Neutral Citation Number: [2020] EWHC 596 (QB)

Case No: QB-2017-001059

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/03/2020

Before :

MR JUSTICE GRIFFITHS

- -

Between :

EXE **Claimant**

- and -

THE GOVERNORS OF THE ROYAL NAVAL SCHOOL **Defendants**

- -
- -

James Counsell QC (instructed by **AO Advocates**) for the **Claimant**
Susan Rodway QC and Nicholas Fewtrell (instructed by **Keoghs LLP**) for the **Defendants**

Hearing dates: 24-27 February, 2 March 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE GRIFFITHS

Mr Justice Griffiths :

1. Between 15 October 1990 and 10 July 1991, the Defendants' school ("the School") employed a man as a kitchen porter ("Hughes") who, unknown to them, had a criminal record. His offending included indecent assault on a female (1980), deception and (separately) assault occasioning actual bodily harm (1981), and 2 counts of unlawful sexual intercourse with a girl aged 15 (1984).

2. The Claimant (whose identity is protected by Court order, and whom I will refer to as "EXE") went to the School as a 13-year old pupil in September 1989. It was a boarding school but she was a day girl. In 1991, Hughes had unlawful sexual intercourse with her when she was 14 years old, a couple of months short of her 15th birthday. This was a crime, and she was the victim of that crime. The School did not know about this but they discovered other misconduct by Hughes in July 1991 as a result of which his employment came to an end. His crimes against EXE however continued, and the experts agree at least on this: EXE suffered clinically significant mental health symptoms as a result of what Hughes did to her.

3. EXE brings these proceedings against the School for damages. Hughes is not a party. No-one knows where he is or what has become of him. But it is important to recognise that this judgment is not about whether Hughes was a criminal, or whether EXE was his victim, or whether she has suffered what she should not have suffered because of him. Hughes was a criminal; EXE was his victim; EXE has suffered what she should not have suffered because of him. Those are undisputed, undeniable, and very important facts. Because they are not disputed, very little more will be said about them, because a judgment has to decide what is disputed. No-one should make the mistake, however, of thinking that what takes more words to say, in the rest of this judgment, is more important than what I have just said.

4. The issues in the case – what is disputed – are smaller than the big fact of Hughes' criminal responsibility for harm to a young girl. They are about whether the School – which did not know what was happening – has liability in this civil action for damages as a result of Hughes' acts, whether on the basis of vicarious liability or on the basis of negligence in the recruitment process.

5. There are 6 issues, which I will consider in the following order:-

    i) Are EXE's claims against the School statute-barred by the Limitation Act 1980?

    ii) Were Hughes' actions against EXE torts – that is, civilly actionable wrongs? There are issues about what precisely happened, to be decided on the balance of probabilities (absolute truth is not achievable) and they include to what extent, if at all, EXE gave consent to Hughes which was sufficient, not to absolve him of the crimes, which cannot be washed away, but to mean that there was no tort liability.

    iii) If and insofar as Hughes himself did commit torts against EXE, to what extent if at all is the School vicariously liable – that is, bound to pay the price. This question arises because Hughes was a School employee, but it renders the School liable only to pay for Hughes' wrongs; it is not an independent liability of the School in that it does not involve wrongdoing by the School.

iv) Was the School independently liable, and at fault in the tort of negligence, for failing to carry out sufficient checks to detect that Hughes was a potential danger to its young female pupils including EXE?

v) What is the extent of the actionable harm suffered by EXE as a result of any torts that may be proved, whether committed by Hughes with the School vicariously liable on his behalf, or (and it might be both) committed by the School in failing in its own duties?

vi) What in money terms is the correct measure of the damage suffered by EXE?

The factual background

6. The School was an independent secondary school for girls. Its pupils were a mixture of day girls and boarders.

7. The Claimant was born in 1976. She was the oldest of three children, including a younger sister who gave evidence.

8. She attended her first school from the ages of 3 to 12. This meant that she joined the School one year later than the usual entry, which was at age 11. She went to the School in September 1989, when she was 12. She was a day girl, not a boarder. She lived with her parents and siblings. Her father was a lawyer.

9. One year later, on 15 October 1990, Hughes was given a job as a kitchen porter at the School. He remained an employee until 10 July 1991.

10. EXE's best friend was C. Roe, nicknamed "Croe". At lunchtime, they would sit on a window sill and chat. They met Hughes as he passed them on the stairs, and they spoke with him regularly and became acquainted with him over a number of lunchtimes.

11. EXE says that on one occasion when she was alone, Hughes took her down the staircase from the window sill and exposed himself to her. The evidence on this is disputed. She also says that, apparently on the same day, he said that he liked her more than his girlfriend. She said she liked him too.

12. The next day, there was a fire at the School. The window sill area was blocked off. Hughes was taken to hospital. This meant that the meetings on the window sill no longer took place. The fire was on or about 17 May 1991. EXE did not see Hughes again until half term, which began after Friday 24 May 1991.

13. During half term, on 28 May 1991, EXE telephoned Hughes at the school and arranged to meet him off school premises, in the open air. They met for about half an hour. She had given him her home telephone number in circumstances I will examine in more detail, below. They kissed goodbye, which was their first kiss.

14. They arranged to meet again on 31 May 1991. They walked with EXE's dog, and found a makeshift shelter in a field, where they cuddled and kissed.

15. School resumed on 3 June 1991. On Thursday 6 June 1991, by prior arrangement made when they had met on 31 May, EXE stayed on at school after hours and went to Hughes' bedroom on the School premises. There they had sexual intercourse for the first time.

EXE was then 14 years and 10 months old. She had no previous sexual experience. She repeated her visits every Thursday evening after that, up to and including 4 July 1991, making a total of 5 occasions, on each of which they had sexual intercourse (6 June, 13 June, 20 June, 27 June, 4 July). She told her parents she was home late because of Duke of Edinburgh Award meetings on Thursday after school.

16. On 10 June 1991, the School warned Hughes about over-familiarity with other girls (not EXE) and questioned him about drugs. On 6 July 1991, the police contacted the School about Hughes' arrest for drug offences. His room was searched and a substance suspected of being cannabis was seized by the police.

17. On the same day (6 July) EXE telephoned Hughes at the School and he suggested he could go to Spain when she would be there with her family on a summer holiday.

18. On 8 July 1991, the substance found in Hughes' room was confirmed to be cannabis and the police said they would charge him with the drugs offence. The Bursar called Hughes in, and Hughes offered his resignation, which was accepted. He was not required to work his notice, which expired on 10 July 1991.

19. On 10 July 1991, EXE went to Spain with her family. Following the suggestion previously made to him by EXE, Hughes made his own way to Spain and EXE saw him in the road as the family drove past him on 21 July. She contrived to meet him alone, and they had sexual intercourse on the beach without her parents knowing anything about it, according to evidence she gave to the police in 1991, although she did not recall it when giving evidence to me.

20. EXE and her parents returned to England after their holiday in Spain. She celebrated her 15th birthday in England in August. On 5 August 1991, she got a letter from Hughes saying he was sleeping rough near where she lived. She went to him the same day and, for a total of 4 consecutive days until 8 August, they had sexual intercourse every day. He then went away but, on his return, they resumed their daily meetings and sexual intercourse for a few days between 18 and 21 August or thereabouts, before he had to go away again.

21. A few days later, on Saturday 24 August 1991, EXE left her home when her parents had gone to bed, leaving a note, and by prior arrangement Hughes met her outside shortly after midnight. They walked and hitchhiked to Tinsley near Rotherham in Yorkshire where Hughes had rented a run-down flat. According to her police statement a few days later, they arrived at about 9.15 pm on the night of Monday 26 August 1991. Meanwhile, her parents, discovering the note, called the police. I will pass over other details and return to them when considering the issue of consent. However, EXE tells me that, whereas the sexual intercourse had not been violent before (leaving aside the question of consent, which does not depend on violence), Hughes violently raped her while they were in the flat. This is disputed.

22. Hughes left the Tinsley flat on Monday or Tuesday 27 August 1991 to report to the police (he was on bail for offences unrelated to EXE) and he was arrested and did not return. EXE stayed in the flat. Shortly after midday on 28 August she rang a friend of Hughes using a number he had given her and, at the man's request, told him where she was. This was passed to the police, who found her outside the shop from whose public telephone she had placed the call. PC Fenwick picked her up, and later made a statement

about what she told him ("the Fenwick Statement"). Later the same day (28 August), her father drove up to the police station in Yorkshire and took her back home. On 29 August 1991 she made a full statement to the police. Her evidence to me is that it was broadly correct, but that there were some things that were not true or omitted ("the Police Statement").

23. In the autumn of 1991, she returned to the School as a boarder. I will consider her later life when considering issues of causation of loss and quantum.

24. Meanwhile Hughes was charged, on a 7-count indictment dated 15 January 1992, with criminal offences arising out of his conduct with EXE over the period I have mentioned. These were:-

    i) Abducting a child under 16, on a day between 23 and 26 August 1991, contrary to section 2(1)(a) of the Child Abduction Act 1984.

    ii) Sexual intercourse with a girl under 16 (EXE, aged 14), on 6 June 1991, contrary to section 6(1) of the Sexual Offences Act 1956 ("Unlawful Sexual Intercourse").

    iii) Indecent assault on a female contrary to section 14(1) of the Sexual Offences Act 1956 (EXE, aged 14, on 6 June 1991, as in Count 2) ("Indecent Assault").

    iv) Sexual intercourse with a girl under 16 (EXE, aged 15), on 5 August 1991, contrary to section 6(1) of the Sexual Offences Act 1956 ("Unlawful Sexual Intercourse").

    v) Indecent assault on a female contrary to section 14(1) of the Sexual Offences Act 1956 (EXE, aged 15, on 5 August 1991, as in Count 4) ("Indecent Assault").

    vi) Sexual intercourse with a girl under 16 (EXE, aged 15), on [Monday] 26 August 1991, contrary to section 6(1) of the Sexual Offences Act 1956 ("Unlawful Sexual Intercourse").

    vii) Indecent assault on a female contrary to section 14(1) of the Sexual Offences Act 1956 (EXE, aged 15, on 26 August 1991, as in Count 2) ("Indecent Assault").

25. To all these charges Hughes initially, on arraignment at the Crown Court on 27 February 1992, pleaded Not Guilty. On the day of his trial, 16 March 1992, he changed his pleas on Counts 2, 4 and 6 only to Guilty. These pleas were accepted and the other counts were not pursued and ordered to lie on the file. He was sentenced to 9 months' imprisonment on each, the second concurrent and the third consecutive, followed by a consecutive 12 month sentence for breaches of earlier suspended sentences. EXE was in Court, ready to give evidence against him in line with her Police Statement, but after that she never saw him again.

26. Counts 2 and 3, 4 and 5, and 6 and 7 respectively appear to have been alternative counts. In each paired alternative count, the same date and same victim are specified, but the difference between the alternatives is the difference between a non-penetrative sexual act (Indecent Assault) and a penetrative sexual act (Unlawful Sexual Intercourse). In

neither case, however, do the counts charged require proof of lack of consent on the part of the victim. This is to be contrasted, for example, with a charge of rape, which would be an act of sexual intercourse to which there was no consent. The mere fact of sexual intercourse with a girl under the age of 16 would complete the 1956 Act crime of Unlawful Sexual Intercourse, regardless of consent. Similarly (and less obviously), in the case of an indecent assault on a girl under the age of 16, it was not necessary to prove lack of consent, because her age made her incapable of giving a lawful consent: *R v McCormack* [1969] 2 QB 442, 445G, cited by Lord Clyde in his brief review of the history of the offence in *R v J* [2004] UKHL 42 at para 42. Consequently, it was not the prosecution case that Hughes' acts against EXE were acts to which she had not consented and the criminal convictions on Hughes' guilty pleas do not, therefore, establish the fact or otherwise of consent where (as in the tort claims before me) lack of consent is a necessary element.

27. The dates of the offences charged were 6 June, 5 August and 26 August 1991. 6 June corresponded to the first act of sexual intercourse in Hughes' room at the School; 5 August corresponded to a meeting and sexual intercourse in the countryside near EXE's house after she had got back from Spain; and 26 August was a night in the course of the stay at Tinsley near Rotherham.

28. There was no guilty plea to the Abduction count. The civil action with which I am concerned does not allege any tort (such as false imprisonment) based on the Abduction.

The evidence

29. I heard evidence from 9 witnesses of fact, of whom 4 were not required to attend for cross-examination. I was also referred to something in excess of 1,000 pages of documents, including witness statements.

Witnesses for EXE:-

i) EXE (the Claimant).

ii) EXE's sister.

iii) EXE's father.

Witnesses for the School:-

iv) Mr J S Rhodes, Head Caterer at the School at the time in question.

v) Dr Jill Clough, Headmistress of the School at the time in question.

vi) Mr A M Day, Bursar of the School since 2002, who was not at the School at the time in question. His evidence was agreed.

vii) Admiral Sir Derek Reffell. He was Chairman of the Governors at the relevant time. His evidence was agreed.

viii) Lt General Sir Henry Beverley. He was a Governor at the relevant time. His evidence was agreed.

ix) Pamela Gueritz. She was also a Governor at the relevant time, and her evidence also was agreed.

30. Each side called an expert to give psychiatric evidence. The experts produced a Joint Report, and reports of their own. They were both cross-examined.

31. A number of the issues raised conflicts of evidence between witnesses, and conflicts between recent and historic evidence from EXE herself. On some of these issues the documentary material was sparse or non-existent. I will here indicate my assessment of the witnesses' credibility and reliability in general terms.

EXE

32. EXE was accepted as a witness of truth, in that it was not suggested that she was saying things to me that she did not honestly believe to be true at the time she said them. Rather, it was said that she was now giving false memory accounts of things she had not said before (I heard some expert evidence about the "distorting and sometimes creative nature of recall": Maden 1 para 283; and I was also referred to the observations of Leggatt J in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) paras 15-22, although *Gestmin* was discussing commercial cases in which documentary evidence is a more abundant and available alternative to recalled evidence than is typical of historic sex abuse cases, which makes the approach outlined by Leggatt J in para 22 less apt).

33. EXE's own evidence was that her Police Statement in 1991 was deliberately untrue in some respects, and deliberately incomplete in others. She said that she was protecting Hughes when she made it, on his instruction. However, her Police Statement was more convincing than her present evidence. It was highly detailed and circumstantial in a way that her evidence to me was not. Although it did not at any stage accuse Hughes of acting without EXE's consent, it did not protect him: he was charged with Indecent Assault or Unlawful Sexual Intercourse, both of which he denied throughout his own police interviews, and the Police Statement not only admitted but gave very full, in some ways graphic accounts, of regular sexual activity over a clear timeline.

34. Her evidence to me was inevitably weakened by the passage of time. There were things (such as the sexual intercourse in Spain, and the fire which closed off the window sill area and put Hughes in hospital) which she no longer remembered at all. On two important points, where it was possible to cross check her evidence to me against other evidence, I was satisfied that her evidence was not only incomplete and inaccurate, but wrong in substance to the extent of being misleading.

35. One was the incident in Spain. In her prepared witness statement of evidence in chief, she said, not only that she did not remember it, but that her memory was that it could not have happened: "I have no recollection of having sex or even being alone with [Hughes] when I was in Spain. I know that, in my police statement, I gave an account of us having sex on the beach on one occasion. I have no recollection of this nor, so far as I can now recall, was there ever an opportunity for us to have time on our own but it is possible that I am wrong about this." The account in her Police Statement was that "my dad said I could have some free time and I met [Hughes] on the beach" and this was corroborated by her father's evidence both to the police in 1991 and to me. It was also confirmed by a letter from Hughes to EXE after he went back to the UK from

Spain, in which he said "I am very happy that we did get to spend some time together it meant everything to me. You know it seems very funny now I am home because it means I travelled 2500km to spend 2 or 3 hours with you 1500 of it on foot." It was also confirmed by EXE's own notes in the police file, in her handwriting, in which she sets up meetings with Hughes on the beach: "Some time tonight at about 9.30 pm if you can I'll meet you near the shower on the beach. Finally I've managed to get away!! Hope I can see you then" and, in another note, "even now I can't be with you that much – you don't know how sorry I am about this but somehow I'll get round my parents." I found it remarkable that, even after referring to her own police statement, and having access to the materials which showed she did have the opportunity to meet Hughes in Spain and that she did take it, she nevertheless in a carefully considered statement of her evidence in chief not only said she could not remember it but positively suggested that it could not have happened.

36. Another example was her evidence to me that her family had cut her off and thrown her out of the house with no money. This was also what she told the Defendants' expert (Maden 1, para 72) and her own expert (Roychowdhury 1 para 3.36). But her father gave evidence that she left at her own request and that, following and in compliance with that request, he organised and paid for the flat she moved in to with her new boyfriend: "I recall that very clearly. Shortly after that she went to live with Mike. She asked me to arrange, she said she wanted to rent the property. And I arranged the letting agreement. I paid the deposit and I paid 3 months' rent in advance for them". This was supported by her sister who remembered it (and was a witness called by and sympathetic to EXE generally). This was not a matter of forgetting; it was a misrepresentation which was directly contradicted and refuted by the evidence of her own witnesses.

37. EXE also told the School's expert psychiatric witness when he examined her on 20 March 2019 that she married her on and off boyfriend of 9 years, Simon, "…in 2014. She married him because he owed her so much money and she was living in his father's flat. The marriage lasted for two months because Simon was so violent and intimidating. She left him and got the police involved." (Maden 1 paras 84-85). However, she told her own expert when he examined her on 8 January 2016 that she was still married to Simon, had been married to him since 2014, and was living with him in a flat in London (Roychowdhury 1 paras 3.1 and 3.44; cf para 3.90). The contrast between marriage in 2014 which ended after 2 months (her account in 2019) and marriage in 2014 to the man she was still married to and living with (apart from a break of a few months "about a year ago") (her account in January 2016) is hard to reconcile.

38. These are only examples.

39. I concluded that EXE was not a witness on whom I could rely unless and insofar as her evidence was supported by other credible evidence. Of the evidence she did give, I found her Police Statement more convincing and credible than her more recent evidence. It was closer in time to the events it discussed; it discussed them more factually and less impressionistically than her later accounts, as well as more thoroughly and fully; and it was to a large extent an account against her own interests at the time, in that it was incriminating a man towards whom (as she told me - and she was in this supported by the evidence of her father and sister) she was at the time of the Police Statement still well-disposed. That does not mean that I discount the possibility that, because she did want to protect Hughes, the Police Statement also has to be looked at

sceptically and carefully in some respects, and I will consider what it said in detail, and how it relates to other evidence, when I consider the issue of consent.

EXE's Father

40. EXE was highly critical of her father's treatment of her in many respects, one of which I have mentioned. He nevertheless gave evidence in her support. I found him to be a balanced and fair witness, who accepted areas on which his memory might have failed, spoke sympathetically about EXE at every point, and came across (both in the substance of his evidence about material events as well as in the way in which it was given) as quite a different person to the oppressive, heartless, unforgiving father of EXE's recollection. He appeared to be a hands-on father who was always concerned for his daughter's welfare, who adopted a modern approach of trying to develop and improve communication, and to follow his daughter's wishes so far as it was consistent with her own interests. The time he allowed her alone in Spain is one example. Importantly (since his presentation in 2020 would not necessarily correspond to how he was in the 1980s and 1990s), his evidence about the nature of his children's upbringing and of their relationship with their parents was supported by EXE's other witness, her sister. I found him a credible witness. His evidence now, however, was to some extent compromised by the passage of time (and he did not try to disguise or make that up), although it was not (I should say) in my judgment compromised by age: he was a young 73.

41. I should mention that EXE's mother died some years ago, and did not make a police statement in 1991 other than a pro forma statement verifying her daughter's birth and age.

42. *EXE's sister*

43. The evidence EXE's sister could give was limited, because she was the younger sister and had limited sight of and insight into the events of 1991. Nevertheless, she was a level-headed, clear, sympathetic and yet apparently objective witness, who distinguished convincingly between her actual memories as a child and what she made of them in retrospect. I did not find her attempts to recontextualise the memories she did have helpful, and I was most assisted by what she said was her actual and unvarnished recollection, which I accept: for example, that, after the Rotherham weekend, EXE "had a love bite on her neck which made me feel sick. She was cross with mum and dad for coming to get her." "…I think she felt that this man loved her. This made her very angry with mum and dad for bringing her home." The love bite is corroborated by a police surgeon's examination of EXE carried out on Thursday 29 August 1991 ("Neck – lovebite as shown page 6"). No other injury or evidence of violence was found, after a detailed examination, including examination of the genital area: "There was no evidence of violence or a lack of consent on her part". She also gave some evidence about EXE's later life.

J S Rhodes, Head Caterer

44. Mr Rhodes had a much diminished recollection, but appeared to me an honest and credible witness. I was particularly impressed by his ready willingness to volunteer information of an embarrassing nature about himself in the context of a move from

employed to agency status, which showed him to be a frank and reliable witness. Nevertheless, he had obviously forgotten a lot.

Dr Jill Clough, Headmistress

45. Dr Clough was an impressive and convincing witness, who was clear, forthright, modest and demonstrably conscientious and able.

Other witnesses of fact

46. The witness statements of A M Day (current Bursar of the School), Admiral Sir Derek Reffell, Lt General Sir Henry Beverley and Pamela Gueritz were unchallenged and were read. Mr Day could not give evidence from 1991, as he was not in post: he dealt with witnesses and documents no longer available due to the passage of time. The others were very old and no longer had any useful recollection; their witness statements were provided to confirm this.

Expert evidence

47. There was substantial, but not complete, agreement between the two expert witnesses, who were Dr Ash Roychowdhury (Consultant General and Forensic Psychiatrist) for the Claimant and Professor Anthony Maden (Consultant Forensic Psychiatrist) for the School. Dr Roychowdhury filed three reports (the later two commissioned as further information became available) and Professor Maden filed one report, before they produced, in addition, their Joint Report. Each then produced a further report following the Joint Report. Both experts were called and cross examined.

48. Both experts were helpful in summarising and quoting what medical records are available going back to EXE's childhood, and also in recounting what she said to them on interview by them. It was also helpful that they achieved so much agreement and clarified the issues in their Joint Report. There was, however, some disagreement, and I concluded that the evidence of Professor Maden was, in this case, more persuasive than the evidence of Dr Roychowdhury. This was principally because Dr Roychowdhury appeared to me to be handicapped by overpowering confirmation bias.

49. His first report was dated 27 January 2016 and was based on GP records, his interview with EXE on 8 January 2016, and very limited school and other records. Of this material, by far the most relevant and important was the account given to him by EXE herself, which covered many matters not documented at all in the other material.

50. His second report, dated 22 June 2016, was commissioned when the entire police file from 1991 had been obtained and provided to him. This contained 34 items (some of them consisting of more than one statement), including 26 witness statements and 3 transcribed taped interviews with Hughes. The witness statements – and particularly EXE's own principal witness statement of 1991, which I have called her Police Statement – were dramatically inconsistent with EXE's account to Dr Roychowdhury of the events at that time, upon which he had based his earlier report. After reciting this material, Dr Roychowdhury began his opinion section by stating "The opinions as stated in my original report remain valid and are not altered substantially in any way by the new evidence provided". He then explained that conclusion, in the remainder of his report, beginning "Some points are of note, however, in providing further validity to

my existing opinion." He then treated all the additional material as supporting his original view. Whilst a conclusion that, on balance, and after an even-handed discussion, his original opinion might (perhaps) be sustained, could be respectable; a discussion which simply treated all the contemporaneous 1991 material as confirming his original opinion, without any engagement with the obvious alternative readings of the facts which it provided, to my mind lacked credibility.

51. The Joint Report (which followed a second examination of EXE by Dr Roychowdhury, as well as her examination by Professor Maden), acknowledged that there were serious discrepancies between EXE's accounts to Dr Roychowdhury and to Professor Maden respectively, which they set out. There were also some statements of fact by her to them which were apparently inconsistent with some of the medical records which existed. These are identified in the Joint Report.

52. Dr Roychowdhury's final report, after the agreement of the Joint Report, followed a challenge or (at least) query from EXE's solicitors about two conclusions of the Joint Report apparently unfavourable to her case. These were (in para 24 of the Joint Report) "…her anxiety has not prevented her from working or from carrying on her personal and social life"; and (in para 33 of the Joint Report) "[W]e agree that subject to our differences in relation to her A level studies, the material events would not have prevented her from pursuing any career or work for which she was qualified and motivated." Dr Roychowdhury, in his response, reaffirmed that the opinion in his original reports "has not changed", asserted that the queried points of agreement in the Joint Report were compatible with them, and put a rather different slant on the Joint Report statements, saying "Said differently, it is my opinion, that the range of employment options open to her had been restricted by the consequence of the material events on her mental state impacting on her education. However, once in a job (from that restricted pool), she has been able to function at work" (Roychowdhury 4 para 3.6).

53. Initially, what I have described as confirmation bias persisted in Dr Roychowdhury's oral evidence to me. As in his reports, whenever he was shown any material, whether it was in a witness statement or a document, which might appear inconsistent with his opinion, he did not entertain the suggestion and, instead, insisted that it could be read in a way which supported his original and unchanging view. There was even a very remarkable and long hesitation before he responded to the elementary proposition: "The validity of your opinions depends on the judge's decision of the correct facts". He also appeared to be suggesting that lack of consent by a girl of 14 or 15 can be deduced from the fact of her age alone (which is not the law) and to be unable to recognise anything that might suggest that there was consent by EXE in 1991, but he did in answer to questions from me begin to soften those positions, at least in terms of theoretical possibility.

54. Professor Maden accepted in cross examination that most of his work is for defendants and that most of his current work is as an expert witness rather than in practice, although he did have a large NHS and private practice in the past and is also Emeritus Professor of Forensic Psychiatry at Imperial College, London. However, he seemed to me to engage more thoroughly with all the material, and he readily made appropriate concessions (in cross examination) when opinions he had expressed were undermined by evidence given at the trial.

55. I therefore found Professor Maden to be a more plausible as well as a more persuasive witness than Dr Roychowdhury. However, I emphasise that the areas of dispute between them were relatively limited, and the engagement of the two experts between themselves was undoubtedly productive in highlighting and testing certain points.

Issue 1 – Limitation

56. The first issue is whether EXE's claims against the School are statute-barred by the Limitation Act 1980.

57. The limitation period for the claims in this case is 3 years from EXE's 18th birthday (time does not run until she attained her majority): see section 11 and section 28 of the Limitation Act 1980. The primary limitation period, it is agreed, therefore expired in August 1997. This was 6 years after the events in question. The letter of claim was sent on 24 March 2015 and proceedings were issued by a Claim Form dated 12 September 2017. However, in the meantime, a limitation moratorium from 24 March 2015 had been agreed in correspondence. The distance in time between the events in 1991 and the point when time ceased to run for limitation purposes on 24 March 2015 is 24 years. That is a long time.

58. The first issue is whether this is a case where the primary limitation period should be extended under section 33 of the Limitation Act, which provides (so far as material):-

> **33.— Discretionary exclusion of time limit for actions in respect of personal injuries or death.**
>
> (1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which—
>
> (a) the provisions of section 1 or 11A or 12 of this Act prejudice the plaintiff or any person whom he represents; and
>
> (b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents;
>
> the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates.
>
> (…)
>
> (3) In acting under this section the court shall have regard to all the circumstances of the case and in particular to—
>
> (a) the length of, and the reasons for, the delay on the part of the plaintiff;
>
> (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11…;

> (c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
>
> (d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
>
> (e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
>
> (f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received."

59. The test in section 33(1) of the statute is whether it appears to me to be "equitable" to allow the action to proceed, having regard to the degree to which the primary limitation period prejudices the Claimant on the one hand and the degree to which extending the time would prejudice the Defendants on the other hand. I am directed, by section 33(3), to have regard to "all the circumstances of the case" and, in particular, to the factors identified at (a) to (f), so far as relevant, although this is not an exhaustive list. Of those factors, particular reliance is placed in this case on (a) the length of and the reasons for the delay on the part of the Claimant, and (b) the extent to which, having regard to the delay, the evidence adduced is or is likely to be "less cogent" than if the action had been brought within the primary limitation period ending in 1997.

60. Section 33 has been considered in many cases of high authority, and a number of them have been cited to me. However, the parties agreed the essential principles and so I will not rehearse all the cases to which I have been referred, although I am familiar with them and bear them fully in mind.

61. I will start with the reason for the delay, having already mentioned the length of the delay. The experts say about this (Joint Report para 39):-

> "We agree that EXE has never lacked the mental capacity to complain or to instruct her legal representatives. We agree she has never been psychiatrically disabled from complaining or from initiating a claim. Dr Roychowdhury, as outlined in his report, does refer to the psychological impact of the material events and how this can serve as an explanation as to why action was not taken earlier."

62. The question asked here about whether EXE has ever been "psychiatrically disabled" from bringing her claim is clearly derived from the dictum of Lord Hoffmann in *A v Hoare* [2008] 1 AC 844 at para 49, that:-

> "The judge is expressly enjoined by subsection (3)(a) to have regard to the reasons for delay and in my opinion this requires

> him to give due weight to evidence, such as there was in this case, that the claimant was for practical purposes disabled from commencing proceedings by the psychological injuries which he had suffered."

63. I do not read this as meaning that, in a case where the claimant is not "psychiatrically disabled" the "reason for the delay" referred to in section 33(3)(a) cannot count in the claimant's favour when performing the assessment of "all the circumstances of the case" required by section 33(3). Lord Hoffmann's statement immediately followed a sentence in which he emphasised (contrary to a restrictive interpretation suggested by some earlier authorities) "the discretion is unfettered". I have to have regard to the reason for the delay, whatever it is, when weighing all the circumstances of the case and deciding whether it is equitable to extend the limitation period.

64. In this case, EXE had (unlike the position in many other cases) disclosed Hughes' sexual acts on her in 1991 to her family (her mother, her father and her sister at least), to her school and to the police, to whom she had made her Police Statement. She had been ready to give evidence about it in the Crown Court until Hughes changed his pleas on the first day of what was to have been his trial. However, I find on the evidence that, although she was in no way at fault or to blame for Hughes' unlawful sexual intercourse with her when she was only 14 and 15, a high degree of shame surrounded what had happened, and she felt it acutely, and continued to feel it for many years. Her sister's evidence was that her family limited its social contacts compared with its life before and this corroborates EXE's evidence that she was made to feel ashamed, and did feel ashamed.

65. EXE gave evidence that she self-harmed and had alcohol issues but her account to the experts in the case about this was inconsistent and it was not well supported by medical notes. I do not consider that these were significant factors in her delay in bringing proceedings. She also gave evidence of the impact on her of her mother's death, when EXE was 23, which would have been in about 1999. I accept that this was a source of real distress to EXE but it does not appear to me on the evidence to have been a significant part of the reason for the delay. She also gave evidence of a life which included personal difficulties, including difficulties in her relationships with men. These relationships each lasted a number of years, but none of them appears to have been very settled or consistently happy.

66. I am satisfied that the reason for the delay was EXE's sense of shame, and her reluctance to disinter her own memories of what Hughes did, and those of her family. The experts agree that she has unusual levels of anxiety, although their diagnosis is not identical. Professor Maden says she has an anxious personality which fluctuates according to stresses in her life and that these proceedings have caused her to suffer at least one panic attack. Dr Roychowdhury diagnoses a mild general anxiety disorder in the context of an anxious temperament. For present purposes, the divergence is not significant: the point is that EXE's anxiety presented a psychological impediment to incurring the stress of bringing legal proceedings, although it did not disable her from doing so. Her evidence is that it was when publicity about the victims of Jimmy Savile surfaced that she felt encouraged, and I accept that. The timing of her approach to solicitors supports it.

67. I will consider, next, "the extent to which, having regard to the delay, the evidence adduced… is… less cogent than if the action had been brought within the time allowed…" (section 33(1)(c)). Quite a lot in this case is not disputed, but issues 2, 3, 4 and 5 include very substantial disputes of fact.

68. The first dispute is whether EXE consented to acts by Hughes so that she cannot rely on them as assaults on her. Her Police Statement said that she did consent, which is why he was not charged with non-consensual sexual offences. To prove otherwise, she relies on her evidence to me, but this I have found not to be cogent, and I am satisfied that the lack of cogency is partly because of the passage of time. There is also a dispute about whether she was violently raped by Hughes in Yorkshire, which is something she does not seem to have claimed to anyone before these proceedings. There is in her medical notes a letter from her GP dated 1994 (when she was 18), supporting a termination of pregnancy, saying "She has a very tragic story having been raped at the age of 15 which resulted in a criminal conviction for the man concerned" but this probably refers to the unlawful sexual intercourse (which did result in a criminal conviction for the man concerned) rather than to a new allegation of violent rape (which was not suggested to the police or, so far as the evidence discloses, anyone at that time). Therefore, the claim based on a violent rape is only supported by EXE's evidence in these proceedings, which has lost cogency over the years.

69. Also in issue is whether the School is vicariously liable. Hughes was an employee until 10 July 1991, by which time the unlawful sexual intercourse had already started, but there is still a question under the second limb of the two-stage test in *Mohamud v W M Morrisons Supermarkets plc* [2016] AC 677 at para 45: "…whether there was sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable…" There was some confusion over which staircase the window sill was on, EXE identifying in her first witness statement a staircase on the floor plan which she said in her second witness statement was the wrong one, but the case proceeded on the basis that her second witness statement identified the staircase correctly. There is then an issue about whether the window sill was in an area which was out of bounds (the School says that the staircase finally settled on was out of bounds, and EXE says, if it was, she did not know that). The ambit of dispute on these points is much less affected, in my judgment, by the passage of time.

70. There is also an issue about whether the School was negligent in failing to discover Hughes' criminal convictions before employing him. Here the evidence has, in my judgment, been badly affected by the passage of time. There are documentary records (which I will consider below) about what standards applied, and how the School went about recruiting Hughes, but I do not accept that these can be taken as conclusive and speaking for themselves, or that very little could be expected from the evidence which has now been lost. I think it very likely that evidence from those responsible both for the applicable standards and for the recruitment of Hughes himself would have been important, and might well have had a bearing on what standards were to be expected in 1991, and whether the School fell below them. The Bursar would have been a key witness, but he is no longer well enough to be interviewed or to give evidence, and would not be able to remember events so long ago. The only Governors who have been found who can give evidence are all too old or too far removed from the time in question to have any useful recollection, including the Chairman of the Governors, who provided a witness statement. The Headmistress, Dr Clough, did not remember Hughes at all,

and although she did have useful memory about changes in procedures for checking staff criminal records, and gave evidence about it, her memory overall was certainly less clear and full than I would have expected it to be nearer the time. Another witness referred to in the papers is the Chaplain of the Fleet, who was apparently consulted at one stage about employing a single man when there was a difficulty in finding staff. He has been identified as the Right Reverend Noel James, but he died in 2009 and no statement was made by him about Hughes, or recruitment to the position filled by Hughes, in 1991 or before he died.

71. There are also issues about the effect of Hughes' conduct on EXE in her later life and especially about whether it caused her to underperform in her A levels, and in her further education, and to suffer a handicap in the labour market afterwards. Her school records are no longer available: they have not been retained by the School and they have not been retained by her family. This means that whether her A level grades were less than predicted, and whether her academic achievement altered as a result of what Hughes did, depends entirely on her own evidence to me, which I have decided is less cogent than it should be, partly because of the lapse of time. The experts' Joint Report says "We agree there are important missing records in the form of school reports and other education records. We agree that it would have been easier to assess this claim had it been brought within the time limits."

72. I am satisfied that the cogency of the evidence on all sides has suffered significantly and irreparably by the loss of witnesses, the loss of records, and deteriorating recollection, and that the delay in the period since 1991, and even in the period between expiry of the limitation period in 1997 and the start of the limitation moratorium in 2015 has caused very significant prejudice to both sides. This prejudice on both sides does not cancel out. It has the effect, in my judgment, of creating the "real possibility of significant prejudice": *AS v Poor Sisters of Nazareth* [2008] UKHL 32 at para 25; *CD v Catholic Child Welfare* paras 35 and 39. I would put it higher: as I have listened to the evidence and submissions in this trial I have been convinced not only of the possibility but of the fact of significant prejudice. The written materials are sparse and incomplete, EXE now argues that the most important of them (the Police Statement) cannot be regarded as reliable, and the cogency of the oral evidence, which has become even more important as a result, is so far short of what it would have been nearer the time, that I cannot be satisfied that a fair trial is now possible: *RE v GE* [2015] EWCA Civ 287.

73. In my judgment, in view, particularly, of the lack of cogency in EXE's evidence, and the deterioration in the availability and cogency of evidence generally which I attribute to the passage of time, it is not equitable to extend the limitation period under section 33 of the Limitation Act in this case.

74. However, in view of the evidence I have heard, and the conclusions I have reached on that evidence, I will nevertheless state my findings on other issues.

Issue 2 – Torts by Hughes

75. The second issue is whether Hughes' actions against EXE were torts – that is, civil wrongs sounding in damages.

76. It is common ground that the mere fact that they were crimes is not definitive of whether they were torts. This is because any consent by EXE was not a defence to the crimes, but any act to which she consented was not (it is agreed) a tort: *London Borough of Haringey v FZO* [2020] EWCA Civ 180 para 125 per McCombe LJ: "consent is a defence to a claim of trespass to the person".

77. It might be argued that no child under 16 should be regarded as capable of giving a valid consent for these purposes, but that is not the law. Whether or not consent was given is a question of "primary fact, based on an assessment of both factual and expert witness evidence": *London Borough of Haringey v FZO* [2020] EWCA Civ 180 para 124. In EXE's case, the expert evidence is complicated by the inconsistency in EXE's account over time, and by the dispute over the facts as she now presents them. The experts agree that the question of whether she consented to sexual intercourse is a matter for the Court, that "contemporaneous police and other records suggest that she was a willing participant in events" and that "she now portrays these events as rape and on one occasion forcible rape." (Joint Report para 6). Dr Roychowdhury found an explanation in the change in "the psychological effects of her grooming and her relative youth at the time of the offences" (Joint Report para 6). However, his marked confirmation bias leads me to discount his evidence generally and on whether the evidence supports a lack of real consent based on grooming in particular. In this case, the experts have very little to say on the question of consent.

78. So far as I can on the evidence available I find the facts as follows. In doing so, I base myself heavily on the Police Statement, which I consider to be the most reliable (although, on EXE's evidence, not wholly reliable) account: it is compiled near the time, presumably by an expert police statement-taker, and is more detailed and plausible and connected as a narrative, including dates, than any other source. I am able, however, to read it in the light of the other evidence.

79. EXE joined the School a year after the other girls and, initially, found it difficult to break into friendship groups which had already formed, and suffered some bullying, which her father raised with the School on her behalf. By 1991, however, she had settled in and had a best friend in Croe. The School was based in a former country house, set in its grounds, but with other buildings around the grounds which included the teaching rooms.

80. The main building – the former country house – housed on its main upper ground floor the School dining rooms and kitchens, the Headmistress's office, the Bursar's office, and a formal entrance, with a section that was public and fairly imposing, as well as service rooms in a separate wing. This floor had 3 staircases: one by the girls' dining rooms labelled for the trial as Staircase A, one outside the Bursar's office leading from the entrance hall and inner hall, labelled for the trial as Staircase C, and one between the two which was out of bounds (although EXE did not realise that), labelled for the trial as Staircase B. Staircase B was more utilitarian than Staircase C, and was used by Hughes and other kitchen porters to go from the kitchens, cold room and store room down to other service rooms and store rooms on the lower ground floor. If any of the 3 staircases can be described as the "back stairs", Staircase B was it.

81. No teaching was carried out in the main building. Therefore, during the day, EXE (who was a day girl) would only be there in the lunch break, when she was having her lunch in the girls' dining room. She did not refer to ever having to go to other parts of the

building, such as the careers room or Bursar's office or Headmistress's office, during the material time in 1991.

82. The first and second floors were the location of the girls' dormitories for those who (unlike EXE) were boarders. They were not allowed there during the day, and EXE never had occasion to go there (as far as the evidence shows) at any time. The girls' time in the dormitories was always supervised and patrolled. No girl would be expected to be there alone, but always with the other girls during the hours of their retirement there *en masse* and under supervision. A separate part of the second (top floor) had some staff accommodation, and it was here that Hughes had his bedroom, next door to a small communal staff sitting room and at the top of Staircase B.

83. EXE and Croe formed the habit of going off during their lunch break and sitting on the window sill on the upper ground floor of Staircase B (which was not the one adjacent to the girls' dining room, or one they had any business to be on, and which was out of bounds), precisely because it was out of the way and quiet. There they would chat.

84. There came a time when Hughes saw them there and they started to talk to him, but only when they were together and only for a brief time. There was not much time available. They had to fit their window sill time into what was left of the lunch break when they had eaten, and before they had to leave the main building to go to their afternoon lessons.

85. Hughes was a kitchen porter. He was strictly behind the scenes. He was not involved with serving the food, for example. He had no duties in the dining hall. He would go up and down Staircase B on his journeys between stores and service rooms on the upper and lower ground floors. There were two other kitchen staff manning the dishwashers, two more cleaning up the dining areas, one doing outside work and then the two kitchen porters including Hughes doing the fetching and carrying away from the girls and the serving and public areas.

86. Hughes was a convicted sex offender with young girls although the school did not know this. He was promiscuous with girls aged 20 or less and did not care if they were under 16 (this from his Social Inquiry Report). Mostly these were described as "one night stands" but some lasted longer. He was rootless, irresponsible, occasionally violent (but not, apparently, with girls), and used cannabis and acid. He came across as a quiet, unthreatening person with girls. He had been in prison, sometimes had no fixed abode and thought nothing of sleeping rough, hitch hiking and walking long distances. When living at the School, he drank at the local pub, sometimes with Sixth Formers, and he was reprimanded for his fraternisation with girls, which was completely unexpected and unacceptable for someone doing the job he did, which was not expected to involve any contact with them, as well, clearly, as being entirely inappropriate.

87. Despite only seeing and chatting with Hughes when she was for short periods on the Staircase B window sill with Croe, EXE experienced strong feelings for him, which grew. She talked in notes passed between her and Croe of being in love with him, even before they had ever been alone together. She said "he makes me laugh & he's quite fun" but Croe warned "he only wants one thing".

88. EXE was not put off, and welcomed the chats that Hughes had with her and Croe, and looked forward to them. Hughes also saw his chance and was happy to talk to these two

girls who were approaching their fifteenth birthdays and interested in talking to him. He did not have to use any ruse or trickery; he did not have to lull them into a false sense of security; and he did not do any of those things. Everyone had their eyes open. Everyone went along with the chatting and the growing sense of familiarity. EXE knew Hughes was 30 years old and that he had a girlfriend.

89. On Thursday 16 May 1991 Croe had a singing lesson and EXE went to the window sill on her own. Hughes came and talked to her as usual. He asked where Croe was. EXE told him. EXE asked if Hughes was OK and he said "No" and looked unhappy. He told her he was having problems with his girlfriend, because he liked EXE. This was the first time they had ever been alone together. It was not an occasion engineered or expected by Hughes. EXE now says Hughes took her down Staircase B to the lower ground floor and exposed himself to her. It is a striking allegation and would be easier to remember than a mental state. It is not in itself alleged to have been an assault, but only the initial part of the context in which subsequent acts of sexual intercourse took place. It is a suggestion which seems to me to be unlikely given the very gradual development of the relationship from friendly talk through to growing conversational intimacy and then to meetings during which there was first a parting kiss and then more kissing and cuddling before eventually the relationship developed into one of full sexual intercourse. I suppose it is possible that Hughes might have done this at the outset in order to see whether EXE was completely repulsed by it, and was encouraged when she nevertheless pursued her contacts with him after this first occasion. However, I regard this as speculative and far-fetched and it is not an explanation which was offered by any witness, expert or otherwise, or by Counsel. I think that the most likely thing is that this simply never took place. It does not seem consistent either with the narrative in the Police Statement (from which it is completely absent) or with EXE's current understanding of events (that she was being imperceptibly brainwashed or passively coerced and manipulated to such an extent that she did not know what was happening until decades later). Since it is such a recent allegation, and not corroborated, as well as being absent from the original Police Statement, I reject this evidence.

90. The very next day following this single, initial, meeting of EXE and Hughes alone, the fire took place which closed Staircase B and put Hughes in hospital. There was no possibility of one-to-one conversation between then and the half term holiday which began at the end of the following week. EXE wrote a note which is in the trial bundle and which I find, although undated, was written before the half term holiday began and after this meeting. It referred (I find) explicitly to "last Thursday", and to the meeting on the window sill when Croe was at her singing lesson. It said nothing which could even remotely refer to what is now alleged to have been the indecent exposure, and I find that was because it did not take place. Instead, it said: "I'm sorry you couldn't exactly call me majorly responsive last Thursday but – 1. I was holding a big file 2. If we got caught you'd get fired and I'd probably get suspended or something. If it's still OK by you, maybe I could see you at half term…" This shows that EXE knew that seeing Hughes was wrong, and that Hughes was not allowed to talk to her as he had been doing, and she was not allowed to talk to him. It also shows that she was nevertheless taking the initiative (and not, as I find, in response to any suggestion by him) in reaching out for another one-on-one meeting. The letter began (before the passage I have quoted) by giving Hughes her home address and a home telephone number (landline). It went on to say "If you want to call me at half term so we can arrange a time, just say 'Could I speak to [EXE] please or something like that and I

hope whoever picks it up – the phone – would think it was that guy Redvers I told you a bit about. I'm sorry it sounds like I'm ordering you around so much…" This confirms (as I find) that EXE was taking the initiative and was not responding to pressure or suggestions from Hughes.

91. The letter is exhibit "CH/3" in the police file and the officer who exhibited it says it was found at the home of Hughes' mother in Rotherham. I deduce that EXE got it to him before half term, and he then kept it until the police took it later in the year. I find that it is probably the note that EXE's sister recalls EXE asking her to pass to a kitchen porter when they were queueing for lunch one day, which she did without thinking anything of it. EXE's sister links this to a memory of "being by a window on some stairs" but this would not have been Staircase B (they would queue for lunch near Staircase A) and nothing turns on it.

92. According to her Police Statement, which I accept in this respect, EXE also rang the School and got put through to Hughes. She now doubts how she would have known what number to ring, but she accepted that the School number would have been in the public telephone directories. It is clear from the letter (which is written without contact since the last window sill meeting) that the phone call was made after she wrote and (I find) sent the letter. EXE made the call, not the other way around. She invited Hughes to meet her, and she used a pretext (walking the dog) to meet him at a village pub. They took a short walk down a lane (she told the police that she took hardly more than half an hour to walk from her house to meet him, and to walk back after) and talked, and when they parted there was a kiss.

93. The next meeting was at the same public house one week later, and this was arranged in the first telephone call that Hughes made to EXE, using the number and the pretext name which she had given him in her letter. The Claimant again used the excuse of walking the dog to get away from the house (her idea) and this time the conversation was deeper as they found a shelter in a field and then had their first cuddle and kiss (using language in the Police Statement). They were met on the way home by a woman who recognised EXE but not, of course, Hughes. EXE did the talking to her.

94. The next meeting was when School had resumed after half term. It was on 6 June. This was the occasion when EXE used her parents' (incorrect) understanding that she needed to stay late at School for Duke of Edinburgh Award activities (which was EXE's idea) to give herself the opportunity of making her way to Hughes' room in the staff quarters. This was only the fourth time she was meeting him alone: the first time on the window sill during Croe's music lesson; the second and third times near her house during half term; and now this fourth occasion. She made her own way to his room. His name was on the door and it was not locked. There was no-one there. She waited for him. She had said she would do this at their last meeting. When he arrived he said: "I can't believe you actually got here."

95. They kissed, with clothes on. They then talked seriously about whether they should have sex. They talked of the possibility of pregnancy. Hughes said he had contraception. They "spoke about the law and the fact I was only 14 years old and not 16 years. About what my parents would say if they found out. He said if the police found out he would be sent to prison. We still wanted to have sex even though all these things told us we shouldn't". (Police Statement). Hughes said "he didn't want to hurt me" and, if she did not want to go through with it, she did not have to. She "loved him

and felt it would not be having sex but making love and he agreed with me". This was her suggestion; not his. I find that what followed was fully considered, fully consensual, and welcomed by EXE, who was not groomed into it. They had sexual intercourse. It was done gradually and considerately (within the parameters of what was a grotesquely wrong act by Hughes). Hughes also made it clear that EXE could stop it at any point before and during it. It was painful and EXE did ask Hughes to stop at one point, which he did completely, before "we tried again". She then found it less painful and did not ask him to stop again before he finished. Afterwards, they "lay together and spoke of how much it had hurt at first because I had cried a bit." She got up just under 2 hours after she had arrived and left just in time to be picked up by her mother, who thought she had been at her Duke of Edinburgh event. Before she went "we arranged to meet there again next Thursday".

96. In the week that followed they were never alone together and did not even meet on the window sill. There were no letters from EXE to Hughes and he had sent no letters or notes to her. The next Thursday she went to his room again. She was not under any pressure to do so. She had had the week to think about what had happened. There had been no words between her and Hughes. It was up to her. She went.

97. They had sex again that second Thursday in his room and she told the police "I was in full agreement for this to take place". She maintained this position at least until the trial and change of plea many months later. She might have thrown the blame on to Hughes; but she did not. She might have kept quiet about what they had been doing sexually (which is what he wanted her to do, of course), but she did not. She volunteered that they had sex, and that it was what she wanted and consented to. The circumstances I have outlined support that. There is no evidence to the contrary until the evidence given in these proceedings. I accept what is said about that in the Police Statement as true.

98. This continued every Thursday until the end of term, the last Thursday being 4 July 1991. That made a total of 5 Thursday evenings together in Hughes' room. EXE saw the end of term coming and told Hughes that she would be going to Spain for a family holiday: including the start date (10 July) and that it would be for 3 weeks.

99. On the first day of the summer holiday, Saturday 6 July, EXE telephoned Hughes. He said that he had spent the night in a prison cell "over some drugs thing his girlfriend had been involved in". He surprised her by saying: "How would you like me to come to Spain". I doubt that this had even occurred to her as a possibility. It was the first time he had made a suggestion of his own. She at once said "Yes, I'd love you to come to Spain". She told him where she would be and he said he would camp on the beach.

100. That day (6 July), the police told the School in the small hours of the morning (which is consistent with Hughes' spending the night in the cells) that Hughes had been arrested for drugs offences and it was that day that the suspected cannabis was taken by the police from his room at the School. This was (according to a letter from the Bursar I have seen) reported to the School Solicitor and the Headmistress. They had no idea of the relationship with EXE. It is not suggested that there was anything in Hughes' room or anything else which would have alerted them to it.

101. When the substance was confirmed as cannabis, and the police had decided to press charges, Hughes was called in by the Bursar on 8 July and he offered his resignation which was accepted. The letter is in language which sounds as if it was dictated by the

Bursar (I have other letters from Hughes for comparison). It said "Dear Sir, I wish to terminate my employment at the Royal Naval School on Friday 19 July 1991. This giving you 12 days notice" (*sic*) and was signed. He was not required to work out his notice. A letter dated 11 July from the Bursar to the two senior Governors and the Headmistress recorded that the letter was signed after the Bursar had called Hughes in and "asked for his story". He blamed his girlfriend for leaving the cannabis in his room. "He was aware of a School Rule which prohibited guests in the Staff Quarters, but said he thought it only applied at night": in context this was in reference to his girlfriend being in his room, not any pupil of the School. Contrary to the date in the resignation letter, "He was discharged… on 10 July", which is agreed as the last day of his employment by the School.

102. Meanwhile, EXE went to Spain with her family.

103. Hughes was now out of the School, and no longer employed there. He seems to have been homeless. He tramped (as his letter after Spain shows) or hitched to the spot that EXE had told him about on the beach. She saw him when she was in the car with her parents. She negotiated with her father (he remembers this) to have some time alone, which he allowed her because she seemed to need it and it seemed reasonable, and she used it to go to the beach and meet Hughes on what seems (from her letter to him, and his to her after he had gone back to England) to have been not more than one or two occasions, but they had sexual intercourse as they had become accustomed to when they met in his rooms at the School. This is stated in the Police Statement, which I accept, to have been a meeting on one day only, 21 July 1991. It was Hughes who had suggested he follow EXE to Spain, but it was EXE who made it possible for them to meet there, by giving him the location, and getting away from her parents for what she wrongly told them would be time alone, and I find on the evidence that she was doing this willingly, and without prompting from Hughes. She seems to have been cleverer and more resourceful than him. I say this (so far as EXE is concerned) taking account of her later educational achievements (which include a good degree in English, and a teaching qualification), the way she presented to me (although I remind myself that this is when she has grown up) and the evidence about her words and actions during the events I am considering. So far as Hughes is concerned, I base it on looking at his letters (which are misspelled and muddle up capital and other letters illiterately), and the abundant evidence of his random and rackety lifestyle at this time, and accounts of him by various witnesses in the police file, and in the Social Enquiry Report. He did write poetry, apparently, but I have seen what may be some of it and it is poor stuff; basic language, minimal content, short lines, no metre, no rhyme, less than a child's work.

104. EXE's family came back to England from Spain and she passed her fifteenth birthday in August 1991. Meanwhile, Hughes also came back, and at this point he wrote his first letter to EXE. There are four letters from this summer holiday, after Spain, from him to her. In his first letter of these four, he said that he had been picked up by the police in Spain and taken back to the UK. He declared his love in hyperbolic but basic language. I reject the suggestion that this was grooming language; it came far too late in the relationship to be grooming for the relationship and it is crude and not particularly manipulative, on my reading of it. All four letters are undated but written from an address near Rotherham which I know from the police file to be his mother's house. I know from her statement in the police file that he arrived there on 8 August after what he said was a week in Spain. However, EXE's Police Statement speaks of receiving a

letter from Hughes on 5 August which said he was staying "down south": this letter was never found by the police and I do not have it. In it (according to EXE's Police Statement), he told her he could meet her at an outdoor spot near her home, and she says in the Police Statement that she went there the same day (5 August) and had consensual sexual intercourse with him, followed by further meetings and intercourse after her parents thought she had gone to bed on the 3 days that followed, in the same outdoor spot, ending on 8 August 1991. The first of these occasions (5 August) is Count 5 on the Hughes indictment to which he pleaded guilty. The owner of the field provided a statement in the police file which said that she had noticed Hughes (identified by description rather than name) in the area and "a few days later" saw him again accompanied by a young girl and her dog. She saw Hughes again on 7 August 1991 and saw the girl and her dog (no doubt EXE), on the Sunday, alone, which would have been 11 August. She did not see Hughes again at this point. I will call this lady "the Landowner." She mentions a shelter on her land which I find was the one Hughes and EXE used when they met.

105. Hughes' mother indicates in her police statement that he reached her house on Thursday 8 August; this does not entirely tally with a late night meeting with EXE in the south after bedtime that day but it is the number of meetings rather than the precise date which matters more, and perhaps his mother was the person mistaking the dates. She says he stayed in her house until Saturday 17 August, returning on the afternoon of Thursday 22 August. On the Friday evening, 23 August, he told his mother that he had had a telephone call from EXE (giving her name) who was from the south, and he would be leaving, and by the time she got up the next morning (24 August) he had gone. She was used to him leaving, walking, and hitchhiking his way in lorries; he had no transport of his own.

106. This tallies with EXE's Police Statement: she knew that after their last meeting on 8 August he had gone to his mother. She said in the Police Statement: "We kept in touch by phone and post. I knew [he] would be back on the 19th and we arranged to meet during the night at his camp". The camp would be the shelter in the Landowner's field.

107. The four letters sent by Hughes from his mother's house could relate to this period of keeping in touch by phone and post, as does the phone call mentioned to his mother the night before he left her on 24 August. The first letter, which I have already mentioned as referring to Spain (bundle p 644), does not read however as if there had been meetings before the letter and after Spain; and another letter (bundle p 650) is written on the basis that he may have been taken into custody for trying to leave England and go back to EXE in Spain (presumably because that would be a breach of his bail). A third letter (bundle p 654) undated except "4.30 am Monday" says "I still cannot get over last week it was the best time in my life because it was with you" and, earlier, refers to "the beach party" being over: this looks like a letter, again, after Spain but before any meetings in the south, although it is written from his mother's address which makes the dates difficult. These are love letters and talk of marriage: "Be mine I feel that our souls have blended together and became as one. I know I have asked you to marry me and you have said yes, and I still will marry you one day very very soon. But in my heart I feel we are already married" and so on. They are extravagantly worded and inappropriate from a 30 year old man (and a sex offender) to a 15 year old girl but, whatever their date, they are too late to be grooming and do not appear to me to be grooming in any useful sense of that word. They are foolish and wrong but not devious

or manipulative. They tell no lies that have been proved or that seem particularly likely. They assert no authority and rely neither on status (Hughes had no status at all; he was homeless and unemployed, and the police records so far as they go do not suggest this was a particularly bad downturn for Hughes, who was always a drifter) nor on the age difference to influence EXE. Hughes did not (for example) ever suggest to EXE that his police troubles were because of what they had been doing together. The police activity was not in fact anything to do with their meetings (except if his account of being picked up by British policeman from Spain was because of a bail breach, but he did not say that and even said the police had let him stay on a bit) but a lie might have been told to obtain some sort of hold or create a sense of obligation in EXE: that lie was not told. EXE was the age of the multiple other girls aged under 20 that the Social Inquiry Report shows that Hughes was used to having sex with, in respect of whom (quite wrongly) he made no distinction between those who had passed the age of consent and those who had not. The conversation about the illicit nature of the EXE-Hughes relationship, and their ages, and the need for consent, and the risk of prison, had taken place during the School term in July, as I have found. The relationship was well under way before these letters. I reject the suggestion made to me that these letters were part of a process whereby EXE was persuaded to give a consent which was not a free consent. The timing is wrong, the content is wrong, and the other facts are wrong for the purposes of any such argument. The letters do express some anxiety about Croe knowing "about us" (bundle p 642) and "you will have to have a word with her" and "to lose you would kill me" but this suggests that EXE might have told Croe already. On the one hand, the need for discretion was obvious and, on the other hand, EXE was (perhaps) being indiscreet. Whether she had yet told Croe about the sexual relationship or not, EXE had from the outset independently taken steps to keep what was happening from the knowledge of her family, and Hughes had not directed her in that respect. Here the letters end. I find that the police probably found all the letters there were from Hughes (except the first one); and EXE accepted there were four or five in total.

108. EXE's Police Statement provides the final section of the narrative. After the call she made to him at his mother's house, he went down south to meet her again. The Police Statement links this to a conversation in one of their meetings in the field between 5-8 August, when

> "…we discussed my current home life and how I was being lectured and always seemed to be in the wrong. I asked [Hughes] if he would take me back to Sheffield with him. At first he said "no it wasn't a good idea." He said "Do you really want to come with me." I said I did. I persuaded him to take me."

109. EXE will have been asked about this as part of the police investigation into what was eventually charged as the Abduction (to which Hughes never pleaded guilty, and which was not pursued after his other guilty pleas). EXE now says that the whole of this statement should be regarded as unreliable to the extent that it exculpated Hughes, because she was trying to protect him. However, the accounts of sexual intercourse were not protecting him, and the narrative portraying the sexual intercourse as consensual, whilst protecting him from a charge of rape, was consistent with all the other evidence I have identified, including the chronology of events, the letters, and the actions taken by EXE with her family in order to build her relationship with Hughes and to meet him regularly, but with large gaps when his direct connection with her was

broken. On balance, I find that what is said in the passage from the Police Statement I have quoted was broadly true and correct. In other words, it was EXE's request that Hughes should take her to Rotherham. It was a shatteringly stupid move on Hughes' part, given the concerns expressed in his letters that what he was doing should not become known, and this also supports the evidence in the Police Statement that it was not his idea and that he was not keen on it at first.

110. The agreed day came and, by agreement, EXE was picked up by Hughes and they hitchhiked their way back to Yorkshire together. She left a note for her parents and brother and sister which I have seen. EXE says that he told her to emphasise that she was going by her free consent but she accepted in cross examination (contrary to the implication in her witness statement for trial) that she wrote it when he was not there. He may well have told her to emphasise that point, but (as I have found) it was true. The letter as a whole reads like a careful attempt by EXE to reassure her parents and persuade them not to look for her. The language is quite unlike anything that Hughes would have been capable of, from what I have read, as are the feelings which are expressed. I am satisfied that these were EXE's own words, chosen by her and expressing her real thoughts at that time.

> "Firstly, I would like to say that I love you all very much, but I have left to find my own life. I realise this decision is going to affect a great many things like my education, but I promise I will be back if things show the slightest sign of not working out for me.
>
> I want you to know that I'm not putting myself in any form of danger by leaving.
>
> I was not forced to make this decision and therefore not forced to write this.
>
> I promise you all that I will keep in contact with you all, however I do not want to be found and I would be forced not contact you if you send the police after me.
>
> I will not be staying anywhere illegal and there will be nothing illegal about the activities I take while I am away – I can promise you that.
>
> I have no wish to hurt anyone be they family or friends and I know that what I have done is a selfish thing because I'm going after what I want and I'm leaving you in the lurch.
>
> So I can only say please be happy and secure in the knowledge that I'm safe – I wish I didn't have to hurt you all in this way and whatever I write will not make this seem any better, but please forgive me, be happy with yourselves – I will do anything within my power to keep very strong lines of contact open and I will be back to see you all when I'm sorted out – I'll phone and write.

> Please remember and know that you are all in my heart always and know that I love you all.
>
> May all your wishes for the future come true and the happiest lives anyone can have.
>
> I love you all."

111. When they got to Tinsley, they went to the run-down flat that Hughes had found for them. Her parents discovered the note the next morning and called the police but did not know where she might be. I heard distressing evidence about the impact, including very natural fears by her father and sister (and, no doubt, her mother) that EXE might not be seen again alive. This was based on what the police were saying to them.

112. There was at least one night in the flat together (the dates become slightly confused) before Hughes left to report for his bail, and EXE was alone in the flat. There was sexual intercourse, and this was charged as the Unlawful Sexual Intercourse on 26 August 1991 (a Monday) on Count 6 of the Indictment to which Hughes ultimately pleaded guilty. EXE's recent evidence for the trial (and her accounts to the experts) say that this was a violent physical rape by force, quite unlike their previous acts of intercourse. This is disputed and I will return to it.

113. After he had left the flat, Hughes was arrested and did not return. EXE seems to have waited a day before she rang a number he had given her in case of difficulty, from a telephone in a shop. It was the number of an acquaintance of Hughes. Before that, she had left various notes in the flat, showing that she was going out during the time she was expecting Hughes to come back. One says "Help yourself to food and stuff". Another says "6.51 pm Dear Ray, Have just gone down to the shop and will be back really soon. I hope your journey was OK and I hope everything went well for you in [the location of the police station in the south]. See you in a minute. Love you."

114. EXE's telephone call was made in the presence of the shopkeeper, who later gave a statement which is in the police file. His statement shows that he was the landlord of the flat (he never got paid the agreed rent, however) and gave them the keys on the day they arrived at 7 pm on Sunday 25 August 1991. The next day, Bank Holiday Monday, he saw EXE on her own coming into his shop to buy food. The shopkeeper then saw her again the next day, Tuesday, saying there was a problem with the water (her Police Statement also refers to this). When Hughes did not return, just after midday on Wednesday 28 August 1991, she rang the number Hughes had given her of his friend. The friend got her location from her over the phone and, without her realising he would, passed it to the police who picked her up at the shop. In the police car, according to what I consider to be a reliable statement from the police officer, "she insisted that she had accompanied Hughes voluntarily and had in fact asked Hughes if she could go with him, she described him as her boyfriend, stating that they were in love with each other." Later, at the police station, "after initial reservations, questioning what her parents would be told, she admitted that they had in fact had sex." I note that her reservations were about what her parents would be told; not what she would tell the police. This is consistent with what she said about the relationship being true, and not consistent with her saying it in order to protect Hughes although it was not true. However, she told the police in the car (contrary to the fuller and, as I find, truer account in her Police Statement) that the sexual relationship had started in the field where he was sleeping

rough two weeks after they had met. This was no doubt to keep his job at the School out of it, but she did not maintain that fiction very long. Even in the account given at the police station on the day she was picked up (which was on a day previous to the full Police Statement) she described the sexual relationship as considerate and consensual, with no reference to grooming, coercion, indecent exposure on the lower ground floor of the School, or rape in Yorkshire. When asked about what she knew about Hughes' history, she was "surprisingly well informed. She said she knew that he had been charged on two previous occasions for having sex with girls under the lawful age, but appeared happy with the explanation given by Hughes. She also knew of other criminal convictions but was under the illusion that these were unfortunately mistakes that wouldn't happen again. In my opinion [EXE] was totally besotted by Hughes…" In cross examination, she said she was not besotted. She did not deny in cross examination that she thought she was in love but questioned whether she could know what love was at the age she was at the time.

115. EXE herself in cross examination said that she knew what the act of sexual intercourse was and what it involved before she met Hughes; she knew that it might lead to pregnancy (this was something that she said in her Police Statement she discussed with Hughes, and he used contraception); and she knew about consent to sexual intercourse. She said in cross examination she had the information and the understanding to decide whether to consent to sexual intercourse with a man. The question is, however, whether she in fact gave it.

116. On the face of it, her Police Statement describes all the sexual acts that took place between Hughes and her as completely consensual. The one exception to this now alleged is the claim that he forcibly raped her during the stay in Yorkshire, the night before Hughes left to answer for his bail. In her statement to me, EXE said:

> "On the way to Rotherham I noted that Ray's attitude to me began to change. He dropped the loving façade and became more and more impatient and abrupt. No longer did he tell me that he loved me. When we got to Rotherham, he became violent. I was taken to a flat where he held me facedown, and forcibly raped me as I lay face down. He bit me on the neck with such force that it caused me real pain. There was none of the gentleness, which I had experienced with him up till now. It began to dawn on me that he did not love me, as I thought he did."

117. This is not supported by the Police Statement, which describes sexual relations as gentle, loving and welcome throughout. It is also not supported by EXE's sister's evidence which was that, even after the police brought her back and arrested Hughes, EXE "felt that this man loved her". It is also inconsistent with the police surgeon's examination, which found no evidence of violence on her body. The reference to a bite might explain the love bite seen both by the police surgeon and by EXE's sister, but there is a difference (which I would expect a police surgeon looking for signs of violence to recognise) between a bite "with such force that it caused me real pain" during a rape, and a love bite, although the photograph referred to by the police surgeon is no longer available. EXE had a period of counselling from a chartered clinical psychologist in 1996, when she was 19 or 20. The notes refer to distress on finding her then boyfriend with another woman, a poor relationship with her father and other family issues, worries about exams and personal relationships and "the pattern of her

relationships with men." But they do not record any allegation that she had been raped by Hughes, or apparently any reference to her time with Hughes at all.

118. The only evidence in support of the violent rape is EXE's evidence at this trial. If EXE had been a more reliable witness, I might have accepted evidence that she was raped but not so violently as to leave visible marks, and that she might have deluded herself that the rape did not mean she was not loved by Hughes, and that she might not have mentioned it to anyone although it took place. But I have not found her to be a reliable witness at all, and so, in her case and in this case, I am not able to accept that she was raped based solely on her evidence to me. I therefore find as a fact that no violent rape took place and all the sexual intercourse was non-violent and apparently consensual.

119. That does not, however, conclude the issue of consent. There may be an absence of consent even when there is no force or violence. It is also well recognised that there may be submission to sexual intercourse without it constituting consent. It is, further, accepted that a person, particularly a child or young person, may give what appears to be a consent which is not a true consent because it has been obtained by a process of grooming. I will follow the guidance on consent for these purposes in *London Borough of Haringey v FZO* [2020] EWCA Civ 180 paras 124-138, which covers these and other possibilities in a definitive review of the authorities and the law.

120. Apart from the recent allegation of violent rape in Yorkshire, which I have rejected, it is EXE's own case that all the acts of sexual intercourse were non-violent and apparently consensual. It is only in retrospect that she has come to believe that she did not really consent. Her case on why there was no real consent was, however, very inconsistent even in the course of her cross examination. In her witness statements, the narrative given of the relationship is sketchy, and I have already decided that it is much less reliable than the Police Statement, which is very detailed and thorough. At many points, the witness statement, indeed, relies on the Police Statement to provide detail which EXE admits she can no longer remember. What her witness statement adds is a different account of her feelings at the time, and a new explanation of what was happening which takes away the element of consent on her part which she included throughout her Police Statement. I do not think that her memory of feelings is reliable; it is more difficult for any witness to remember feelings than events (a point supported by the expert evidence of Professor Maden), and EXE is a particularly inconsistent and unreliable witness, as I have found. I therefore reject those parts of her witness statement.

121. I also reject the revised narrative of whether or not there was genuine consent in EXE's witness statement. She says that Hughes "would set up situations where he would be alone with me" but the Police Statement is completely inconsistent with that and shows that at every point it was EXE who took the initiative, with Hughes having very little opportunity because of the chronology of events to do so. It was EXE who provided him with her address and telephone number. It was EXE who went to his room, and waited for him when he was not there the first time. It was EXE who set up the meeting in Spain and who, when she saw him there, went to meet him after making an excuse to her parents. The letters in the papers come initially from EXE to Hughes and not the other way around.

122. Although in his letters from Yorkshire after Spain (which appear to have numbered four or five, and which I find on the evidence were the only letters he sent) Hughes says

things which are said to be manipulative about how he loves her, how he will kill himself if he is not with her and how dependent he is on her not disclosing what he has been doing with her and even getting her friend Croe to cover for them, these come long after the relationship including the sexual relationship had been fully established. I do not regard them as constituting grooming which procured the consent to that relationship and I do not find on the evidence in the Police Statement, which I prefer to EXE's recent evidence, that there was any grooming which meant that EXE gave anything other than a free and real consent to everything that happened.

123. In her witness statement EXE accuses Hughes of "passive coercion" and says "with hindsight and being older now, I can now see that he used love to manipulate me". She says "although I said to the police that I was in "full agreement" with everything that happened, in fact, as I have explained, I now realise that I was only doing what he told me to do, namely, to tell the police that it was all of my own free will." In cross-examination she repeatedly used the word "brainwashed" to describe her state of mind but the facts do not support that given how the Police Statement demonstrates that she was the driving force both behind the contacts with Hughes themselves and the various methods by which she, and not he, made them possible. She was not passive and her consent was not mere submission. She was a willing participant and protagonist.

124. I accept that EXE now genuinely believes that she was brainwashed, and coerced (not quite the same thing, but a word she also used), and that she now believes that Hughes manipulated her. However, I find on the evidence that this was not in fact the case. I find on the evidence that the account she gave in the Police Statement was accurate, and that she knew what she was doing and genuinely wanted to do it at the time, without being groomed to do so by Hughes, and without her free will being undermined. I find that she took the initiative, and was if anything making the suggestions: such as that he should ring her on the number she gave him; that he should use a false name which her parents would recognise which she told him; that he should follow her to Spain to the particular place she specified to him; and even that she should go with him to Rotherham (which he at first resisted).

125. I find that all the acts were consensual, and that they do not give rise to claims in tort. But I do not by this in any way resile from the important fact that it was nevertheless a crime, and rightly so, for this older man to have sexual intercourse with a girl under 16, and that he seized the chance, and that the fault lay with him, because he was older, and had previous convictions, and knew what he was doing, and was responsible (both morally and as a matter of criminal law) in a way that EXE, given her age, was not.

Issue 3 – Vicarious Liability of the School

126. The third issue is, if and insofar as Hughes himself did commit torts against EXE, whether the School is vicariously liable. My finding on Issue 2 means that this issue does not arise. I will, however, briefly address it.

127. The strongest part of the case on vicarious liability concerns the period up until 10 July 1991, when Hughes was an employee of the school. This immediately satisfies the first stage of the two-stage test in *Various Claimants v Catholic Welfare Society* [2013] 2 AC 1, namely, whether the relationship between the School and Hughes is capable of giving rise to vicarious liability. The second stage is whether there was sufficient connection between the position in which Hughes was employed and his wrongful

conduct to make it right for the School to be held liable: see *Mohamud v Wm Morrison Supermarkets plc* [2016] AC 677 at paras 44-46. This is to be determined after a broad, fact-sensitive and open-minded enquiry.

128. In the present case I do not find sufficient connection between Hughes' job as a kitchen porter and his wrongful conduct to make it right, in my judgment, applying the principles in the well-known authorities cited to me, for the School to be held vicariously liable for that conduct, even during the period of his employment. The only connection that I can see between his job and his misconduct is that he came across EXE at the School, in working hours, on the premises, and began to get to know her and her friend on the window sill of Staircase B. However, his job duties did not involve him having any contact at all with any girl at the School, and did not give him any power or authority or influence over any girl at the School. The window sill was out of bounds, and no-one at the School had any idea either that the girls were spending a few moments there during their lunch break, or that they were getting to know Hughes. Hughes was reprimanded for his contact with girls, but I find (based on the scanty evidence that is now available to me about that) that this was contact at the local pub after hours and it is common ground that it was not a reprimand for his contact with EXE and Croe, of which no-one in authority at the School was aware.

129. Hughes did not use his position as a kitchen porter or his employment at the School to get to know EXE, or to have sexual contacts with her. The first act of sexual intercourse took place in his room at the School, but this was after school hours, when EXE was not meant to be at the School. It was, if anything, less convenient and more risky for her to visit him in his room at the School, with the risk of being caught, than if he was living in the village, for example. The relationship between Hughes and EXE was mostly conducted after he had been forced to leave the School: in Spain, then in the countryside near EXE's family home, and, finally, in the flat in Yorkshire which Hughes rented in August 1991.

130. The argument is even weaker after Hughes' employment ceased on 10 July 1991. The most traumatic period of the relationship was after this, including the time in Yorkshire which was charged as the Abduction, and the disclosure, prosecution and shame which followed.

131. I would not, therefore, in any event have held the School to be vicariously liable for any torts established under Issue 2.

Issue 4 – Negligence by the School

132. The fourth issue is whether the School is directly liable for a breach of duty on its own part. This is independent of Issue 2 (consent) and Issue 3 (vicarious liability) because, as it relies on a duty on the School itself, vicarious liability is not necessary and, unlike the torts alleged against Hughes, consent is not relevant.

133. This claim is put as liability in negligence for employing a man with a criminal record without checking his background. Doing the best I can on the evidence now available (which I have decided is, at this distance in time, not satisfactory for the purpose), I find the facts as follows.

134. When Hughes applied to be a kitchen porter, there were difficulties in recruiting staff and this is not a case where a candidate who appeared to be better or more respectable presented themselves. As long as he passed muster, he was bound to get the job. It was a lowly position, and unskilled, and his previous employment, as noted on the police file, suited him for it: in the previous 5 years he had been "Gull Chef, Reading area" for 3 years, briefly unemployed, and then a porter at a hostel in St Albans, before being employed by the School in October 1991. The School took up an oral reference from what they understood to be his previous employer, Taylor Plan Catering, "This indicated that the man was a good worker, although untidy in his personal appearance. Nothing was known to his detriment". This is quoting from a letter from the Bursar (a distinguished former Naval Captain, who was no longer available to give evidence), dated 11 September 1991, which I will accept as true. The Bursar interviewed Hughes and "questioned him as to his health and former conduct, including any record held by the Police. From his replies he was considered satisfactory for work in the kitchen and was engaged". This was on the face of it a proper and sufficient enquiry. It included an independent reference. It included a specific question about a Police record. I must assume, and find on the evidence I have, that Hughes lied and said he had no Police record. At this date, the School had no right to have a criminal records check run on Hughes. I will consider the practices prevailing at the time in more detail shortly.

135. The only witness of fact available at the trial who had anything to do with this recruitment was Mr Rhodes. His memory was weakened by time and he was clearly subordinate to the Bursar. However, he did recall the oral reference being taken up, by himself, and confirmed its contents. He also recalled the interview, and it was not suggested, nor did he say, that the account given by the Bursar in 1991 was incorrect.

136. Mr Rhodes said that Hughes' role as kitchen porter included fetching and carrying bags of food "but this would not be during meal times and would be when the pupils were in classes." Kitchen porters were required "to fetch and carry cooking equipment such as pots and pans, but this would have been limited to the kitchen only. There would have been no need to carry this equipment around the School premises." Having heard him cross examined, I accept this evidence. Mr Rhodes said that he did not think (and I accept this was what he reasonably thought at the time of the recruitment, with all his knowledge as Head Caterer) that a kitchen porter would be able to speak to the pupils for any length of time during their normal working hours as they would mainly be assigned to the kitchen and fully occupied. He pointed out that the girls would not be in the main building at all during teaching and working hours except for lunch, and he said the lunch break was 45 minutes. He was not aware of Hughes ever, after he was employed, talking to girls in the School and, although he was referred to the police statement of a salad bar chef (who was not available to give evidence to me at this distance of time) called Jurd referring to fraternisation, for which Hughes was reprimanded, I find that this was based on fraternisation outside School and after hours and not on Hughes having contact with girls of any age (so far as anyone was aware) during lunch or during the school hours when EXE was there, as a day girl. The final paragraph of Jurd's police statement is the only one which refers to Hughes possibly getting to know girls on the window sill and it reads as an unnatural addition, not based on personal observation, which the police might have wanted in order to show that it was possible (but not based on personal observation) that Hughes had got to know EXE there as we now know he had. No-one at the time (I find, and the evidence is all one way on this) realised that he was talking to EXE and Croe on the window sill after they

had gone there on their own initiative and as he was passing on the stairs of Staircase B. It was out of bounds. Reliance was placed on a police statement by Croe (she also was not available as a witness to me, because of the lapse of time) in which she refers to the upper flight of Staircase B being out of bounds, but does not say either way whether the window sill between the upper and lower ground floor levels was. This does not cause me to reject the evidence of the Headmistress, and of Mr Rhodes, and the implications of the floor plan and the backstairs appearance of this particular staircase, which all support the assertion that it was all out of bounds. I do not find that the Croe statement clearly says the contrary and, if it did, I would find it to be incorrect given the other evidence. I do accept that there was no notice that it was out of bounds, and I do accept that EXE did not realise it was positively out of bounds, but I think it likely that its out of the way location, and its appearance, and connection with the service rather than the public parts of the main School building ought to have alerted her to the fact that she would be told off if anyone saw her there, because she had no business to be there. She knew she was not meant to talk to Hughes: she mentioned that in her first note to Hughes, which I have quoted in paragraph 90, above.

137. In summary, Hughes was being recruited for a job in which there was no expectation whatsoever that he would have any contact at all with the girls at the School. It was no part of his job that he should do so, and it was no part of the layout of the School that he would be required even to pass the girls as he went about his job. It is correct that he was given a bedroom on the top floor, and this was the floor above the dormitories, but there is no evidence that he ever had contact with girls going to, or from, or who were in, their dormitories, and I accept the evidence that they were there during limited hours and always under supervision. I note that on the Thursdays when EXE went to Hughes' room herself at the end of the summer term between about 7 pm and 9 pm, she never met anyone and was never seen arriving or leaving.

138. The legal basis of EXE's claim in negligence requires both a duty of care to EXE in the recruitment of Hughes as kitchen porter and a breach of that duty.

139. As to the existence of a duty, I agree with the submission, based on the three-stage test in *Caparo Industries plc v Dickman* [1990] 2 AC 605 HL, that in recruiting any staff to the School (and especially perhaps resident staff as Hughes was), the School owed the girls, including EXE, a duty of care to take reasonable steps to check that the people employed were suitable to be employed on the School premises in whatever capacity they were expected to be working. The School did not attempt to argue that there was no duty. The issue is on whether there was a negligent breach of the duty in the recruitment and vetting of Hughes.

140. On the facts I have found, there is no obvious negligence or breach of duty. The argument was based, however, on the failure by the School to approach the authorities for a criminal records check, which, had it been performed by those entitled to do it (which they were under no obligation to do for the School) would have shown that, contrary to what he said in answer to a direct question at interview, Hughes had criminal convictions - and criminal convictions, moreover, including indecency with young girls, which made it clear immediately that he was in every way unsuitable for employment at a girls' school.

141. I have decided that the fading of memories, and the death, or age and loss of ability to testify on the part of witnesses, and the difficulties in locating witnesses, have created

a real risk of substantial prejudice in trying this question. However, I will do what I can based on what I have. There are documents which are undoubtedly relevant, and Dr Clough gave evidence to me, but I do not have from witnesses any sense of what might have been the prevailing attitudes and standards of reasonable people.

142. Given the frailty of recollection in this case, I will concentrate on the documents, and this is also how the Claimant's case was primarily put to me.

143. Hughes was interviewed at a time when vetting practices in schools generally and at this School in particular were in a period of change. Precise dates are therefore important. The date on which Hughes applied for the job is now forgotten, as is the date of his interview and the date on which his oral referee was consulted. However, his start date is agreed as 15 October 1990 and so, if I have to pick a date for when the application, reference and interview process began, I will estimate it as probably starting on or about 1 October 1990.

144. The Headmistress, Dr Jill Clough, was an experienced and, as I saw from her evidence and from her career record, a highly intelligent, proactive, forward-looking and conscientious professional in the education of girls. She had been a teacher since 1966. She was Head of Department at a girls' boarding school from 1978, became Deputy Head of a day school she moved to in 1981, and joined the School as Headmistress in 1987. When she joined the School, the only pre-employment check the School could carry out was to ask the relevant Government department (the Department for Education and Science) if a person was on what was called "List 99". List 99 was a system set up in the 1950s which blacklisted people from working with children, but it depended on referrals and reports, rather (it seems) than automatic reconciliation with criminal records, and it concentrated on teaching staff and not other staff. Hughes was not on List 99.

145. Shortly before Hughes started work in October 1990, more thorough vetting began to be encouraged and practised. The Children Act was passed in 1989 but only came into force in October 1991 and so it is too late to be setting the standard. Before that, however, a Circular was issued on 9 December 1988 by the Home Office, the Department of Education and Science, and other government departments ("the 1988 Circular"). It was addressed to public authorities, and was it seems primarily directed at state schools and state-run institutions, but it was also issued "for information" to others, including "Proprietors of Independent Schools". It was entitled: "Protection of Children: Disclosure of Criminal Background of Those with Access to Children". The opening summary said that it explained "the procedures for checking with local police forces the possible criminal background of those who apply to work with children." It said in terms (para 1) that it described arrangements that applied "in the main only to persons employed by statutory bodies": it was not binding in law and it did not purport even to apply to private schools. I bear in mind that a range of practice may fall short of negligence: it would not be right to describe best practice as necessary to avoid a finding of negligence.

146. The section in the Circular on "Persons On Whom Checks Should Be Made" (beginning at paragraph 3 of the Circular) included the following:-

> "This Circular applies to directly engaged individuals, whether employees, or paid or unpaid volunteers, who have substantial

> opportunity for access to children up to the age of 16… The following are the main groups of people for whom checks should be considered where a person is being appointed, approved, or registered:
>
> (…)
>
> (h) school teachers in schools maintained by local education authorities;
>
> (i) other staff in education departments who have substantial opportunity for access to children (e.g. education welfare officers, educational psychologists, para-medical staff, school caretakers);…
>
> … Further guidance on the definition of substantial opportunity for access is given in paragraph 7 and a further illustrative list of posts which are subject to checking under these arrangements is given at Annex D."

147. Paragraph 7 was headed "Substantial Opportunity for Access" and included the following:-

> "7. Many of those staff in the list given in paragraph 3 and Annex D will have substantial opportunity for access to children and therefore should be checked through these arrangements. In some cases, however, the situation may be less clear. In these cases a judgement must be made on whether the amount of access to children can be regarded as substantial and therefore whether it is necessary to request a check. The following guidelines may be helpful in reaching a decision:
>
> (i) Does the situation involve one to one contact?
>
> If it does and such contact is likely to be away from the child's home, or separate from other adults or children, then access should be regarded as substantial;
>
> (ii) Is the position supervised?
>
> It is possible for a person to spend considerable amounts of time with children, but under close supervision. This should not normally be regarded as substantial access;
>
> (iii) Is the situation an isolated one?
>
> There is a greater risk to a child who is living away from home, e.g.in residential care, possibly for lengthy periods, and the risks may further increase the further the child is from the parental home, or where parental visits are infrequent. A similar situation could arise where there is opportunity to take children singly, or

> in a group, away from the family surroundings, (for example on holiday);
>
> (iv) Is there regular contact?
>
> The more regular contact a person has with the same child, or group of children, the greater the opportunity to put the child at risk. This is especially so if the contact is unsupervised, or occurs away from other children. Intermittent contact, for example parent helpers for school trips, would not normally be regarded as having substantial access for the purpose of requesting checks (although there may be exceptional instances of parent helpers in schools whose access to children might be judged substantial in terms of these guidelines). Checks should not be carried out simply because an individual works at, or visits, schools, or other local authority establishments where children are present, as part of their duties, unless those duties would normally bring them into unsupervised direct contact with children. In view of this deliveryman, or swimming pool attendants would not normally be subject to checking;"

148. Looking at this, I can understand why the School would not consider Hughes to fall within the category of those with "substantial opportunity for access to children". He was not expected to have any contact with the girls as part of his job at all. I think that it was a reasonable reading of the Circular that it would not require any application for Hughes to be criminal record checked. That is quite apart from the fact that it was only guidance, and only applied to state schools. It is clear from the Circular that it is based on the jobs that people did and the duties they performed when doing their jobs. It was not based on informal or illicit opportunities that might be taken to access children which any person on (for example) school premises might take if so inclined. This is particularly clear from the sentence in the final paragraph I have just quoted: "Checks should not be carried out simply because an individual works at, or visits, schools, or other local authority establishments where children are present, as part of their duties, unless those duties would normally bring them into unsupervised direct contact with children." The emphasis is on whether it is "part of their duties", and the test is whether "those duties would normally bring them into unsupervised direct contact with children." It was no part of Hughes' duties to have any access at all to the girls, supervised or unsupervised, and "those duties" would not "normally" bring him into unsupervised direct contact with the girls. Therefore, the Circular did not require him to be checked, and did not set a standard which meant that it was negligent not to check him. On the contrary, it set a standard, at the highest level, which made it inappropriate to check him. The evidence I heard from Dr Clough was that it was doubtful whether a request for a person to be checked for a criminal record would be granted if they were outside the categories of those normally checked because of the resource implications.

149. It will be recalled that paragraph 3 of the Circular said that "Further guidance on the definition of substantial opportunity for access is given in paragraph 7 and a further illustrative list of posts which are subject to checking under these arrangements is given at Annex D." I have already quoted from paragraph 7. The illustrative list of posts subject to checking in Annex D included the following:-

> "SCHEDULE OF POSTS SUBJECT TO POLICE CHECKS UNDER THESE ARRANGEMENTS
>
> It is not possible to provide a definitive list of posts which should be subject to checking under the arrangements set out in this Circular as descriptions of posts vary considerably between authorities. But the attached list should offer local authorities guidance as to those posts which would normally qualify for a check under these arrangements. For convenience a list of posts which would not normally qualify for a check has also been included, as there has been uncertainty about the status of these posts.
>
> Posts for which a check would normally be undertaken
>
> Education:
> Caretakers in schools or residential establishments
> (…)
> School Technicians
> (…)
> Sports Instructors
> Teachers
> Welfare Assistants
> Youth and Community Workers
> (…)
>
> Posts for which a check would not normally be undertaken
>
> Education:
> Administrative Staff (Head Office or in schools)
> Bus, Coach or Taxi Drivers
> Cleaners
> Dinner Assistants
> Gardeners and Groundsmen
> Parent Helpers
> Student Teachers and other trainees
> (…)
>
> Other staff
> Librarians and Library Assistants (except in school libraries)
> Museum Staff
> Leisure Centre and Swimming Pool Staff
> Park Attendants and Grounds Staff
> Public Convenience Attendants
> Security Guards"

150. These indicative lists confirm my view that Hughes was not a person who required checking under the guidance in the Circular. He was even less appropriate for checking (for example) than the Dinner Assistants, because, whereas their job gave them regular contact with children under supervision, his job duties did not involve him having any

expected access at all. Gardeners and Groundsmen did not need to be checked, although they might have at least as much informal opportunity to talk to girls and befriend them in out of the way places as a kitchen porter like Hughes.

151. The Circular was followed up by a letter from the Department of Education and Science dated 30 April 1990 (so, still before Hughes was recruited) ("the Letter") addressed to "Headteachers and/or Proprietors of all Independent Schools in England". This referred to the Circular and to the availability of criminal records checks, and "strongly advises all schools to make use of this facility which is provided free of charge". It therefore modified the emphasis in the original Circular only on state schools. However, I have decided that Hughes was not within the categories of worker for whom criminal checks were said by the Circular to be appropriate.

152. The repetition and restatement of policy in the Letter and its Annex does not appear to me to change the position in that respect. Indeed, the whole context is provided by the opening paragraph of the Letter, which said:-

> "It is apparent that not all proprietors of independent schools are fully aware of the obligation to report instances of misconduct by teachers or of the arrangements whereby schools can check the possible criminal background of prospective employees including teachers, who will have substantial access to children under 16 years of age in the course of their work. These arrangements are set out for ease of reference in the attached Annex."

153. Once again, the emphasis is on those who will have substantial access to children "in the course of their work". Hughes did not have substantial access to children in the course of his work and it was not to be expected, on the facts of this case, that he would have substantial or, indeed, any real access to the girls at all. The access he obtained to EXE and Croe was when they were sitting in an area which was out of bounds, and this was the case even if EXE did not realise it was officially out of bounds when they went there. The Letter did not require or advise that a person being recruited to a position like Hughes' position as a behind-the-scenes kitchen porter at the School should be subjected to a criminal records check.

154. I therefore reject the claim that the School was negligent in failing to ask for such a check.

155. I should say that the evidence is that the School was, if anything, ahead of others in its concern that checks should be conducted more widely than had hitherto been usual practice in independent schools. A Report by the Headmistress to the Governors dated 2 December 1991 said that "…all members of the academic, boarding and [Headmistress's] administrative staff have been required to undergo the police search since September 1989." However, this did not catch Hughes, who was not a member of the academic, boarding or administrative staff.

156. The same Report shows that "In January 1991, all newly-employed domestic staff were asked to consent to the search. This has only been mandatory, within given limits, since October 1991, with the coming into full enactment of the Children Act". This pioneering practice, adopted in January 1991, would have caught Hughes if he had been

employed after that date – but he was not. That it was far-sighted is shown by the fact that it was adopted before his criminal behaviour with EXE took place or was discovered. After it was discovered, Dr Clough took the initiative in lobbying government on the basis that current standards were inadequate, with Hughes specifically in mind. This further confirms that, for him to have been checked at the date that he was recruited to perform the job he was given, would have been completely outside the prevailing norms and expectations of reasonable and responsible people. The failure to carry out such checks was not in my judgment negligent.

157. I reject the claims based on a negligent breach of duty by the School.

Issue 5 – Causation and Issue 6 – Quantum

158. There is no doubt that EXE was harmed by what Hughes did. Where the experts disagreed about the nature and extent of the harm caused, I preferred the evidence of Professor Maden, for reasons I have already given.

159. However, the fifth and sixth issues do not fall for decision, since I have not found any tort or breach of duty to be proved, with the consequence that none of the harm suffered by EXE is actionable against the School.

Conclusion

160. The result is that EXE's claims against the School must be dismissed.