

SCOTLAND

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Reforming the law of limitation of actions in cases of
historic childhood abuse

A. THE UNREFORMED LAW

- The Prescription and Limitation (Scotland) Act 1973:
- Section 17—Personal injuries claims are subject to a three-year limitation period (the triennium).
- The triennium runs from: (a) the date when the injuries were sustained (or, in cases where the act/omission causing the injuries was a continuing one, from the date when the act/omission ceased); *or*
- (b) (if later) the date on which the pursuer became aware, or on which it would have been reasonably practicable for him/her to become aware, that the injuries were sufficiently serious to justify legal action against the defender.

A. THE UNREFORMED LAW

- Section 19 gives a court power to override s 17, and allow the pursuer to bring an action, “if it seems to it equitable to do so”.
- In exercising discretion, courts have typically refused to waive s 17 if there is a risk that a defender would be materially prejudiced by the bringing of the action.
- So, in cases where a long period of time has passed since the injury, and in consequence crucial witnesses have died or other evidence no longer exists, courts are likely not to waive the triennium.
- In childhood abuse cases under the unreformed law, courts took the view that the limitation period began to run when the child reached the age of 18.

A. THE UNREFORMED LAW

- Because in such historic childhood abuse cases, decades have typically passed since the start of the triennium, and witnesses/other evidence may no longer be available, courts have usually refused to waive s 17.
- An example of a 2017 case under the unreformed law: *K v The Marist Brothers* [2017] CSIH 2: an unsuccessful appeal against a first instance decision not to waive the triennium in relation to a claim for damages for childhood physical and sexual abuse. More than fifty years had passed since the alleged abuse.
- Court held the defenders would be materially prejudiced were the claim to be allowed, given the length of time which had passed since the alleged abuse.

B. THE REFORM

- The 1973 Act was amended as of 4th October 2017 by the addition of new sections 17A–17D.
- The new sections disapply the triennium which would otherwise be applicable to personal damages claims in respect of childhood abuse.
- To benefit, an injured party must have been under 18 when the injuries occurred (or in the case of continuing injuries, when the injuries began), the injuries must have derived from abuse (incl. sexual, physical, and emotional abuse, as well as neglect), and the injured party must raise the claim personally (see new s 17A).

B. THE REFORM

- The new provisions have retrospective effect, extending to rights of action accruing before the coming into force of the provisions, and additionally they grant some prior litigants a right to bring a new claim (see new s 17B).
- CAVEAT: the triennium will still apply to childhood abuse cases if the defender satisfies the court that s/he would be substantially prejudiced were the action to proceed or where, having regard to the pursuer's interest in the action proceeding, the court is satisfied that the prejudice is such that the action should not proceed (see new s 17D).

B. THE REFORM

- Given this caveat, has anything much changed?
- Yes: there is now a presumed entitlement to bring claims of childhood abuse, no matter when they occurred. The onus lies on the defender (or, *ex proprio motu*, the court) to find a reason to justify disallowing the claim, whereas previously the onus lay on the pursuer to convince a court it would be equitable to allow the claim to be brought outside the triennium.
- But in cases where the abuse occurred many decades before, it is likely that claims will still be denied on the basis of likely 'substantial prejudice' to the defender.
- So, in all likelihood, *K v Marist Brothers* would still have been decided the same way under the reformed law.

B. THE REFORM

- Note the inclusion of “neglect” as a form of actionable abuse.
- Neglect is not defined. Presumably it includes failure to clothe, feed, or house a child adequately.
- What of other arguable forms of neglect: could there be educational neglect? E.g. inadequate home-schooling?
- What of radicalising a child, e.g. showing it terrorist literature or videos?
- Note also: “emotional abuse”—presumably covering the child who claims s/he was denied adequate love and affection?
- It will be interesting to see how the courts’ views develop in the light of societal norms and expectations.