

Justice Committee

Limitation (Childhood Abuse) (Scotland) Bill

Written submission from the Association of Personal Injury Lawyers

The Association of Personal Injury Lawyers (APIL) was formed by pursuers' lawyers to represent the interests of personal injury victims. APIL is a not-for-profit organisation with 26 years' history of working to help injured people gain the access to justice they need. APIL currently has more than 3,500 members, 168 of whom are in Scotland. Membership comprises solicitors, advocates, legal executives and academics whose interest in personal injury work is predominantly on behalf of pursuers.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- to promote full and just compensation for all types of personal injury;
- to promote and develop expertise in the practice of personal injury law;
- to promote wider redress for personal injury in the legal system;
- to campaign for improvements in personal injury law;
- to promote safety and alert the public to hazards wherever they arise; and
- to provide a communication network for members

Introduction

APIL welcomes the introduction of the Limitation (Childhood Abuse) (Scotland) Bill, and applauds the Scottish Government's recognition that abuse victims are a unique category of pursuer. Currently, an abuse victim who has not come forward within three years of the alleged abuse, or within three years of reaching majority, must rely on judicial discretion as to whether it is possible for a case to proceed. Due to this, many abuse victims are being denied access to justice, and are unable to obtain closure from their ordeal.

The Bill not only removes the limitation period for those abuse victims who have not yet brought a court action, it also includes provisions to allow a right of action for some pursuers who had their initial claim disposed of due to limitation issues. In response to the Scottish Government's original consultation we argued that any failure to include these provisions "would create a grossly unjust state of affairs where people who have dared to come forward earlier are rejected but people who have waited longer are permitted to pursue their case"¹.

We therefore welcome the fact that provisions have been included in this Bill for those who have previously brought a claim, but we are disappointed that, as currently drafted, the provisions in the Bill will prevent some abuse victims from receiving the compensation they deserve, and to which they have a right. The provisions on

¹ <https://www.apil.org.uk/files/pdf/ConsultationDocuments/3162.pdf>

previously litigated rights of action also present some practical difficulties for pursuers, and it is vital that these are addressed by the Scottish Government.

Unfairness of new section 17C

Clause 1 of the Bill will insert new section 17C into the Prescription and Limitation (Scotland) Act 1973. This new section applies to cases where a right of action in respect of relevant personal injuries has previously been disposed of due to time bar issues, and where a “relevant settlement” was made to the pursuer.

The Bill defines a relevant settlement as something which was agreed by the parties to the initial action; the pursuer entered into it under the reasonable belief that the initial action was likely to be disposed of by the court by reason of section 17 (of the Prescription and Limitation (Scotland) Act 1973); and where any sum of money which it required the defender to pay to the pursuer, or to a person nominated by the pursuer, did not exceed the pursuer’s expenses in connection with bringing and settling the initial action. Section 17C (5) clarifies that if a pursuer received more than was necessary to pay his expenses, it is not a relevant settlement.

In these circumstances the pursuer may, under the threat of a limitation defence, have been advised to accept a settlement at a much lower amount than the full value of his claim. If he received an amount, however small, above the level of his judicial expenses, he will be unable to make a fresh claim under the provisions of this Bill.

A hypothetical example

In this hypothetical example a defender agreed to make a token payment of £2,000 after an initial action was brought. The payment, sometimes referred to as a ‘nuisance value’ payment, would be offered to the pursuer to discontinue his claim. The amount would be nowhere near the true value of the claim. The pursuer, under the reasonable belief that the initial action was likely to be disposed of by the court due to limitation issues, accepted the payment. As the pursuer’s judicial expenses came to £1,950, the pursuer was left with a small payment of £50. As the settlement in this case exceeded his judicial expenses, he is now unable to bring a fresh action under the terms of this Bill.

The pain of the abuse does not end when the abuse ends, and it can have long term and far reaching consequences on the pursuer’s life. He could have suffered from any number of psychological conditions, including post-traumatic stress disorder. He may also have developed problems with alcohol or drug addiction. For this he received £50. His claim in current terms without the obstacle of limitation may be worth a six figure sum. It is of course important to avoid double compensation, but this provision goes far beyond that. By denying proper compensation to those who received what would in current terms be no more than a pittance, the Bill discriminates against those who tried, and failed, to obtain proper compensation in the past. This is grossly unfair. It is extremely difficult to understand the rationale behind this provision.

An alternative approach

We recognise and appreciate that with these provisions the Scottish Government may be attempting to avoid double compensation for abuse victims. There is, however, a much fairer way to avoid double compensation. The pursuer, despite receiving a sum greater than his judicial expenses in a previous relevant settlement, should still have the right to bring a fresh claim under this Bill if his initial claim was disposed of due to limitation issues. Any compensation (as opposed to expenses) already received should, however, be offset, with interest, against any compensation received in the fresh action.

This approach will not only avoid double compensation, but more importantly will ensure that an abuse victim receives proper compensation, which will have been carefully calculated based on his individual case.

Practical difficulties of new section 17C

The provisions in new section 17C also create some immediate practical difficulties for pursuers in very old cases. Some of the initial actions which this Bill attempts to deal with will go back 20, 30, or 40 years, and it is likely to be difficult to prove the settlement terms in these cases. Solicitors are only required to retain files for 10 years, and court papers are unlikely to record the settlement terms. A joint minute (the document which would usually bring proceedings to an end in a negotiated settlement) will simply record the fact that the action was settled out of court, while insurers' records may just record that a payment was made.

The Bill also fails to address where the onus of proof lies. Will it be for the pursuer to provide details of the relevant settlement in the initial action, or will it be for the defender to prove what has already been paid? It is vital that these practical difficulties are addressed by the Scottish Government before the legislation is implemented.

Sam Ellis, Parliamentary Officer
APIL
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