

Justice Committee

Limitation (Childhood Abuse) (Scotland) Bill

Supplementary written submission from the Association of British Insurers

Settlement by decree of absolutor

Thank you again for the opportunity to provide evidence at the Committee meeting on Tuesday 21st February.

In the email dated 23rd February the Committee invited further comments from the ABI in relation to the perceived issue of settlement of child abuse cases by decree of absolutor.

In support of this you state that it was raised by the Faculty of Advocates in its response to the Scottish Government consultation in 2015, and you refer to Scottish Government civil justice statistics which suggest that absolutor is a much more common disposal in personal injury cases than dismissal.

I have reviewed the consultation response by the Faculty of Advocates and note that they made the following comments in relation to settlement of claims by decree of absolutor:

“Court actions are resolved in favour of a defender in one of two ways: by decree of dismissal, or by decree of *absolutor*. The former is broadly appropriate where the action is brought to an end for procedural reasons, whilst the latter is a judgment on the substantive issues raised by the case. As a result, a case can be re-litigated where decree of dismissal has been granted, whereas decree of *absolutor* is a final judgment, which will prevent further litigation by affording the defender a defence of *res judicata* to any subsequent action.

Many cases brought to an end on the basis of a plea of time bar following a court hearing will have a decree of dismissal pronounced. However, it is our understanding that a large number of cases were settled extra judicially on the basis that decree of *absolutor* was granted, following a refusal by the Scottish Legal Aid Board to provide further funding.

...”

There is no reference in the response by the Faculty of Advocates to the settlement of child abuse cases by decree of absolutor being used by insurers in the manner suggested at the Committee. They state that the reason for settlement by defenders on the basis of decree of absolutor was due to a refusal by the Scottish Legal Aid Board to provide further funding.

The statistics you refer to relate to personal injury cases disposed of in the Court of Session in 2014-2015. As you correctly point out personal injury claims for childhood abuse are not broken down by type and it is impossible to know how many (if any) may relate to child abuse claims. That said one reason for the Limitation

(Childhood Abuse) (Scotland) Bill has been given as the low number of childhood abuse claims currently pursued. We anticipate that the number of childhood abuse claims within these statistics is low.

I note that claims for accidents at work, road traffic accidents, clinical negligence and disease claims are broken down by type within the statistics. The number of claims concluded with decree of absolvitor under the heading 'other' (which would include any childhood abuse claims) is 231. The number of accident at work cases concluded with absolvitor is 631 and clinical negligence claims is 108. By comparison, the number of 'disposed' accident at work cases is 952 and clinical negligence claims is 131. It appears from the statistics that decree of absolvitor is indeed a common method of settlement in Scotland. This I would suggest does not support the assertion that settlement by decree of absolvitor is used as a tactic by insurers but is in fact common practice on settlement of all personal injury claims. Decree of absolvitor gives all parties, pursuers and defenders, the legal certainty that a case has been settled so that they can move forward.

If as the Convener suggested during the Committee on the 21st, the inclusion in the draft Bill of the ability for a victim/survivor to resurrect claims previously settled by decree of absolvitor, relates to the perception that this was used as a tactic by insurers, this perception is unfounded. As I stated to the Committee on 21st February this is not something that the ABI has heard previously. If the Committee has any additional evidence relating to this matter I would welcome them sharing this with us.

As Graeme Watson of FOIL who also attended the Committee sessions stated, he has dealt with a large volume of childhood abuse claims for defenders/insurers (400 to 500) and he did not recall settlement by way of decree of absolvitor being requested by insurers in the circumstances alleged by the Convener, but recalls being "somewhat surprised that the claimants' solicitors proposed absolvitor".

While we are willing to consider any evidence the Committee can offer in support of the alleged practice, in the absence of such we do not recognise such a practice exists.

Pre-Action Protocol

During my evidence to the Justice Committee on February 21 in relation to the Limitation (Childhood Abuse) (Scotland) Bill I referred to the potential for the design of a Pre-Action Protocol and how this could improve the claims process in damages actions for historic abuse for all parties concerned. I thought it might be helpful for the Committee if I provided some further detail on this.

A Pre-Action Protocol is a process which requires the parties to a prospective action (in this case for damages for personal injury) to comply with a compulsory protocol before the commencement of legal proceedings. The aims of a Protocol are to encourage the fair, just and timely settlement of disputes before court proceedings are raised, and to narrow the issues for litigation in cases which do not settle.

As the Committee will know, a mandatory Pre-Action Protocol for personal injury claims was approved in Scotland by the Scottish Civil Justice Council and has been introduced to apply to claims occurring after 28 November 2016. Further details can be found at <http://www.scottishciviljusticecouncil.gov.uk/new-rules/2016/07/25/new-compulsory-pre-action-protocol>

We believe that a Pre-Action Protocol for historic abuse claims would have a number of benefits for all parties involved: survivors, the Scottish courts service, and defendant organisations. Evidence and settlements could be agreed at an earlier stage without requiring survivors to endure what Barnardo's Scotland refers to as the secondary trauma of having to repeat the details of their abuse for the court.

An effective Pre-Action Protocol could avoid the time and expense incurred by all parties in going to court, releasing court costs and time to consider other cases. The litigation process which faces pursuers in historic abuse actions is currently confusing, lengthy, and expensive and in some cases a deterrent to bringing claims. We recognise that a Protocol may not meet the requirements of all victims and survivors of historic child abuse. However, we believe it would provide an alternative to court action which would offer pursuers access to justice via a route that would secure a faster, legally binding settlement for them. Defender organisations and their insurers would have an incentive to settle claims where agreement can be reached without incurring court and legal fees, thereby managing the financial risk of handling such cases. Pursuer solicitors could secure resolution for their clients more swiftly than by taking cases to court and would avoid incurring legal fees on behalf of their clients.

Pre-Action protocols are intended to ensure:

- more early contact between the parties;
- better and earlier exchange of information;
- better investigation by both sides;
- that the parties are in a position where they may be able to settle cases fairly and early without litigation;
- that if litigation does become necessary, proceedings can run to the court's timetable efficiently with points of issue narrowed as a result of following the pre-action protocol;
- predictability in the time needed for steps to be taken;
- the standardisation of relevant information, including documents to be disclosed.

Our experience is that Pre-Action Protocols have proven highly effective in speeding up the litigation process in England and Wales since 1999 by providing a framework for both parties involved to follow, increasing early clarity, encouraging a 'cards on the table' approach to claims, reducing the number of experts and encouraging earlier settlement of cases. Following the success of standard Protocols for injury

cases, specialist Protocols were introduced, including for the Resolution of Clinical Disputes and Disease and Illness Claims, in England and Wales.

There is currently no separate Protocol for abuse claims in England and Wales, where such claims are governed by the Civil Procedure Rules (CPR) and the Personal Injury Pre-Action Protocol. There is an opportunity for Scotland to lead the rest of the UK in developing a Protocol for historic abuse cases which significantly improves the legal process and reduces the emotional impact for victims and survivors seeking access to justice.

The new Scottish mandatory Protocol for personal injury claims took just over 12 months to be implemented and come into effect following its initial consideration by the Scottish Civil Justice Council, and so if it was decided to introduce a Protocol for historic abuse cases then we would hope that this could be delivered within a similar period of time.

I hope this further detail is helpful for the Committee in its consideration of the Bill.

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