or not the abuse 8 took place? 9 MR DURKIN: Yes. 10 MR SKELTON: In respect of one of the others, there was 11 a challenge, but that was actually backed up by witness 12 evidence? 13 MR DURKIN: That's right. 14 MR SKELTON: I think, is it fair to say, you can't disagree 15 with the defendant putting forward positive evidence if 16 that's their instructions by their client? 17 MR DURKIN: Yes. 18 MR SKELTON: In the third case, there wasn't a positive case 19 put, presumably due to a lack of evidence, but the 20 claimant was challenged on the consistency of his 21 account, so whether it was reliable and credible? 22 MR DURKIN: The challenge was on limitation. 23 MR SKELTON: It ties in with both whether or not the judge 24 is going to accept the abuse on the balance of 25 probabilities and the issue of limitation, as Mr Garsden</p> <p style="text-align: center;">Page 98</p>
<p>1 has identified? 2 MR DURKIN: Yes. 3 MR SKELTON: Taking those three -- that's the three basic 4 positions, none of them is unreasonable, is it? I mean, 5 they are entitled to say, "We are not challenging this, 6 we are challenging that because we have got positive 7 evidence, and we think your account is unreliable and we 8 are going to test that". Isn't that the job of lawyers? 9 MR DURKIN: And the job of the court, yes. 10 MR GARDSEN: I think it depends on whether there's been any 11 previous criminal proceedings, because I think we have 12 heard yesterday from F42 that, even though there'd been 13 a criminal conviction, the inconsistencies between 14 different statements that are now available that weren't 15 available in the criminal proceedings is still 16 challenged and was challenged, I know, in this case, in 17 the test cases. So maybe you didn't have a criminal 18 conviction, but you'd had a criminal investigation, but 19 the reliability of testimony is still being challenged 20 in order to show inconsistency and defeat the case on 21 limitation. 22 MR SKELTON: Again, is there something about child sexual 23 abuse cases which means that that process of challenge 24 about consistency of statements, which is extremely 25 important, as you heard from the witness yesterday, who</p> <p style="text-align: center;">Page 99</p>	<p>1 I will come on to, whose credibility of his accounts has 2 been repeatedly challenged on the basis he's given 3 different accounts at different times, is that fair to 4 those claimants? 5 MR GARDSEN: As to whether it is fair, I think you have to 6 look at the effect it has upon them. If you have 7 a situation where there is a criminal process which 8 results in a conviction or results in the claimant 9 giving evidence to the police and it is then challenged 10 at a later stage, I think it's questionable as to how 11 fair it is. The defendants are entitled to do it. It's 12 a question of whether the effect upon the individual is 13 outweighed by what actually happens, and I'm sure if you 14 asked any claimant, any survivor, they would say it's 15 deeply unfair, deeply offensive and psychologically 16 damaging for them and makes them very angry and brings 17 up all their bad feelings about what happened. That 18 would be my view. 19 MR DURKIN: In terms of the last trial and the individual 20 that lost, I was the coordinating solicitor, but he was 21 also my client, and I got to know this man quite well. 22 He was quite a straightforward, simple man. He was 23 semi-literate, a family man. I completely believed his 24 account. On the day when he had to give the detail of 25 what happened of the abuse, it was in the court in</p> <p style="text-align: center;">Page 100</p>

<p>1 Chester, a very intimidating building, I just think he 2 cracked under the pressure. He couldn't, under 3 cross-examination, give a clear and cogent account. 4 If you ask me whether or not he was abused in that 5 home, I'd say he was. I think the right decision was 6 made on the evidence given, because of the way he gave 7 that evidence, but whether or not that was the best 8 evidence that he could have given, I very much doubt. 9 He was a man who looked perplexed and confused as to 10 where he was and what he was doing. 11 MR SKELTON: It's right, though, isn't it, that that's the 12 system of civil justice? You take your chances at 13 court, and people react differently. Some people will 14 go to pieces under examination, some people are 15 remarkably resilient under examination. Some people's 16 memories seem to disappear or seem to coalesce into 17 a way in which even they didn't expect to happen. So 18 there is a huge variety, but you do take your chance 19 when you go to court. 20 MR DURKIN: I think you do, but the questions that were 21 being asked of this man, who -- I think he was in his 22 40s or early 50s, were about him being sexually abused 23 as a child. It wasn't -- he wasn't being asked about 24 a road traffic accident or an accident at work. He was 25 being asked about the most sensitive issues imaginable</p> <p style="text-align: center;">Page 101</p>	<p>1 for any of us, and he was having to recount them in an 2 open court. I just, intellectually and emotionally, 3 don't think he was capable of acquitting himself. 4 MR GARDSEN: I think I'd also like to add that, in those 5 days, special measures for giving evidence were unheard 6 of in civil cases, and still we do not have any Civil 7 Procedure Rules for special measures in the same way as 8 we have in the criminal courts. 9 If this man was going through the criminal courts, 10 he'd probably have an ISVA, he'd have support before 11 going to court, he'd probably have been given the option 12 of giving evidence in a different building, from behind 13 a screen. He wouldn't be in the rather Victorian and 14 unpleasant court number 1 at Chester Crown Court which 15 is not suitable for that type of evidence in modern 16 terms. 17 I've done quite a lot with the Association of 18 Child Abuse Lawyers about special measures, and 19 I think -- you know, it was sad that we weren't able to 20 provide them with the witness support that they needed, 21 and even now in a group action I was running in the 22 summer, I was really struggling to get witness support 23 for these victims of abuse before they gave evidence. 24 So I think that is also something that is important and 25 that needs to change and that should be taken into</p> <p style="text-align: center;">Page 102</p>
<p>1 account. 2 MR SKELTON: This is something which you identify as 3 being -- particularly out of this category of claimant 4 and witness. The victims of child sexual abuse should 5 not be examined in the conventional way because the 6 questions that they're being asked are so integral so 7 their psychological well-being and their sense of 8 themselves? 9 MR GARDSEN: You're talking about abuse that happened in 10 childhood. When adults talk about abuse in childhood, 11 they regress and become the way they were when they were 12 being abused, and they are vulnerable, and in the 13 criminal courts they are regarded as vulnerable 14 witnesses entitled to protection. The civil process is 15 absent from that. I know being trialled at the moment 16 is witness testimony being given by video in advance in 17 a proper environment. So, you know, we have the 18 Truth Project. That is a good environment for people to 19 talk about the abuse. We could have a situation where 20 that evidence is examined in that sort of scenario and 21 played back in court with the witness available for 22 cross-examination, for example. 23 I think, you know, when these cases came to court, 24 there was none of that, it was eight years ago -- ten 25 years ago. I think that would have helped a lot.</p> <p style="text-align: center;">Page 103</p>	<p>1 MR SKELTON: It is difficult from your perspective, but is 2 that going to result in fairness to the defendants as 3 well, bearing in mind that they may need to put some 4 very difficult questions, they may need to say, "You 5 weren't at the home at this time, so you can't have been 6 abused at that point, from our perspective", or, "The 7 abuser, who is still our employee, denies that 8 allegation". Do you think that can be put fairly 9 without traumatising people, even with the measures that 10 you identify? 11 MR GARDSEN: I think the same sort of questions were put to 12 Lord Faulks when you were asking him questions, and 13 I think you did put them for that reason, and I think 14 it's something that the defendants have to be allowed to 15 do, but it has to be done in the right sort of a way. 16 I know with the Advocate's Gateway there's talk of 17 a pre-hearing with a judge when counsel who is going to 18 be cross-examining runs through the questions he wants 19 answered and the judge decides whether it is right for 20 them to be put in that sort of a way, so there is 21 a filtration system to make sure, if possible, that the 22 victim/survivor/claimant isn't traumatised by the way 23 those questions are put. I think you asked Lord Faulks 24 that when he was giving his evidence: "Do you not think 25 that the way you put this question was very damaging and</p> <p style="text-align: center;">Page 104</p>

<p>1 it wasn't relevant?", "Well, perhaps so".</p> <p>2 MR SKELTON: Yes, although I think it is right that he</p> <p>3 didn't necessarily accept that special measures -- which</p> <p>4 it is fair to say he didn't know a lot about -- should</p> <p>5 necessarily be brought into the civil justice context.</p> <p>6 MR GARDEN: That just shows how out of date we are.</p> <p>7 MR SKELTON: Turning back to the decision of</p> <p>8 Mr Justice Irwin in the final trial, what was the</p> <p>9 significance of that decision, in respect of those</p> <p>10 cases, for the cohort?</p> <p>11 MR DURKIN: I think it would be fair to say that finally the</p> <p>12 defendant and the claimants' lawyers had an</p> <p>13 understanding of lines of engagement, and there was</p> <p>14 a tacit understanding that we should look at settling</p> <p>15 claims and discontinuing claims. Because this was at</p> <p>16 the end of a long process: two courts of appeal, three</p> <p>17 trials. The law was more settled. We were looking at</p> <p>18 vicarious liability. There was more understanding of</p> <p>19 limitation. And of course, by that time, the respective</p> <p>20 parties knew each other in terms of their approach to</p> <p>21 the work, and there was a slow process of resolving the</p> <p>22 claims.</p> <p>23 From memory -- I could be wrong -- there was an</p> <p>24 agreement to select cases for further trials. I might</p> <p>25 be conflating that with the St George's litigation,</p> <p style="text-align: center;">Page 105</p>	<p>1 where that happened, whereby the defendant would choose</p> <p>2 three cases and the claimant would choose three cases</p> <p>3 and the defendant would choose three cases and that</p> <p>4 ended up in a slow process of claims settling and</p> <p>5 discontinuing and no trials.</p> <p>6 MR SKELTON: So far as you can remember, is it after the</p> <p>7 judgment of Mr Justice Irwin, this final judgment, that</p> <p>8 settlement in terms of financial offers started to be</p> <p>9 forthcoming, or had you had intimations of financial</p> <p>10 offers before?</p> <p>11 MR DURKIN: No. The final tranche of claims, the three</p> <p>12 trials, then cleared the way for settlement and</p> <p>13 discontinuance of claims.</p> <p>14 MR SKELTON: Did you have a series of discussions with</p> <p>15 Mr Gillespie, who would have been your counterpart at</p> <p>16 Hill Dickinson, to work out how to compensate all of</p> <p>17 them?</p> <p>18 MR DURKIN: No, no, it was a case-by-case basis. The way</p> <p>19 the group worked at the time was that some claimants</p> <p>20 were in-house at Abney Garsden McDonald, some claimants</p> <p>21 were out of house. I co-ordinated the settlement of</p> <p>22 those claims, advising the individual solicitors,</p> <p>23 advising the in-house solicitors. So there were no</p> <p>24 settlement meetings per se, but it was done by</p> <p>25 correspondence and then telephone calls.</p> <p style="text-align: center;">Page 106</p>
<p>1 MR SKELTON: The overall litigation took an extraordinarily</p> <p>2 long time to resolve -- 14 or so years. Certainly many</p> <p>3 of the years were taken up with resolving legal</p> <p>4 questions, or waiting for legal questions to be</p> <p>5 resolved. Do you think it actually could have been done</p> <p>6 any quicker, bearing in mind that this was itself a very</p> <p>7 important case legally and was in a climate of legal</p> <p>8 change?</p> <p>9 MR DURKIN: The St Aidan's and St Vincent's cases in stark</p> <p>10 contrast to the Danesford case -- if you remember, the</p> <p>11 five cases all started off as the North West Child Abuse</p> <p>12 Cases, split off in 2001, Danesford, and we have --</p> <p>13 there has been some evidence about why Danesford settled</p> <p>14 through the Methodist insurance Company, but they did</p> <p>15 settle, they settled for a modest amount of money. The</p> <p>16 costs were limited, both to the claimants and</p> <p>17 defendants. And the claimants were able to get on with</p> <p>18 their lives in or around 2001/2002, rather than ten</p> <p>19 years later and an enormous amount of legal costs.</p> <p>20 So the simple answer to the question is: yes, it</p> <p>21 could have been dealt with earlier, more compassionately</p> <p>22 and with a massive reduction in legal costs. It's</p> <p>23 entirely possible.</p> <p>24 MR SKELTON: I think you use the word "attritional", which</p> <p>25 is a strong word. Am I right in thinking you're</p> <p style="text-align: center;">Page 107</p>	<p>1 implying that there was a tactic to wear down the group?</p> <p>2 MR DURKIN: It certainly felt like that from an individual</p> <p>3 perspective. I really had to keep fighting all the way</p> <p>4 through. I really had to put a lot of energy into the</p> <p>5 litigation, I had to keep the funders on board, I had to</p> <p>6 keep the medical experts on board. Most importantly,</p> <p>7 I had to keep the claimants on board and motivated and</p> <p>8 keep explaining to them why the claim was so slow. Yes,</p> <p>9 it felt very -- it was hard litigation. It was very</p> <p>10 professionally satisfying, as we got a mixed result.</p> <p>11 I think we won more than we lost or settled more than we</p> <p>12 lost, but from a claimant's perspective, it was a very,</p> <p>13 very difficult claim.</p> <p>14 I feel they were confused as to why it took so long.</p> <p>15 MR SKELTON: But if the defendant, as I think you have both</p> <p>16 accepted, is entitled to defend the claims if it chooses</p> <p>17 to, it doesn't have to take what Mr Garsden called</p> <p>18 a moral approach. If it says, "We are going to defend</p> <p>19 these claims. Limitation is an issue", a major issue,</p> <p>20 it seems, and that defence ultimately, if it can't be</p> <p>21 resolved by agreement, has to be resolved by the courts,</p> <p>22 then the attrition really comes from the system rather</p> <p>23 than from the defendant, doesn't it?</p> <p>24 MR GARDEN: Well, the word was actually used by defendant's</p> <p>25 counsel at a hearing. It was he who described the</p> <p style="text-align: center;">Page 108</p>

<p>1 litigation as "attritional". And if you read the 2 judgments, which I think are in the documentary 3 evidence, particularly one particular judgment of 4 Holland J back in 2004, he expresses frustration at the 5 cases not being able to settle, which is why he referred 6 it for mediation and, when it came back from mediation 7 and was told that it had failed, he made a sarcastic 8 remark, words to the effect, "Well, I'm not surprised". 9 Our job as claimants is to push the litigation 10 forward as fast as possible, get it to trial as 11 possible, but as fast as we push it forward, we get 12 repeated applications which frustrate the progress of 13 it, and, granted, some of it was the law, but at the end 14 of the day, you come to the conclusion that, of 15 the three defendants, two settled, certainly within four 16 and seven years of it starting, and the other one went 17 on to 2010. 18 MR SKELTON: Beyond the major issues that you have 19 identified in your evidence, the big issues of 20 limitation, the lead cases, the changes in the law, was 21 this sort of a day-by-day attrition, in terms of tactics 22 to disagree with things that you were asking for, 23 disclosure you were requesting, court dates, things like 24 that, on a day-to-day basis? Was that the case? I'm 25 trying to understand the basis for you saying that it</p> <p style="text-align: center;">Page 109</p>	<p>1 was a tactic to be attritional. 2 MR DURKIN: My opponents were firm but fair. I think the 3 relationship between myself and my opponents was 4 described at one case management hearing as "civilised 5 testiness". So no quarter was given by the defendants, 6 I'd say, and at each stage we had to prove the case 7 which, perhaps, that's what claimants have to do. 8 I suppose my thoughts about the litigation taking 9 a step back is that it was long and hard, it wasn't 10 particularly fair for all the claimants, it cost an 11 enormous amount of money. The alternative approach 12 would have been to take a compassionate approach -- the 13 defendants don't have to do that, but to take 14 a compassionate approach, see the modest financial value 15 of the claims, settle them, save the harm and suffering 16 to the claimants, and save a lot of legal costs. 17 MR SKELTON: Do you think they would have saved more money 18 settling, like Liverpool had done and the other 19 defendant early on, than they did fighting? 20 MR DURKIN: No question. Yes, they'd have saved a fortune. 21 I was perplexed throughout why the defendants were 22 fighting this litigation. 23 The solicitor in the Danesford litigation in 2001 24 couldn't understand why St Aidan's and St Vincent's were 25 fighting. It didn't make economic sense. With</p> <p style="text-align: center;">Page 110</p>
<p>1 St Aidan's and St Vincent's, we were dealing with two 2 homes in which individuals had been convicted of abuse. 3 So the fact that people had been abused was 4 incontrovertible. And yet they took 12 years or so to 5 settle. There was an alternative. 6 MR SKELTON: Do you have an idea of the spread of outcomes 7 across the 120 or so cases in St Aidan's and 8 St Vincent's? In other words, how many cases got 9 settlements, how many cases lost and how many cases may 10 have departed on the way? 11 MR DURKIN: I think in Peter's statement, is it paragraph -- 12 I can't quite see. I think there was something like 13 a two-third win for the claimants and a third loss. 14 MR SKELTON: The phrase "attritional", the word 15 "attritional", seems to imply that people would have 16 dropped out on the way as a result of just the endless 17 obstacles presented to them or the difficulties 18 presented to them. Did you lose claimants on the way 19 who may have had cases which were equally meritorious to 20 others that succeeded? 21 MR DURKIN: I can't identify any specifically, but I imagine 22 that would have happened, simply because of the length 23 of the litigation. People suffer from litigation 24 fatigue. They must have asked themselves why were they 25 engaging in the process.</p> <p style="text-align: center;">Page 111</p>	<p>1 MR GARDSEN: I think F42 is one. 2 MR SKELTON: Would you explain that, please? 3 MR GARDSEN: F42 came forward in 2001, if I've got his 4 cipher correctly, and was -- after the cut-off date, 5 issued a claim, had it stayed, I think, and then lost 6 way and didn't pursue his case until he tried again in 7 2014/2015. So he was one that was lost on the way. 8 MR SKELTON: Staying with his claim, I think when he tried 9 again he hasn't proceeded successfully either? 10 MR GARDSEN: No, indeed. 11 MR SKELTON: Could you explain why that is? I think you 12 were here yesterday, I have shown you a letter from the 13 same solicitor who in fact did St Aidan's and 14 St Vincent's. It is a detailed letter identifying in 15 a very forensic way all of the inconsistencies that may 16 have occurred in his account over the years by reference 17 to where he was and who abused him and at what 18 particular timeframe. It's a detailed, conventionally 19 legal analysis. Why does that lead to his claim being 20 effectively unable to proceed? 21 MR GARDSEN: Well, if you look at limitation as one issue, 22 he has tried to pursue a claim in 2001 and had some 23 medical evidence and instructed solicitors, and then 24 comes again 13 years later and the argument on 25 limitation is that he knew that he had a right of</p> <p style="text-align: center;">Page 112</p>

<p>1 a claim in 2001, hasn't pursued it and then has waited 2 another 13 years. That's one argument. And it's the 3 same for any claimant who has two bites of the cherry: 4 even though the law has changed in the interim and he 5 has now a better claim than he did in 2001, as is 6 common, I'm afraid, with people who were abused many 7 years ago, their memory of peripheral details is 8 sometimes not as good as it is of the abuse, and in that 9 letter it was pointed out what conflicts there were in 10 some of that external detail, but, as he pointed out 11 yesterday, the main items he remembered clearly and was 12 the subject of criminal prosecution.</p> <p>13 However, he was subject to public funding and, in 14 order for us to pursue the case further, we have to get 15 the buy-in of the Legal Aid Agency, and there has to be 16 an analysis of all that evidence. So all the factors 17 taken into account meant that, with the -- the advice we 18 got from our barrister was that we should make an offer 19 to try and settle the case. However, if we couldn't 20 settle it at that stage, she couldn't support the 21 pursuing of the case to litigation, and without 22 Legal Aid support, we were hamstrung. We were hoping 23 that when we made that part 36 offer, which we did -- 24 sorry, that's an offer to settle -- it would be met with 25 a conciliatory approach and an acceptance. What</p> <p style="text-align: center;">Page 113</p>	<p>1 actually we got back was a four-page letter calling him 2 a liar, which obviously deeply upset him, and we weren't 3 able to pursue the case any further.</p> <p>4 I found it very difficult to hear that yesterday, 5 and I felt that, you know, we'd let him down, and he 6 went away very unhappy, and I'm deeply sorry for that. 7 And I wish we could have given him what he wanted, which 8 was some justice.</p> <p>9 MR SKELTON: And that applies to conditional fee 10 arrangements as well, that you have to recognise that if 11 a case is not as strong as it might be, for the reasons 12 you've given, because memories may have faded, because 13 there was a time when the claim could have been brought 14 and wasn't, that you still can't progress it because the 15 funding is not going to be there to back the costs?</p> <p>16 MR GARDSEN: I suppose it's the difference between us taking 17 the financial risks and the Legal Aid Agency, but the 18 issues are the same: it's just that if we can persuade 19 the Legal Aid Agency to back it, then we can continue. 20 Whereas, where we are backing it, the issues are the 21 same, but the risk analysis has to be done.</p> <p>22 MR SKELTON: Are you in a position to say why the same 23 person can be believed in one system of justice and not 24 in the other?</p> <p>25 MR GARDSEN: The issues are different. In one system of</p> <p style="text-align: center;">Page 114</p>
<p>1 justice, the criminal justice system, there is no such 2 thing as the law of limitation. It doesn't matter how 3 old the accused is, whether they're 20 or 90, they can 4 still be prosecuted, and at one time it was possible to 5 defeat a case on abuse of process, whereas the law -- 6 the criminal law on abuse of process is now a lot 7 different, and it's recognised that victims of abuse 8 should be allowed to take the case to trial. Whereas in 9 the civil system, it's a different ball game, and the 10 opportunity for defendants to knock a case out on 11 limitation are far more sophisticated and therefore 12 it's -- in answer to your question, there should be no 13 difference. But there is.</p> <p>14 MR SKELTON: Do you have anything to add to that, Mr Durkin?</p> <p>15 MR DURKIN: In terms of the five-page letter from 16 Hill Dickinson, a claimant receiving that letter or 17 hearing about that letter, their initial reaction is, 18 "I've not been believed". The barrister then has to 19 look at the points raised. He creates some doubt 20 peripherally in terms of their account. That doubt 21 could weigh in the balance in terms of the exercise of 22 discretion, but the point that is missed is that this 23 claimant is consistent about the abuse. The dates and 24 inconsistencies all allow the defendants to attack and 25 challenge his account, so much so the claimant probably</p> <p style="text-align: center;">Page 115</p>	<p>1 doubts himself, and it's a question of getting to the 2 essence of a claim rather than technically challenging 3 it at the periphery of a claim. For a claimant, that's 4 what they simply don't see. They say to me, "Oh, you 5 say it's weak on limitation. Does that mean you don't 6 believe me?" I say, "No, I believe you. You have given 7 a very clear and consistent account about that, but 8 there are some peripheral things that don't help", and 9 then I have to explain that, "If you went to a trial, 10 there could be findings against you, and that could be 11 unhelpful and you could lose on a discretionary point in 12 front of the judge".</p> <p>13 MR SKELTON: Again, isn't this something that judges should 14 grapple with, rather than with an external agency like 15 parliament? Shouldn't it be for the judges to say, 16 "Actually, what matters", exactly as you have said, "is 17 that this claimant has given a coherent account of an 18 abusive event which must have taken place within that 19 institution for which this defendant is vicariously 20 liable". That's what matters. If that were the case, 21 these cases would have merit, but the judges haven't 22 done that. They are going to focus on arguments about 23 consistency and credibility because that's what they, in 24 their wisdom, consider to be fair?</p> <p>25 MR DURKIN: I think the technical arguments and the</p> <p style="text-align: center;">Page 116</p>

<p>1 technical challenges and a more compassionate, fairer 2 system, would look at what happened to that individual 3 and appreciate their need to have a voice rather than 4 shoehorn in their need for justice within the 5 constraints of a personal injury claim and the law of 6 limitation. 7 So I think there could well be a better approach, 8 a loosening of limitation, as has happened in Scotland, 9 or the adoption of schemes, as has happened in the 10 Republic of Ireland, proposed in Scotland, there is 11 currently a scheme in Lambeth in South London and one, 12 I think, proposed in Islington. There's been the Jersey 13 scheme. So there are alternatives to this attritional 14 forensic approach whereby, cost-effectively and 15 compassionately, people are given a voice and maybe some 16 modest amount of compensation as well, as a recognition 17 of what they have been through. 18 MR SKELTON: Just staying with the issue in Scotland, you 19 don't, I don't suppose, practice in that jurisdiction 20 yourself? 21 MR DURKIN: No. 22 MR SKELTON: The new Act of 2017 is still in its infancy, 23 obviously, and no doubt will be tested by creative 24 counsel for a few years to come. But it's fair to say, 25 I think, that the Scottish system had been much more</p> <p style="text-align: center;">Page 117</p>	<p>1 severe when it came to limitation and has now been 2 softened to a degree but still incorporates a balancing 3 exercise of prejudice, which is analogous, in fact, to 4 the section 33 discretion? 5 MR DURKIN: I'm not an expert on Scottish law, of course. 6 But I think there's been a political intention to soften 7 the law of limitation. It was very draconian in 8 Scotland before the legislative changes. But I think 9 the general acceptance is that it's a more liberal venue 10 for limitation or potentially is more liberal to deal 11 with limitation than in England. 12 MR SKELTON: Would you both advocate the abolition of 13 limitation for this category of claimant? 14 MR GARDEN: I don't think there's much doubt that the law 15 of limitation -- the Limitation Act 1980 was not 16 designed for child abuse cases. What has happened is 17 that judges in cases like A v Hoare have manipulated and 18 twisted it to try and do justice to claimants, but it 19 isn't really fit for purpose and needs a redraft. We 20 have a situation where sexual abuse cases are easier to 21 proceed out of time, physical abuse cases aren't. We 22 have a situation where the wishes of the claimants and 23 their feelings aren't taken into account as much as they 24 should be. 25 As I understand it, the law in Scotland has</p> <p style="text-align: center;">Page 118</p>
<p>1 abolished limitation in child abuse cases of any type, 2 and I think there's a "get out of gaol" application 3 possible by the defendants if a case is so woefully 4 inequitable that it shouldn't proceed, as there is in, 5 as I said, Victoria, Australia. 6 MR SKELTON: To some extent, it shifts the burden onto the 7 defendant to demonstrate prejudice rather than on the 8 claimant to apply for the court to exercise its 9 discretion, to some extent? 10 MR GARDEN: I think so, but I think it is quite an onerous 11 responsibility. There have been cases, as I understand, 12 in Victoria, Australia, where this has been used. So 13 whatever law you create, lawyers will try and find a way 14 around it to knock out cases. So it's all in the 15 drafting. But there is no doubt that, as we heard most 16 powerfully from B19 yesterday, it needs to be changed, 17 and it needs to be brought in line with civilised law 18 that is more fit for purpose. 19 MR SKELTON: If some insurers -- Ecclesiastical, perhaps, 20 being one of them; Zurich perhaps being to some extent 21 another -- and other defendants are starting to soften 22 their approaches to the use of limitation in particular, 23 and that's the way the wind is blowing, then why does 24 anyone need to intervene to make it a change in the law, 25 if the practical change has already been made?</p> <p style="text-align: center;">Page 119</p>	<p>1 MR GARDEN: That's not my experience of how it is. I've 2 heard it said that nobody tries limitation anymore, but 3 I specialise in this type of work and that's not my 4 experience. It is still used as often as possible to 5 defeat cases. I'll ask Paul whether his experience is 6 the same or not? 7 MR DURKIN: It is raised in each and every case I have, and 8 I think without a legislative change or the introduction 9 of a scheme, we're relying upon the commercial 10 necessities of an insurance company. If an insurance 11 company is told by solicitors there's a possibility of 12 defeating the claim with a technical argument on 13 limitation, well, that -- the commercial necessities may 14 indicate that that insurance company will say, "Defend 15 it on limitation". I don't think we can trust the 16 insurance industry to do the right thing. 17 MR GARDEN: I think we heard at the seminar that I attended 18 in January 2017 that if limitation was abolished, the 19 insurers would find something to replace it or they 20 would find some way of getting around it. I remember 21 that being said, and I remember thinking, "Well, should 22 we stick with what we've got rather than face a more 23 powerful opposition?". I came to the conclusion -- 24 I have come to the conclusion that we should replace it 25 and do something with it, but we have to be very careful</p> <p style="text-align: center;">Page 120</p>

1 what we replace it with to make sure that we don't open
 2 the door to more technical defences. Because I think if
 3 you do, that's what will happen. Do you agree?
 4 MR DURKIN: Yes.
 5 MR SKELTON: I think Mr Uppal made a similar point, in fact.
 6 I think he wasn't necessarily holding a baton up to
 7 abolish limitation either. I think his view was that,
 8 if an issue goes away -- vicarious liability being
 9 a major issue that's changed during the last 20 years
 10 and has made things a lot easier for claimants -- you
 11 are still facing defences because there are new defences
 12 there. In fact, as Ms Erwin-Jones said yesterday the
 13 law is still in flux when it comes to even duties of
 14 care being owed by abusers or those who are responsible
 15 for them in some way?
 16 MR GARDEN: Yes. I remember a very wise lawyer once saying
 17 to me that litigation is a gladiatorial contest entered
 18 by fools, and, in a round-about way, if there is a way
 19 around something, a lawyer somewhere will find it.
 20 So law has to keep up with tactical weapons and,
 21 unfortunately, somewhere in the process we are losing
 22 the buy-in of some very vulnerable individuals, all of
 23 whom have given very powerful evidence that I have heard
 24 this week, and I am saddened that that is what people
 25 think of our civil litigation system. I very much am

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1 every ten cases, every ten enquiries we get, we only
 2 accept and push forward about a third. So seven out of
 3 ten cases, we will have to say to the client, "I'm
 4 sorry, we can't help you".
 5 So if you help -- if you look -- if you look at all
 6 the victims of abuse, only a percentage of them will
 7 instruct lawyers. Of those that instruct lawyers, we
 8 only accept 30 per cent. Of the 30 per cent that we
 9 pursue, and not all will carry on because some will fall
 10 by the wayside, the defendants will only see some of
 11 those.
 12 So if you look at their statistics, one-third don't
 13 succeed, two-thirds do. That's actually a much smaller
 14 proportion of all the claims, all the enquiries, that we
 15 actually receive. So it's misleading to say, "Oh, well,
 16 very few of them actually go to trial". Well, they do,
 17 that is true, but it's only the amount that we can't
 18 help which is a tragedy, which I'm pretty certain -- it
 19 may be a no-fault compensation system without limitation
 20 being an issue would cater for -- it is actually a much
 21 larger number, and, you know, we need to do better by
 22 child abuse victims/survivors in general.
 23 MR SKELTON: The last question, I hope, about limitation: if
 24 it were abolished, would the two-thirds of cases that
 25 you turn away be treated differently?

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1 disappointed.
 2 MR SKELTON: One of the points that Mr Gillespie made in his
 3 evidence was that, actually, you must be careful to
 4 recognise that the number of cases that proceed to trial
 5 are very few in this area. That may be the end point of
 6 the litigation, as it always is, it must come to trial
 7 necessarily, that the court is the place where these
 8 things get resolved, but most things do get resolved
 9 before it gets to that point, the vast majority of
 10 cases.
 11 MR DURKIN: That's right, but what's not said is that
 12 a large number discontinue and they discontinue for
 13 a number of reasons: defendant lawyers write to the
 14 funding authority, the Legal Aid Agency, to say how weak
 15 the claim is, that's a routine tactic for defendant
 16 lawyers; and then I get the letter, respond to the Legal
 17 Aid Agency and say why the claim is strong.
 18 Remember, if a claim does become weak, I would
 19 advise the client to discontinue the claim if it
 20 evidentially becomes weak. I don't think it is fair on
 21 the claimant. And there are some claims that I do
 22 recommend discontinuance.
 23 MR GARDEN: I think what has to be said is that the cases
 24 that defendant lawyers see are only the strongest cases
 25 because statistically at my firm, Simpson Millar, of

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1 MR GARDEN: Definitely.
 2 MR SKELTON: Is that a critical factor in that or are you
 3 evaluating a whole lot of other material about the
 4 coherence of the account compared to the records and the
 5 kinds of things that conventionally lawyers evaluate?
 6 MR GARDEN: To me, the limitation problem is a huge one.
 7 If I look at all the cases that we can't help, the vast
 8 majority of them are on limitation grounds. I'm not
 9 saying that's all of them. I'd say, of all the cases we
 10 reject, probably limitation accounts for 70 per cent.
 11 Other factors probably are other issues, such as lack of
 12 records, maybe the lack of a criminal prosecution, maybe
 13 an issue in that the case is not one we can pursue.
 14 I have to ask Paul whether ...?
 15 MR DURKIN: I think those are all the points. I always ask
 16 my client what harm has been done to them. Sometimes
 17 they say that they have survived the abuse and they
 18 merely want a recognition, and they decide not to go
 19 ahead because compensation isn't what they want. So
 20 everyone is completely different. So, yes, limitation
 21 would be a very, very important factor, but people have
 22 quite complex reasons for coming forward and speaking to
 23 lawyers.
 24 Sometimes it's just to speak to me about what
 25 happened, and then they say, "Well, I've told someone

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<p>1 now. I've never told anyone else in my life. I can get 2 on with my life". It's very hard to generalise with 3 people who have been sexually abused. They're all 4 individual. They all have different needs. 5 MR GARDSEN: Some of them are put off by the adversarial 6 process, I have to say. They don't want to go through 7 that washing machine of, you know, seeing a psychiatrist 8 on your side, the other side, going to court, being 9 questioned, being called a liar. Those are all issues 10 as well. 11 MR SKELTON: Also, Mr Durkin, you mentioned the existence of 12 redress schemes. Can I ask you, first of all, have you 13 had clients you have needed to take through that scheme 14 or otherwise engage with? 15 MR DURKIN: Yes. The first redress scheme I dealt with was 16 the RIRB, the Residential Institutions Redress Board in 17 the Republic of Ireland. I felt that was a very fair, 18 compassionate scheme providing speedy redress to people 19 who have been abused at qualifying institutions in 20 Ireland. I've dealt with one or two Jersey claims. I'm 21 currently dealing with a large number of Lambeth claims, 22 that's a scheme that's been set up by Lambeth Council to 23 compensate people who have been abused emotionally, 24 sexually and physically at qualifying homes. 25 Again, my experience of that is, so far so good.</p> <p style="text-align: center;">Page 125</p>	<p>1 It's only been going since the beginning of this year, 2 but it provides speedy redress, limited legal cost and 3 the facility for an apology and, importantly, 4 a recognition that they were harmed as children. 5 MR SKELTON: Is the redress on the type of levels that could 6 be awarded by the court were a case to be successful at 7 trial? 8 MR DURKIN: The Irish scheme was very generous. I think the 9 awards in the Irish scheme were in excess of the awards 10 in the English courts. The Lambeth scheme is designed 11 to be consistent with the civil justice system. 12 I honestly can't remember the Jersey scheme. 13 MR GARDSEN: I think the Jersey scheme has a maximum of 14 £60,000, graded down for different types of abuse. 15 Because I have also got some experience of that scheme. 16 MR SKELTON: Just staying with Mr Durkin's experience, the 17 Lambeth scheme, does that take into account evidential 18 difficulties with these sorts of claims or does it 19 accept the claimant's account? 20 MR DURKIN: No, it is not a blanket acceptance of 21 the account. The test is on the balance of 22 probabilities. 23 MR SKELTON: Is the account tested or is it listened to and 24 evaluated? 25 MR DURKIN: The account is tested in the sense that the</p> <p style="text-align: center;">Page 126</p>
<p>1 client's likely to see a medical expert, and that expert 2 will, to a degree, listen to the client and give comment 3 on any inconsistencies. If the scheme's solicitors feel 4 that there are inconsistencies, then there can be an 5 appeal to an independent panel, which I haven't pursued 6 any cases to that, but presumably the client would be 7 able to give some -- give their account and the panel 8 would make a decision on the cogency of their account. 9 MR SKELTON: So far, from your experience, have you felt 10 that justice has been done in some form through the 11 redress schemes that you have taken clients through? 12 MR DURKIN: I think clients have welcomed the fact that 13 Lambeth have recognised that they were let down, and 14 they have a sense that, finally, the right thing is 15 being done, and I think Lambeth are genuinely trying to 16 do the right thing in recognising the wrongs of 17 the past. 18 MR SKELTON: And the Jersey experience, Mr Garsden? 19 MR GARDSEN: The Jersey scheme was born out of the lack of 20 judicial competence in Jersey to deal with all these 21 cases. It was more of a convenience. However, I have 22 got a case that was out of time and it still stalled. 23 So it's not a perfect scheme because -- the problem with 24 these schemes is that they are usually time limited, is 25 what I would say. The redress scheme open for about</p> <p style="text-align: center;">Page 127</p>	<p>1 five years, was very good but then ran out of money. 2 The Lambeth scheme only lasts until 2019, December, 3 and you have to file your claim before then. 4 The Jersey scheme also opened and closed, and I have 5 a case that was out of time, which is -- we are 6 constantly challenging. So the problem with these 7 schemes is they have to be properly funded. If they are 8 on a statutory footing, like the Criminal Injuries 9 Compensation Scheme -- not that I'm advocating that that 10 is in any way fit for purpose -- at least it is 11 perennial. These schemes are all very well and good as 12 long as they are properly funded. The question is, who 13 would fund them and where would the money come from? 14 Because the issue for claimants is that they want 15 justice, and the good thing about the civil justice 16 system is that it blames somebody for what happened, and 17 the person who is to blame, whether it be an individual 18 or their employer, is the person who is going to 19 apologise, if they do, and pay out the damages. So that 20 has an attraction, to a certain extent, for the victim 21 of abuse. 22 But there are benefits of both systems, and I think 23 you have to have both systems. The civil justice system 24 is what now happens in Ireland because the redress 25 scheme has ended.</p> <p style="text-align: center;">Page 128</p>

<p>1 MR SKELTON: So is your view, then, that a redress scheme, 2 if it were to be an option, could proceed alongside the 3 civil justice system, as it were, as an alternative for 4 those people for whom it is more attractive? 5 MR GARS DEN: Yes. I think that the redress scheme could 6 catch those perhaps simpler and lower-value cases that 7 at the moment may fall foul of limitation or some other 8 problem, proportionality: you know, is it worth spending 9 £100,000 to get back £15,000? It probably isn't. If 10 you have a simpler system for lower-value cases, then 11 the civil courts could take up the slack for much more 12 complicated, higher-value cases. So I think, you know, 13 you could run the two alongside. And I think that that 14 would mean that more victims of abuse would get justice 15 than do at the moment and save the two-thirds we have to 16 turn away. 17 MR SKELTON: Is there a case for intervening to assist 18 parties to mediate or settle, to negotiate settlement, 19 in the civil litigation context? As I understand it, 20 the use of mediation is not quite as prevalent as it 21 might be in some other areas. Is that anecdotally 22 correct? 23 MR GARS DEN: I think that's right. We have thought of 24 mediation on a number of occasions, and Paul obviously 25 has experience of how it failed in the Nugent Care case.</p> <p style="text-align: center;">Page 129</p>	<p>1 I know the issues for me were always trying to find 2 somebody with enough experience who both sides would 3 trust to do that mediation, and there are now those 4 types of people around. I think, you know, in our 5 initial letter of claim we send with our initial case, 6 it says at the end, "Will you please agree to mediation 7 as an alternative method of sorting this out?". I have 8 never had that taken up by any defendant, ever, and 9 that's a shame, because I think it would be a way of 10 sorting these types of cases out. 11 The problem is that in every case you have 12 a limitation argument and, you know, insurers or 13 defendants want to take the chance of winning the case 14 through litigation rather than engage in mediation. 15 Mediation is probably suitable maybe at a later stage 16 when the issues have been defined and the total cost of 17 a trial becomes the elephant in the room where 18 mediation -- I really do think that mediation ought to 19 be explored much more than it is at the moment, yes. 20 MR SKELTON: But if you have specialists, as many of 21 the people who work in this area are, Ms Erwin-Jones 22 being an example, Mr Gillespie, Mr Durkin and you, 23 yourself, isn't it the case that you don't really need 24 a third party to assist you to negotiate, because you 25 all know the strengths and merits, you all can assess</p> <p style="text-align: center;">Page 130</p>
<p>1 the values of these claims, and you can all negotiate as 2 you do in other cases? 3 MR DURKIN: There is expertise on both sides and an 4 understanding of what's involved. But I really don't 5 think there's much or any appetite for many defendants 6 to mediate or use alternative dispute resolution. 7 What commonly happens, and there seems to be 8 a slight myth here, is that I will submit a claim and 9 quite frequently, more often than not, there will be 10 a letter of rebuttal; that might be three or four pages 11 long. Or get a medical report, try to put some pressure 12 on the defendants, and the defendants will just say, 13 "look, we have sent you a letter of rebuttal. That's 14 it. Litigate". So in my experience, there isn't any 15 appetite for mediation. 16 I might be at fault as well, because I don't suggest 17 it as often as I should, really because my 18 understanding is, when I get that letter of rebuttal, 19 that's the defendant saying, "You prove your case and we 20 will take you all the way. We will argue limitation, 21 causation, quantum, probably challenge the credibility 22 of the client". So that's what we are facing on 23 a day-to-day basis. 24 MR GARS DEN: I think the other issue is, what we have heard 25 a lot from all the survivors of abuse is that they feel</p> <p style="text-align: center;">Page 131</p>	<p>1 completely disengaged with the civil judicial process. 2 Even those that have got damages go away feeling 3 disenchanted and unhappy, and I think the reason is that 4 they're not engaging properly -- sorry, that's not their 5 fault, it's our fault. They are not being engaged as 6 much as they should be in the settlement process, so 7 they don't feel that they have -- they are part of it. 8 They feel, there are these lawyers on public funding and 9 they'll think of a figure and tell them, "Well, if you 10 don't like it, I'm sorry, we are going to pull your 11 funding", and that is not a good way of approaching 12 anything. 13 With mediation, at least they would go to the 14 mediation, they would be able to look the defendant in 15 the eye, they would take ownership of the settlement 16 process, they would feel part of it and it would perhaps 17 be a more satisfying experience than simply getting 18 a letter with a cheque. 19 So I think that's one of the important ingredients. 20 I have spoken to mediators about this, and that's what 21 they tell me and they're more expert than I. 22 MR SKELTON: Lastly, have any of the individual claimants 23 whom you have represented through the St Aidan's and 24 St Vincent's cases, or indeed has the group itself, ever 25 received an explanation and apology for the abuse?</p> <p style="text-align: center;">Page 132</p>

<p>1 MR DURKIN: No.</p> <p>2 MR GARSDEN: I do remember trying to push for one in the</p> <p>3 very early stages, and that was before the</p> <p>4 Compensation Act of 2005.</p> <p>5 MR SKELTON: 2006.</p> <p>6 MR GARSDEN: 2006, thank you. And I was told, "Sorry, we</p> <p>7 don't give apologies. We simply don't do it". The fear</p> <p>8 was that it was part of, you know, an admission of</p> <p>9 liability, and it could be held against them. I can</p> <p>10 understand that approach. Whereas now it's a different</p> <p>11 scenario. But what the attitude would be now, I don't</p> <p>12 know, because obviously the last case settled in --</p> <p>13 well, 2010 -- 2011, something like that.</p> <p>14 MR DURKIN: I very much doubt there'd be any apologies</p> <p>15 forthcoming. It really isn't on the agenda, and that's</p> <p>16 why mediation and schemes are better, because that</p> <p>17 allows a defendant to show some compassion, apologise,</p> <p>18 make some restitution, albeit modest.</p> <p>19 MR SKELTON: But none of the claimants who were paid damages</p> <p>20 by Nugent Care's insurers ever received an explanation</p> <p>21 and an apology for the matters that were being</p> <p>22 compensated?</p> <p>23 MR DURKIN: No.</p> <p>24 MR SKELTON: Thank you. Chair, that's my final question.</p> <p>25 THE CHAIR: Thank you. Mr Frank has some questions.</p> <p style="text-align: center;">Page 133</p>	<p>1 Questions by THE PANEL</p> <p>2 MR FRANK: Firstly, and I'm -- I don't mind which of you</p> <p>3 answers the question. As I understand it, what we learn</p> <p>4 is that the criminal justice system seems to be quite</p> <p>5 considerably ahead of the civil justice system in</p> <p>6 recognising the vulnerability of people who have been</p> <p>7 victims of childhood sexual abuse in that there are</p> <p>8 judges who now regularly and properly make allowance on</p> <p>9 the basis that we do not now expect a witness to come</p> <p>10 and adapt to our courtroom, we expect to be able to</p> <p>11 adopt our courtroom to the needs of the witness. That</p> <p>12 seems to be the new approach in the criminal justice</p> <p>13 system.</p> <p>14 MR GARSDEN: Yes.</p> <p>15 MR FRANK: We don't see that regularly, if at all, in the</p> <p>16 civil justice system.</p> <p>17 MR GARSDEN: That is certainly true, and I have anecdotal</p> <p>18 experience of that, because I have a group action in</p> <p>19 Manchester where it was coming up for trial in September</p> <p>20 and at the pre-trial review we asked the judge about</p> <p>21 special measures and it revealed how little organisation</p> <p>22 there was for that facility. I think, to be fair to the</p> <p>23 judge, he recognised that there was a need for it, but</p> <p>24 it was quite clear that there wasn't a process for it</p> <p>25 and that steps would have to be taken for that to be</p> <p style="text-align: center;">Page 134</p>
<p>1 organised. Because we were talking about things like</p> <p>2 screens, the claimants not meeting each other because</p> <p>3 they didn't want it to be known that they were giving</p> <p>4 evidence in a group action, one witness was agoraphobic,</p> <p>5 had to give evidence from home. Whilst there was that</p> <p>6 facility, it wasn't -- the system isn't really geared up</p> <p>7 for it properly. I think the reason is because there</p> <p>8 aren't as many cases going through the civil courts as</p> <p>9 there are in the criminal courts, so it is not as much</p> <p>10 of a norm as it is in the criminal courts.</p> <p>11 MR FRANK: Thank you. The other question I want to ask on</p> <p>12 that subject, if you have got a client who is Legally</p> <p>13 Aided in a civil process, is there a Legal Aid</p> <p>14 implication for, for example, you on their behalf to be</p> <p>15 making an application for an intermediary or special</p> <p>16 measures? Is there a Legal Aid implication in your</p> <p>17 pursuing that?</p> <p>18 MR GARSDEN: That's a very good question, because in the</p> <p>19 case I'm talking about, I asked the defendants to agree</p> <p>20 to pay for that, and there was a long argument lasting</p> <p>21 several months as to whether or not they should pay for</p> <p>22 it. When we went to the pre-trial review, I said,</p> <p>23 "Well, really, perhaps it's a court expense", and the</p> <p>24 court recognised that maybe it is something that the</p> <p>25 court should provide.</p> <p style="text-align: center;">Page 135</p>	<p>1 However, in terms of Legal Aid, I think if we</p> <p>2 applied for prior authority we may have some issue as to</p> <p>3 whether the Legal Aid Agency ... so, really, we have</p> <p>4 a game of people throwing the ball between each other</p> <p>5 and nobody really taking responsibility for it.</p> <p>6 I think in a criminal prosecution, I think it's the</p> <p>7 police, which of course is a public authority, that</p> <p>8 would pay for that sort of thing as part of the criminal</p> <p>9 prosecution. Whereas in the civil process, there's</p> <p>10 claimant, defendant, court, Legal Aid Agency, and --</p> <p>11 well, who pays for it? The ball gets -- was getting</p> <p>12 tossed around the room.</p> <p>13 MR FRANK: So can I understand that there is no settled rule</p> <p>14 about where the funding for such special measures comes</p> <p>15 from in a civil process?</p> <p>16 MR GARSDEN: Absolutely correct, and, you know, I have</p> <p>17 talked about the Advocate's Gateway and the work they</p> <p>18 have done, and there is no doubt there is no Civil</p> <p>19 Procedure Rule for special measures, there should be,</p> <p>20 and we are a way behind the criminal system. It only</p> <p>21 comes to light because I feel quite passionately about</p> <p>22 it and raised it in my group action which was coming up</p> <p>23 for trial. But when I did, there was a lot of sort of</p> <p>24 nervousness as to what facility should be provided and</p> <p>25 how.</p> <p style="text-align: center;">Page 136</p>

1 MR FRANK: Thank you. If we can move on to another thing
2 now, in relation to the talk about alternatives to civil
3 litigation which we have heard some discussion of, and
4 obviously we have limited time here, we could discuss it
5 far longer than we have time for, but I just want to ask
6 you this: in relation to mediation, in the instance that
7 we have heard of today, that mediation didn't begin
8 until some I think it was five years after the
9 litigation started, which some people might think was
10 a little later than is actually ideal when you're trying
11 to get a ready solution to a legal problem. Some people
12 might think waiting five years is leaving it too long.
13 Can you help us as to whether or not that is something
14 that could be done more swiftly than was done in this
15 instance that we have heard of?
16 MR GARS DEN: Undeniably, it could have been dealt with --
17 I think we are looking at 2004, which is, you know,
18 14 years ago, and the world of mediation and ADR was
19 nowhere near as sophisticated as it is now. There
20 weren't as many mediators who had experience. But
21 certainly, if we were as sophisticated then, I would
22 have been pushing for it earlier than we did. However,
23 when we issued writs, there was a lot of procedural
24 noise, as I think I have referred to, that occupied
25 a great deal of time. We were debating the whole future

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1 time, but what the minimum requirement for a successful
2 redress scheme would be? If it is impossible for you to
3 do it this afternoon, please take time to do it at some
4 future stage, but it would be helpful to understand that
5 because there are a number of different schemes to be
6 considered.
7 MR GARS DEN: Off the top of my head -- and sorry, if you
8 want to take this, Paul?
9 MR DURKIN: Well, there are templates, of course. So the
10 ingredients must be an acknowledgement by the
11 institution that the people have been wronged; the
12 facility for an apology and understanding that they were
13 let down; and, thirdly, some form of financial redress.
14 Additionally, there may be counselling, assistance with
15 social problems.
16 MR FRANK: The reason I ask you the question is because one
17 of the items that has been specified by some victims and
18 survivors as to what they regard as justice would be
19 something that enables it to be -- some assurance that
20 the same thing could not happen to another child in
21 future. Now, I don't know whether that gets lost in
22 a redress scheme or whether it is something that is in
23 fact -- that features in it.
24 MR GARS DEN: My own vision is that we take the best of what
25 you have created as an inquiry, like the Truth Project,

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1 of the group action, so inevitably, that pushed the time
2 forward. But, yes, you are right.
3 MR FRANK: Forgive me if I have misunderstood this, I think
4 I understood it to be said that you had failed because
5 the defendant said they had no instructions from their
6 insurers to settle the claim. Is that what was said?
7 MR DURKIN: Or to consider compensation.
8 MR FRANK: Was that known at the beginning of the mediation,
9 that they had no instructions to settle?
10 MR DURKIN: It is a long time ago, but that's my
11 recollection, that there were no firm instructions, so,
12 yes, it could have been seen as something of a talking
13 shop.
14 MR GARS DEN: I can corroborate that because I remember at
15 the time Paul going to the mediation and everybody being
16 very excited that this elephant may end sooner than we
17 thought, and Paul being very surprised and disappointed
18 when he came back that it had failed because the
19 defendants didn't want to engage with it.
20 MR FRANK: My final question is this: in relation to the
21 question of redress scheme, again, a very big subject,
22 I know, but can you in one minute, if I can ask you to
23 do so, give us your impression of what the ingredients
24 of such a scheme should, at minimum, be, because clearly
25 each scheme will vary from place to place and time to

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1 like the need for reporting on issues arising on
2 a regular basis, we could take those excellent features
3 and import them, maybe, into a redress scheme. Off the
4 top of my head.
5 MR FRANK: Thank you very much. I don't press you any
6 further. Thank you.
7 THE CHAIR: Thank you very much, Mr Garsden and Mr Durkin.
8 Thank you.
9 That concludes today's evidence?
10 MR SKELTON: It does.
11 THE CHAIR: Thank you.
12 (The witnesses withdrew)
13 (4.12 pm)
14 (The hearing was adjourned to
15 Friday, 7 December 2018 at 10.30 am)
16
17
18 I N D E X
19
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