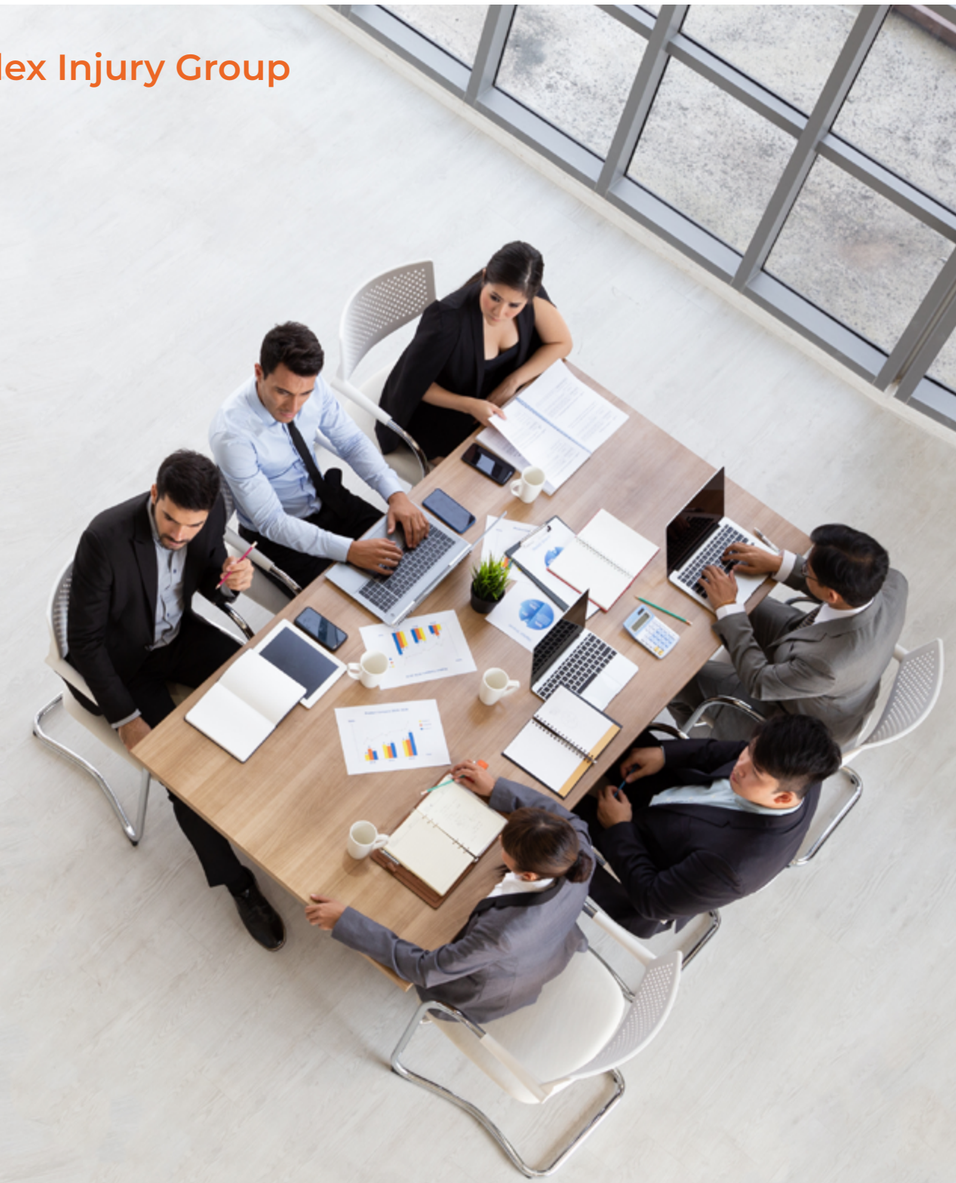
Insight 203

from Horwich Farrelly's Large & Complex Injury Group

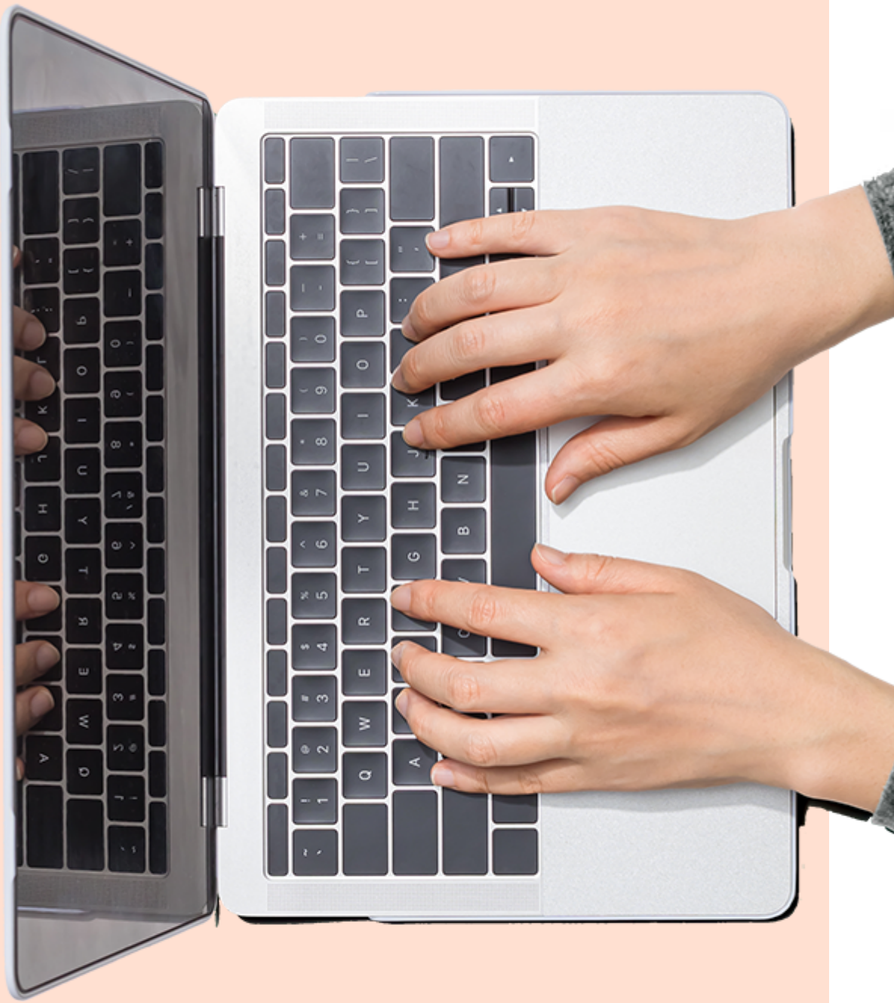


WELCOME TO INSIGHT

- **Welcome to this week's edition of Insight in which we consider the long-awaited decision of the Outer House of the Scottish Court of Session on the subject of limitation.**

Alastair Gillespie
Partner &
Head of Abuse
alastair.gillespie@h-f.co.uk

Steven Smart
Partner &
Head of HF Scotland
steven.smart@h-f.co.uk



Limitation in Scotland: how much does the Sailors' Society judgment really tell us?

B and C against Sailors' Society [2021] CSOH 62 (20 April 2021 – Lady Carmichael)

This judgment on a preliminary limitation proof is the first decision from the senior Scottish court on the new limitation legislation. There is no time bar for claims based on abuse occurring after September 1964. Claimants no longer must give reasons for the delay in bringing their claims.

The burden now rests on the defender to show either that a fair trial is not possible or that it has suffered substantial prejudice which outweighs that suffered by a claimant who is prevented from proceeding. Lady Carmichael held that a fair trial was no longer possible and dismissed both claims. It is anticipated that an appeal will follow to the Inner House. This article considers whether the judgment sets a precedent or instead reinforces much that we already know.

Background

This was a preliminary proof on the question of limitation under the new limitation legislation in Scotland, specifically sections 17D (2) and (3) of the Prescription and Limitation (Scotland) Act 1973 ('the 1973 Act') which had been by section 1 of the Limitation (Childhood Abuse) (Scotland) Act 2017 ('the 2017 Act').

Allegations

B alleged that he was subjected to sexual, physical and psychological abuse by two employees at the defendant's care home, Lagarie ('the home'), between 1968 and 1970.

C alleged similar abuse by the married couple who managed the home between 1974 and the closure of the home in 1982. C also alleged that she was abused by other residents (one of whom, her brother, was deceased) and seriously sexually abused by sailors, abuse which C alleged had been facilitated by WB, but those allegations and the legal liability basis for them were unclear and the evidence in relation to the abuse by sailors was of doubtful quality.

B had previously intimated a claim for his abuse in 2001, but that claim was discontinued in 2006 because of other court rulings dismissing similar actions as time-barred. C had not previously intimated her claim. Both came forward after the change in legislation and intimated their claims in October 2018.

The facts

Evidence was taken on affidavit and provided by way of supporting documents. There was no oral evidence. The following information was crucial to the assessment of whether a fair trial was possible and, even if it was, whether the defender had suffered substantial prejudice sufficient to outweigh the obvious prejudice to the claimants in barring the claim.

- B alleged abuse by two employees, AM and NS. AM died in 1978. NS died in 1999 and his wife died in 2012.
- C alleged abuse by WB and MB. WB died in 1993. MB died in 2017. C's brother A, whom she alleged also abused her, died in 2018.
- Certain witnesses, including MB, had been interviewed after B (and four other former residents) had intimated claims in the early 2000s. No evidence had been obtained to corroborate any allegation made at that time.
- The home's records were destroyed in a flood in the 1980s. Specifically, there were no care records, punishment books, visitors' books, accident books, incident logs, daily logs or admission registers.
- Extensive enquiries on intimation of the current claims had identified a limited number of witnesses, but the more important witnesses were dead or untraced.
- Disclosure was piecemeal and unreliable. Some documentation had survived, including incomplete

social care records, but neither of the social workers who could then be located was able to give evidence of any value.

- The defendants were financially vulnerable. These claims were two of 19 intimated thus far. The sums claimed by B and C alone totalled over £2M. Insurance was limited in time and indemnity (albeit those indemnity limits were at times rather vague). Significantly, reserves were only half what they had been prior to 2015 and the threat of having to make payments under the new Scottish redress scheme, not being covered by insurance, created the very real risk of complete financial collapse.

The law

We would not usually reproduce several paragraphs of black letter law in legal updates. However, this is new legislation that is referred to frequently in the judgment and is potentially of huge legal significance. it is well worth setting out in full and having in mind the full provisions:

17A Actions in respect of personal injuries resulting from childhood abuse

(1) The time limit in section 17 does not apply to an action of damages if—

(a) the damages claimed consist of damages in respect of personal injuries,

(b) the person who sustained the injuries was a child on the date the act or omission to which the injuries were attributable occurred or, where the act or omission was a continuing one, the date the act or omission began,

(c) the act or omission to which the injuries were attributable constitutes abuse of the person who sustained the injuries, and (d) the action is brought by the person who sustained the injuries.

(2) In this section— 'abuse includes sexual abuse, physical abuse, emotional abuse and abuse which takes the form of neglect, 'child' means an individual under the age of 18.

17B Childhood abuse actions: previously accrued rights of action

Section 17A has effect as regards a right of action accruing before the commencement of section 17A.

17C Childhood abuse actions: previously litigated rights of action

(1) This section applies where a right of action in respect of relevant personal injuries has been disposed of in the circumstances described in subsection (2).

(2) The circumstances are that—

(a) prior to the commencement of section 17A, an action of damages was brought in respect of the right of action ('the initial action'), and

(b) the initial action was disposed of by the court—

(i) by reason of section 17, or

(ii) in accordance with a relevant settlement.

(3) A person may bring an action of damages in respect of the right of action despite the initial action previously having been disposed of (including by way of decree of absolvitor).

(4) In this section—

(a) personal injuries are 'relevant personal injuries' if they were sustained in the circumstances described in paragraphs (b) and (c) of section 17A(1),

(b) a settlement is a 'relevant settlement' if—

(i) it was agreed by the parties to the initial action,

(ii) 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, and

(iii) 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.

(5) The condition in subsection (4)(b)(iii) is not met if the terms of the settlement indicate that the sum payable under it is or includes something other than reimbursement of the pursuer's expenses in connection with bringing and settling the initial action.

17D Childhood abuse actions: circumstances in which an action may not proceed

(1) The court may not allow an action which is brought by virtue of section 17A (1) to proceed if either of subsections (2) or (3) apply.

(2) This subsection applies where the defender satisfies the court that it is not possible for a fair hearing to take place.

(3) This subsection applies where—

(a) the defender satisfies the court that, as a result of the operation of section 17B or (as the case may be) 17C, the defender would be substantially prejudiced were the action to proceed, and

(b) having had 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."

The defenders' submissions

The new law was clear in its intentions of improving access to justice to victims of abuse but at the same time protecting the defenders's right to be able fairly to defend itself. The defenders now faced the burden of proving that a fair trial was impossible; or that the prejudice suffered would be so substantial that the action should not be allowed to proceed. This was to be an exercise in equity, in which the court was to assess fairness and prejudice to each party. In the present cases, the absence of witnesses and documents was so acute that a fair opportunity to defend the claims was not possible, precluding the defence from testing the claimants' accounts. There were inconsistencies in the evidence of the claimants and their supporting witnesses, social care records raised questions about honesty, reliability and troubled behaviour, opportunities to complain and other potentially relevant matters.

Yet because the defenders could not rely on any adult witness and so much potentially crucial documentation was missing, they had not been able to investigate these issues any further, thus they could not advance a positive case or challenge any account. Even if the court decided a fair trial was still possible, the prejudice then suffered by the defendants was substantial, not least financially, due to changes in the law on vicarious liability and the effect on quantum of judicial interest.

The claimants' submissions

The starting point under the new law was that, as in criminal cases, claims involving abuse should be heard in all but the most exceptional circumstances. Abuse cases in England & Wales had been allowed to proceed even though alleged perpetrators were dead because the available evidence was sufficiently cogent. The gravity of the wrongdoing was such that a longer delay would be acceptable than in, say, a trial of a minor road traffic

offence, even if most of the potential witnesses were by that time deceased. Lack of documents was largely irrelevant as there would be no record of abuse taking place. Psychiatric and vocational experts had been able to produce reports. Further, there was substantial insurance cover, and the claimants had even reduced their claims to £300k to reflect known limits applicable to their own cases.

The conduct of the defenders and their solicitors, also came under direct fire. There had been no detail on what had been done to investigate between 2001, when B originally intimated his claim, and 2004. Witness statements that could have been taken (not least from MB) were not produced. It was also pointed out that investigations (by the same solicitors) seemed to have begun only in summer 2020, not long before the September trial, even though the cases had been intimated in 2018. Police records were applied for only a week before proof and extensive documents produced on the first morning. In essence, the defenders cannot complain about delay and prejudice when they haven't done what they should reasonably have done to investigate the claims when they had more than enough time and opportunity to do so.

Judgment of Lady Carmichael

First and foremost, it had been appropriate to hold the preliminary proof. The question of a fair hearing cannot be held over to the end. The Sheriff Appeal Court had recently confirmed this in *M v DG Executor 2021 SLT (Sh Ct) 87*. The court should decide now whether a fair hearing is possible; and even if it is considered possible, that does not automatically mean that the full proof won't ultimately be unfair. After all, the judge specifically made no finding as to the truth of the allegations. It was not appropriate for her to do so. She had heard no oral evidence. The court had to assess fairness based on the evidence then presented.

Secondly, there was no ambiguity in the new provisions. If a fair trial is not possible (section 17D (2)) that is an end to the matter. No balancing exercise is required. It is only if a fair trial is possible in principle that the requirement to assess and balance prejudice is then engaged, and the court then turns to section 17D (3).

Although there had been much debate about whether criminal and civil cases were analogous in the context of fairness, notwithstanding the different standards of proof, the judge carefully and cogently reasoned that drawing that analogy would be dangerous. Civil cases in which the alleged wrongdoers have died are very different to criminal cases of sexual abuse in which the accused individuals can give instructions and evidence; in addition, questions of causation and loss must also be answered in civil cases but have relevance in a criminal trial.

The judge then followed, virtually in its entirety, the reasoning of Chamberlain J, who had recently dismissed the claim of *JXJ* (decided in the English High Court under Scots law) which was the principal decided case on the new legislation. The judge revised Chamberlain J's approach slightly and decided that the following approach should be adopted:

- There is no time bar and no onus on the claimant to demonstrate good reasons for delay
- The burden under section 17D (2) is on the defendant to show a fair trial is no longer possible.
- Under section 17D (3), the defendant must show both significant prejudice and that the prejudice to the defendant outweighs that suffered by the claimant if the action did not proceed. This test is of a higher standard than had previously been the case, where only a 'real possibility of significant prejudice' had to be shown.
- It follows that previous cases under the old legislation (section 19A of the 1973 Act, concerning judicial discretion) can be relevant to the extent that they dealt with the question of whether there can be a fair hearing, but cases dealing with the 'real possibility of significant prejudice' should be disregarded as the standard of prejudice required is different.
- Any balancing act under section 17D (3)(b) does not reintroduce a requirement for a claimant to justify their delay.

Applying that analysis to the current cases, the judge dismissed both. The following factors were crucial to her ruling:

- It is not obvious that either claimant will fail to prove their case or that their account is inherently unlikely. However, the deaths of the wrongdoers in each case were very significant. No account is available from them. The defendant has no evidence from them on which to base their case.
- In B's case, they were dead before any claim was intimated. Even if former members of staff might be traceable, but that cannot remedy the fundamental difficulty caused by the absence of the evidence of the alleged abusers. In B's case a fair hearing is not possible. The judge also made some brief and relatively vague comments about section 17D (3) prejudice but did not come to any conclusion as she had already decided that a fair trial was not possible and thus no balancing act of prejudice was required.
- In C's case the absence of evidence from WM and MB prevent a fair hearing. Even if a fair trial had still been regarded as possible, the fact that C's claim also involved allegations of acts or omissions by WB and/or MB facilitating or permitting abuse by sailors and other residents, in addition to the relatively poor quality of that evidence, meant that the judge would have dismissed the claim in any event under section 17D (3)(b).

Comment

Much of the judge's reasoning is in line with the approach to section 17D that was set out by Chamberlain J in *JXJ*. The court should examine whether a fair trial is possible. If it isn't, then that is a complete answer to the claim. If, however, a fair trial is still regarded as possible, based on whatever evidence is put before the court at that point, then the court must engage in an equitable balancing exercise which will specifically not involve any assessment of the reasons for the delay in bringing the claim.

Having assessed the damage to the prospects of a fair trial flowing from the deaths and disappearance of so many potentially crucial witnesses and important documents, Lady Carmichael concluded that the defender had discharged the burden imposed upon it by section 17D (2) and ruled that the claims could not be allowed to proceed.

Lady Carmichael did distinguish her approach from that of Chamberlain J in limited respects:

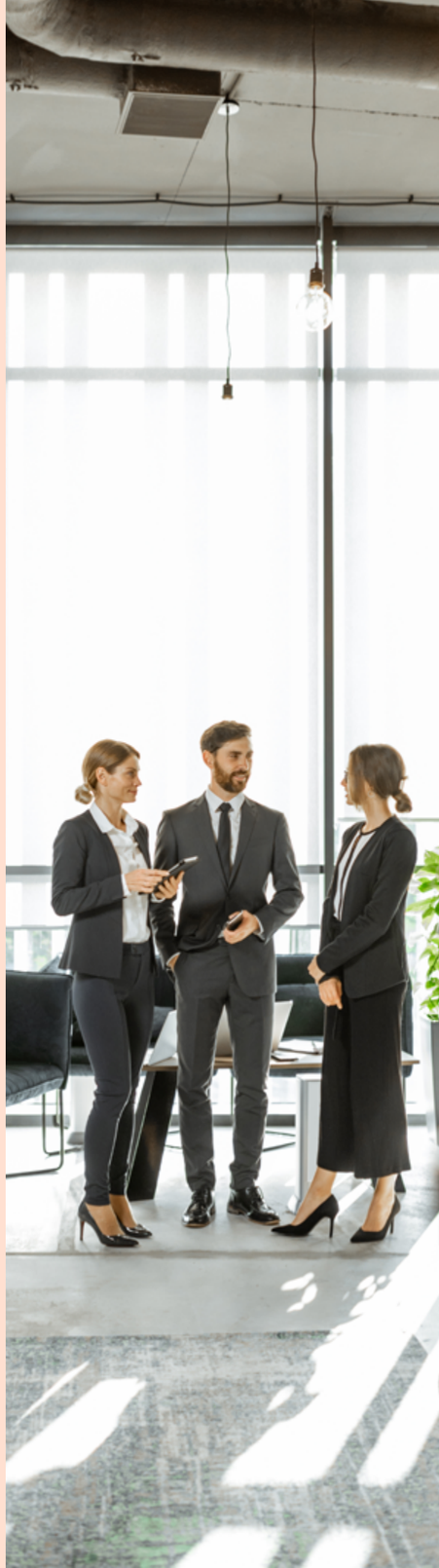
1. Beware of England & Wales decisions on limitation, as the burden there still lies on the claimant to show that a fair trial can take place and there is a far greater focus on the credibility and reliability of a claimant; and

2. Beware also previous Scottish decisions on balancing prejudice (under section 19A of the 1973 Act) as that exercise was conducted when applying a very different test, specifically 'a risk of significant prejudice' as compared to the new requirement to show actual substantial prejudice.

Despite those distinctions, which send out a clear message that the Scottish courts will be developing their own precedent in these cases rather than regarding themselves as being in any way directed by decisions in other jurisdictions, Lady Carmichael reached what many would regard as an expected conclusion on the facts of these two cases. All the main alleged abusers were deceased. Only one, WB, had even been the subject of police investigation, and that had been conducted after he had died. The claimants' affidavits and records contained material that the court would require to be tested, but so much evidence was no longer available that this was simply impossible.

This case would have been much more significant from a legal perspective had the court decided that a fair trial was still possible notwithstanding all these evidential problems. What practitioners will value much more are those decisions to come that involve the substantial prejudice balancing act. How will the courts approach that exercise? What is the definition of substantial in this context? What factors will not be sufficiently substantial? Although these cases are fact-sensitive, there is scope for the courts to lay down some guidelines for practitioners. This was never going to be the case in which that would happen, and although Lady Carmichael made some very limited comments about prejudice those remarks were obiter and took up a mere two paragraphs of a 93-page judgment.

It is anticipated that an appeal will follow, but it is difficult to see where a successful challenge might lie. The present judgment is noteworthy as the first analysis of the 2017 Act by the senior Scottish courts, but it does not set a precedent that clearly alters the landscape of limitation issues in abuse claims raised by the new legislation: we would anticipate that much more challenging decisions involving prejudice lie ahead.



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