

# **RESPONSE TO SCOTTISH LAW COMMISSION'S DISCUSSION PAPER ON PERSONAL INJURY ACTIONS: LIMITATION & PRESCRIBED CLAIMS**

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## **1. Introduction**

It can be argued that claims for compensation for historic child abuse are a breed apart from other personal injury claims. This is due to:

- the nature of the injury inflicted (which through shame, guilt or as a result of threats made at the time prevents survivors disclosing their experiences for a long time).
- the time when the injury was inflicted (when a child, often without any meaningful support)
- the aetiology of the injury (psychiatric harm may only manifest itself as a recognisable sequelae of the abuse much later)
- the injuries were deliberately caused (although many Defendants may be responsible in negligence as opposed to the tort of trespass to the person - assault and battery)

## **2. Why is limitation such an issue in child abuse claims?**

The reasons why potential claimants take so long in coming forward flow directly from the act of abuse itself and it is important that courts understand this when considering limitation.

- Adults who abuse are concerned to conceal their behaviour. They will therefore be keen to establish a climate of fear and secrecy with the children concerned. Threats of violence, death or the death of family members to ensure a victim's silence are common features, which may have a prolonged impact on the psyche of a child.
- Abuse will often be accompanied with understandable feelings of guilt, shame and embarrassment, which may continue long into adulthood. This may be accompanied by the belief that society will judge adults who admit to being abused as a current risk to children, drawing on the myth that abused people grow up to become abusers themselves.
- In the past, children may have attempted to report their abuse at the time, perhaps to the police, social workers, or teachers. In those not so enlightened days, often children were not believed and sent back to the abusive environment, where they were severely punished for speaking out. As adults, the expectation that they will not be believed now, together with a general mistrust of authority figures generally, continue to mark their lives.
- As they have grown up, in order to try and function in every day life, adults abused in childhood will have put the mental anguish and distress they will have suffered to one side. In order to cope with the trauma, the memories are suppressed (the person is said to "disassociate" memories of abuse). Survivors of abuse may have their memories "triggered" much later, possibly by an article in a newspaper or on television, or being contacted as part of a police investigation.

- One key feature of coming to terms with past abuse is obtaining “justice”, the recognition by society that what was done was wrong, and that those responsible should be held to account. This may apply as much to securing a criminal conviction as to obtaining compensation through the civil courts.

All these factors are supremely relevant in understanding the reasons for the delay in bringing claims in the first place. Understanding ones client and his/her own particular story is imperative as limitation issues are decided on the facts of the individual case.

### **3. The current law in England & Wales**

One reason why representing survivors of childhood abuse is such a challenge is that the case law seems to change at an alarming rate. Subject to arguments of capacity and minority, the current law is as follows:

#### 3.1 Suing the abuser/ his employer: Trespass to the person [assault and battery] / false imprisonment

Suing the abuser: A fixed 6 years from the assault, or the age of 18/ the end of a period of mental incapacity: section 2 of the Limitation Act 1980. No date of knowledge arguments (*Stubbings -v- Webb (1993)*) and no arguments to dis-apply the limitation period allowed.

Suing the employer of the abuser: Vicarious liability for trespass/ intentional breach of duty: Again a fixed 6 years as above. (*KR & others v Bryn Alyn Community Holdings Ltd & another (2003)*) although the non-extendable 6 year limitation period appears at odds with the House of Lords’ assumptions in *Lister and others -v- Hesley Hall Ltd (2001)*. It should be noted that whilst in *Lister* their Lordships allowed a claim brought by claimants against the employers of a school warden for his deliberate assaults (the claim failed in negligence, but succeeded on arguments of ‘breach of duty’), their Lordships did not consider limitation as it was not raised. Having said that, had the House of Lords accepted a 6 year non-extendable time limit, the claimants in *Lister* would have been statute barred in 1991, and they had issued proceedings in 1997. See also the cases of *A v Hoare*; *H v Suffolk County Council*; *X & Y v London Borough of Wandsworth (2006)* where the Master of the Rolls giving the judgment of the Court of Appeal, has given permission to the appellants to appeal to the House of Lords to argue that *Stubbings* is wrong or can be distinguished, and that *Bryn Alyn* should be overturned.

As a result of these non-extendable time limits, it is more likely that a claim will be brought in negligence.

#### 3.2 Negligence/ breach of duty

Suing the negligent party: 3 years from the date upon which the claimant’s cause of action accrued, or the date of knowledge (if later) – section 11 (4) Limitation Act 1980 [Note that if a cause of action accrued before 4<sup>th</sup> June 1954, the claimant’s solicitor must refer to older legislation]

Suing the employer: Vicarious liability exists for non-intentional breaches of duty with a 3 year limitation period as above.

(See the anomaly that is *S -v- W & another (1995)*, where a claimant was out of time for suing her father for abusing her, but was within time for suing her mother in negligence for failing to protect her from that abuse. On this basis, one cannot sue an employer vicariously for the deliberate acts of an abusing employee by relying on sections 11, 14 and 33 of the Limitation Act. However one can sue an employer vicariously for (for

example) another employee's failure to report the abuse which he/ she knew was going on, and use date of knowledge and section 33 discretion arguments.)

Date of knowledge arguments under sections 11 and 14 of the Limitation Act 1980: 3 years from the date when the victim knew or should have known that:

Section 14(1)

- (a) **The injury in question was significant** (defined as when a claimant would have considered it serious enough to issue proceedings for damages against a defendant who did not dispute liability and had the funds to meet a judgment). In *Bryn Alyn*, the Court of Appeal spent some time on this issue. It concluded that in cases of psychiatric injury the time when that injury became significant to the claimant was when he/ she realised they were suffering from a psychiatric injury which could be caused by the abuse. The claimants had realised that they were being abused at the time, but did not understand the effects of that abuse, and the psychiatric injuries for which they were claiming had not manifested themselves at that time. The Court of Appeal likened the development of the psychiatric injury in such cases to progressive industrial disease cases (see paragraph 95 of the judgment).
- (b) **the injury was attributable to the breach of duty**. Possibly, knowledge that the claimant was assaulted is not enough. Could it be argued that the claimant only had requisite knowledge when he knew of the precise systemic failings for which he sues the defendant? In a case where the claimant sues the local authority who ran the children's home where he was abused by their employee, does the claimant's date of knowledge only crystallise when he knows that the defendant's failure to have in place proper recruitment processes, calling for references for example, is the basis for the claimant's cause of action?
- (c) **the identity of the defendant ...**

Section 33: There is discretion to bring proceedings after this time under section 33 but *Bryn Alyn* re-stated the law that this remedy is an exceptional one (following *Thompson – v- Brown (1981)*). The court's discretion is informed by balancing arguments of prejudice to each party (s. 33 (1)) and having "regard to all the circumstances of the case" and in particular to those issues detailed at section 33 (3), paraphrased below:

- a) the length of and reasons for the claimant's delay;
- b) the effect of the delay on the cogency of the evidence
- c) the conduct of the defendant after the cause of action arose, including the extent to which it responded to requests for information from the claimant which may have been relevant to the claimant's cause of action
- d) the duration of any disability of the claimant arising after the date of the accrual of the cause of action
- e) the extent to which the claimant acted promptly and reasonably once he knew he had a cause of action
- f) the steps taken by the claimant to take legal and other expert advice and the nature of any such advice

In *Bryn Alyn*, the Court of Appeal stated as a general rule of thumb that the longer the delay, the more the prejudice shifts to the defendant and that if date of knowledge arguments are applied correctly, then the allowance of a further delay under section 33 will be limited, but dependant on an examination of the facts of each case.

### 3.3 Concealment

Outlined in section 32 of the Limitation Act, this applies to both actions defined by section 2 (deliberate torts) and section 11 (negligence/ nuisance/ breach of duty claims leading to personal injury).

If any fact relevant to a claimant's right of action has been concealed by a defendant the limitation period will not begin to run until the claimant has – or should have - discovered that concealment. For example where perhaps a local authority tells the claimant that it did not employ the abuser, but in fact later it is discovered that it did, this would be a relevant fact and the claimant would have a good argument for obtaining an extension to the limitation period.

## 4. Issues raised by the Scottish Law Commission's discussion paper

### Page 8 – 'Legislative Competence'

The Commission notes that the ECHR have accepted that limitation periods are not incompatible with the European Convention (*Stubbings v UK (1996)*). It should however be noted that the ECHR in that case did provide a caveat to that:

*"54. There has been a developing awareness in recent years of a range of problems caused by child abuse and its psychological effects on victims, and it is possible that the rules on limitation actions applying in Member States of the Council of Europe may have to be amended to make special provision for this group of claimants in the near future."*

## 5. Part 6 – List of proposals and questions – our response

1. *The legislation on limitation of actions in personal injury cases should continue to include a "date of knowledge" as a starting date for the running of the limitation period. (Paragraph 2.5)*

Agree.

2. *Should the current statutory assumption of admitted liability be replaced by an assumption that the action had a reasonable prospect of success? (Paragraph 2.11)*

Yes, for the reasons given by the Commission in the discussion paper.

3. *If a claim for sufficiently serious injury is not pursued timeously, the subsequent emergence of additional injury, even if distinct, should not give rise to a fresh date of knowledge and a further consequential limitation period for a claim for that additional injury. (Paragraph 2.21)*

The case of *Carnegie v Lord Advocate* which provides some consternation here for the Law Commission, would have been decided differently in England & Wales. The Pursuer (or Claimant in England) would have a 6 year non extendable limitation period in which to sue for deliberate assaults (section 2, Limitation Act 1980, *Stubbings v Webb*) against both his assailants and his employers and so on the facts of this case as we understand it, the Claimant would have been 'in time'.

However the different limitation periods for deliberate assaults (or non-negligently caused injury) and for negligently caused personal injuries which exist in England & Wales is not desirable. See for example the latest from the Court of Appeal on this issue: *A v Hoare; H v Suffolk County Council; X & Y v London Borough of Wandsworth (2006)*. Whilst the Court of Appeal felt constrained by *Stubbings v*

*Webb*, they have granted permission to the appellant Claimants to appeal to the House of Lords.

We believe the Commission is correct in its interpretation of the Court of Appeal's findings in *Bryn Alyn* (see paragraph 2.20 of the discussion paper) and on that basis we would agree with the Commission's proposals for question 3.

*4. Knowledge that any act or omission was or was not as a matter of law actionable Should continue to be irrelevant in the date of knowledge test. (Paragraph 2.27)*

Agree.

*5. In formulating any amended provisions relating to a pursuer's state of knowledge it remains appropriate to continue to use the terminology of "awareness". (Paragraph 2.30)*

Agree.

*6. The legislation on date of knowledge should continue to contain a constructive awareness test. (Paragraph 2.32)*

Agree.

*7. The current statutory test of whether it was "reasonably practicable" for the pursuer to become aware of a relevant fact is not a satisfactory test. (Paragraph 2.37)*

Agree.

*8. As a matter of general approach, should an awareness test incline towards subjectivity rather than objectivity? (Paragraph 2.47)*

In our view it should incline towards subjectivity. This was the recommendation of the Law Commission of England & Wales in their 2001 report ('Limitation of Actions', Law Com No. 270). The "man on the Clapham omnibus" cannot answer for the Claimant's awareness. The test must take as its marker a person in a similar situation to the actual Claimant. The *Adams v Bracknell Forest* case did use an objective test and we believe that the result was unjust to this Claimant who issued proceedings within 3 years of ascertaining that he was dyslexic; nevertheless it was found that he should have realised earlier that his problems could have been ameliorated by the Defendant.

*9. To what extent are significant practical difficulties commonly encountered in investigating and commencing claims within the current three year limitation period? (Paragraph 2.50)*

The reasons why survivors of child abuse do not disclose their abuse are detailed above. In view of the uncertainties over limitation, and because for many clients primary limitation has already expired by the point when they enter their solicitor's office for the first time, the prudent practitioner will need to issue a protective claim form as soon as funding for the claim has been established. Without the luxury of the three year period to investigate the claim, the practitioner has to attempt to do so within the 4 month validity of the claim form; requesting a substantial amount of historic records, proofing witnesses, instructing medical experts and so on. In some ways though, this just goes with the territory. If the three year limitation period was

replaced with a five year period, we would suggest it would not make an awful lot of difference for practitioners in the child abuse field.

10. (a) *The reference in the 1973 Act to legal disability by reason of unsoundness of mind should be replaced by a reference to the pursuer's being an adult with incapacity within the meaning of section 1(6) of the Adults with Incapacity (Scotland) Act 2000;*

(b) *Should the reference to incapacity be qualified by its being confined to the adult concerned being incapable (by reason of mental disorder or physical disability) of making, communicating, or understanding decisions respecting the making of a claim for damages for the personal injury in question?*

(c) *Should the appointment of a guardian lift the suspension of the running of time by reason of the incapacity of the adult in question?(Paragraph 2.57)*

a) Agree

b) No

c) Yes, as long as the guardian has been appointed specifically to deal with the personal injury claim, as opposed to any other matter. [Note to APIL: I'm not sure if this is correct and my knowledge of Scottish law on guardianship is zero, so this may be best left to those who know!]

We too would be against any specific provision for psychological incapacity caused by abuse (para. 2.56 of the discussion paper). It would – as the Law Commission of England & Wales pointed out in its 2001 report - be extremely difficult to define, as the conditions from which survivors suffer are disparate. Medical causation (i.e. whether and if so to what extent a psychological condition can be attributed to the abuse alleged) is often a live issue in these cases and would present too many problems in this context.

11. *Judicial discretion to allow a time-barred action to proceed should be retained. (Paragraph 3.26)*

Yes. We particularly endorse the comments made by the Commission at paragraphs 3.24 to 3.26 of the discussion paper. As long as there is unfettered judicial discretion to dis-apply the limitation period then no special rule excluding child abuse claims from the limitation regime is necessary in our view.

12. *Should the exercise of judicial discretion be subject to a time limit and if so, what should the time limit be? (Paragraph 3.28)*

No. Judicial discretion should not be fettered by an arbitrary time limit for all the reasons that prescription for personal injury claims in Scotland was abolished and why the Law Commission of England & Wales felt there should be no long-stop date in personal injury claims. To do otherwise would be to introduce prescription again by the back door. No arbitrary time limit can deal with the facts of an individual case. We must have confidence in our judiciary to apply their discretion fairly - balancing the prejudices to each party - but freely.

13. (a) *Assuming judicial discretion to disapply the time-bar is retained, should the legislation include a non-exhaustive list of matters to which the court should give consideration when asked to exercise its discretion?*

(b) *If so, should such guidelines-*

(i) *include any factor additional to those currently listed in section 33(3) of the Limitation Act 1980?*

(ii) *omit any factor listed in section 33(3)? (Paragraph 3.34)*

Whilst we note the Law Commission say at paragraph 3.34 that there is perhaps no advantage to having a non exhaustive list of statutory matters to inform the judge's discretion, we believe however that to codify section 33 (1) and (3) factors in legislation in Scotland would be helpful for practitioners, ensuring the law is more transparent and bringing some parity to the law of England & Wales and Scotland. For this reason we would not wish to include any additional factor, nor exclude any factor not already codified in section 33.

*14. Which of the following options is preferred, and why?*

*[A] Subjective test:*

*An awareness test which provides for a subjective test of constructive knowledge (along the lines expressed in Smith and Others v Central Asbestos Co Ltd) with-*  
*Option (1) -*

*(a) a three year period following the date of acquisition of constructive awareness in which to institute proceedings and*

*(b) no judicial discretion to disapply that time-bar.*

*Option (2) -*

*(a) a five year period following the date of acquisition of constructive awareness in which to institute proceedings and*

*(b) no judicial discretion to disapply that time-bar.*

*Option (3) -*

*(a) a three year period following the date of acquisition of constructive awareness in which to institute proceedings and*

*(b) temporally unlimited judicial discretion to disapply that time-bar.*

*Option (4) -*

*(a) a five year period following the date of acquisition of constructive awareness in which to institute proceedings and*

*(b) temporally unlimited judicial discretion to disapply that time-bar.*

*Option (5) -*

*(a) a three year period following the date of acquisition of constructive awareness in which to institute proceedings and*

*(b) judicial discretion limited to a period of time (say five years) after the action became time-barred.*

*Option (6) -*

*(a) a five year period following the date of acquisition of constructive awareness in which to institute proceedings and*

*(b) judicial discretion limited to a period of time (say five years) after the action became time-barred.*

*[B] Objective test*

*An objective test of constructive awareness with-*

*Option (7) -*

*(a) a three year period following the date of acquisition of constructive awareness in which to institute proceedings and*

*65*

*(b) temporally unlimited judicial discretion to disapply the time-bar.*

*Option (8) -*

*(a) a five year period following the date of acquisition of constructive awareness in which to institute proceedings.*

*(b) temporally unlimited judicial discretion to disapply the time-bar.*

*Options (9) -*

*(a) a three year period following the date of acquisition of constructive awareness in which to institute proceedings and*

*(b) judicial discretion limited to a period of time (say five years) after the action*

*became time-barred.*

*Option 10 -*

*(a) a five year period following the date of acquisition of constructive awareness in which to institute proceedings.*

*(b) judicial discretion limited to a period of time (say five years) after the action became time-barred. (Paragraph 3.35)*

Preferred option is option 3. Subjective test for the reasons given in answer to question 8 above, and unfettered judicial discretion to dis-apply the limitation period for the reasons given in answer to question 12 above. A three year as opposed to a five year primary limitation period will provide some consistency between the jurisdictions of England and Wales and Scotland, and is the preferred option of the English & Welsh Law Commission.

The anomaly in English law over the non extendable 6 year period for non-negligently caused injury under section 2 of the Limitation Act 1980 without the ability for Claimants to argue a later date of knowledge or judicial discretion to dis-apply, produces much injustice in that jurisdiction and should not be repeated in Scotland. It is hoped that that anomaly in England will be dealt with either by Parliament (in response to a lobbying campaign by child abuse solicitors and their clients), or the courts (when the House of Lords considers the appeals in *A v Hoare*, *H v Surrey County Council*, *X & Y v London Borough of Wandsworth* (2006)).

*15. No statutory alteration to the present law on onus of averment and proof in relation to limitation issues should be made. (Paragraph 4.5)*

Note to APIL – not my field!

*16. Should any changes be made to the procedure in personal injury actions in the Court of Session to facilitate resolution of limitation issues as a preliminary matter? (Paragraph 4.8)*

Note to APIL - No idea!

*17. Claims in respect of personal injury which have been extinguished by negative prescription before 1984 should not be revived. (Paragraph 5.24)*

There may be good reasons for marking out abuse cases as special cases to allow those claims to be revived where they have been extinguished before 1964:

- a) To harmonise the dealing of these cases with the English & Welsh jurisdiction (where there is no prescription). NB The Law Commission of England & Wales looked into imposing a long stop date on personal injury claims in its report in 2001 and rejected the idea, mainly because of the problems caused by abuse cases and some industrial disease claims (see Law Commission Report No. 270, para. 3.107).
- b) The category of case can we believe be easily defined – where a Pursuer pursues damages as a result of negligence/ breach of duty or intentional harm (in England & Wales, trespass to the person/ assault and battery) arising out of abuse or neglect in childhood.
- c) The justice of such a move may lie in the fact that in 1984, when prescription in Scotland was abolished, there were no precedents for claims brought in relation to abuse in childhood/ neglect when in institutional care. In England & Wales, the first major public enquiry in relation to social services failings was the

Leicestershire 'pin down' enquiry in 1992/3, and the Waterhouse enquiry 'Lost in Care' relating to the North Wales cases didn't report until 2000. The case law in this area is all very recent: The leading case of *Stubbings v Webb* (later *Stubbings v UK*) started with a writ issued in 1987 and did not come to judicial attention until 1989 when the action was summarily struck out on limitation. "Failure to remove" cases (where it is alleged that social services should have intervened in a family where a child was being abused at home and failed to protect the child) were only given the green light with *X v Bedfordshire Council* (1995) when it went to the European Court as *Z v UK* (2001). The law is constantly changing and updating in a way that legislators and practitioners could not have imagined in 1984.

- d) Commonly cases are being allowed by the English courts where the claimants were in care 30 – 40 years ago. To quote some recent decisions in the English courts on limitation:

*Albonetti v Metropolitan Borough of Wirral*, 10<sup>th</sup> May 2006, Mckinnon J – Claimant abused in 1969 to 1970 at a children's home. Primary limitation expired in 1976 (when aged 21), claim issued in 2001, yet judgment for the Claimant on limitation/ date of knowledge arguments.

*Young v Catholic Care & The Home Office*, 18<sup>th</sup> November 2005, HHJ Cockroft (unreported) – Claimant abused between 1969 and 1977 at a residential school and later a detention centre. Primary limitation expired in 1980, claim issued in 2003, yet judgment for the Claimant on limitation/ date of knowledge arguments.

*Wood & others v Kirklees Metropolitan District Council*, 14<sup>th</sup> December 2004, HHJ Hawkesworth QC (unreported) – earliest abuse in 1976 in a care home, primary limitation expiring for that Claimant in 1986, claim issued in 2000, judgment again for the Claimants on limitation /date of knowledge.

*Bryn Alyn* – The earliest date for the abuse was in 1973 (case of KJM), primary limitation expired in 1980, claim issued in 1999, case allowed through on date of knowledge grounds and damages awarded.

It is not we submit beyond the bounds of possibilities that a claim could be brought in relation to abuse prior to 1964 which would still meet the test on date of knowledge and be allowed to proceed were it not for the prescription provisions. In addition of course any claim in England and Wales brought by a patient (by means of mental incapacity) could proceed as of right notwithstanding when the abuse occurred, as time does not run against that individual at all.

- e) The reasons why many claimants fail to come forward promptly with their allegations is due to the nature of the injury – the fact that the psychological element only manifests itself (sometimes) after a considerable period and the fact that threats were made to them as children not to tell, which has a profound psychiatric effect on a young mind. To prevent claimants from suing as of right as a result of prescription means the defendants (whether their actual abusers, or their negligent care provider [local authority/ religious institution etc]) profit from the way they inflicted the injury in the first place.
- f) The distinguishing factor here between other personal injuries is that these injuries were deliberately caused.
- g) The law in Scotland already has sufficient safeguards to consider the Defendant's prejudice in the delay in actions commencing should prescribed actions be allowed to proceed.

- h) In the alternative, should these submissions not be accepted, then perhaps recommendation could be made to the Scottish Parliament to set up a body equivalent to the Irish Redress Board to deal with those abuse cases which would otherwise be prescribed, where the abuse occurred prior to 1964, and take them out of the jurisdiction of the civil courts altogether, whilst satisfying the requirement for justice to be done to the victims of historical abuse.

22<sup>nd</sup> May 2006

### **Cases cited**

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- KR & others -v- Bryn Alyn Community (Holdings) Ltd & another [2003] EWCA Civ 85, CA
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- X v Bedfordshire Council [1995] 1 WLR 152; Z v UK (ECHR 10 May 2001).
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### **Sources**

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- 'Limitation of Actions' Report of the Law Commission of England & Wales, 3<sup>rd</sup> April 2001, Law Com No.270
- Gumbel, Johnson & Scorer (2002) Child Abuse Compensation Claims, The Law Society, London
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