

Civil Law of Damages: Issues in Personal Injury

A Consultation Paper

Civil Law of Damages: Issues in Personal Injury

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The Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

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Dear Consultee

Consultation Paper on Civil Law of Damages: Issues in Personal Injury

This letter is to inform you of the launch of the attached Scottish Government consultation on Civil Law of Damages: Issues in Personal Injury.

The Scottish Government has given a manifesto commitment to “reform the law of damages. Building on the work of the Scottish Law Commission, we will consolidate and update the existing legislation to bring it into the 21st century”.

The paper seeks views on implementation of the Scottish Law Commission’s 2004 report on *Damages for Psychiatric Injury* and its recommendations for improving the way in which mental harm is addressed by the law; Its 2007 report on *Personal Injury Actions: Limitation and Prescribed Claims* and the recommendations for clarifying and improving the law on time-bar; and on the one outstanding recommendation in its 2008 report on Damages for Wrongful Death. There is also a chapter seeking views on a range of related issues such as the Discount Rate; Interest on Damages and Periodical Payments.

The consultation is only available as an electronic publication, apart from a very limited number published in hard copy for consultees who do not have access to the internet.

We are inviting electronic or, where this is not possible, written responses to this consultation paper by 15 March 2013. If you have any queries please contact Ria Phillips (Email: Ria.Phillips@scotland.gsi.gov.uk or Tel: 0131 244 2442).

We would be grateful if you would use the consultation questionnaire provided or clearly indicate in your response which questions you are responding to as this will help our analysis of responses.

Please send your response with the completed **Respondent Information Form** (see

"Handling your response" in the consultation document) to:

damages@scotland.gsi.gov.uk

or

Civil Law Reform Unit
Scottish Government
2nd Floor West, St Andrew's House
Regent Road
Edinburgh
EH1 3DG

Yours faithfully

Ria Phillips

Ministerial Foreword

Chapter 1: Introduction

Chapter 2: Psychiatric Injury and Appendix

Chapter 3: Time-Bar and Appendix

Chapter 4: The Wider Reform Agenda: Before and After

- Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007
- Damages (Asbestos-related Conditions) (Scotland) Act 2009
- Damages (Scotland) Act 2011
- Discount Rate
- Periodical Payments
- Interest on Damages

Annex A: The Consultation Process and How to Respond to this Consultation

Annex B: Consultation Questionnaire

Annex C: Next Steps in the Process

Annex D: Recipient List

MINISTERIAL FOREWORD



“We have strong, resilient and supportive communities where people take responsibility for their own actions and how they affect others”
A National Outcome being pursued by the Scottish Government

We all have a responsibility to ensure that our actions do not harm our fellow citizens. If, through wilful or negligent action breaching a duty of care, anyone of us materially harms or is harmed by another in a manner which was reasonably foreseeable, the law should allow for appropriate redress.

It is important that Scots civil law in relation to delict – wrongdoing and associated remedies, specifically financial restitution through the payment of damages – is up-to-date, providing a fair, balanced approach in determining rights and obligations. Just as the Scottish Civil Courts Review undertaken by the Rt Hon Lord Gill, looked at modernising how rights and obligations are enforced, and the Review of Expenses and Funding of Civil Litigation under Sheriff Principal Taylor is looking at the financial aspects of civil litigation, so the Scottish Government believe it is appropriate to look too at modernising the substance of those rights and obligations and gave a commitment to “reform the law of damages. Building on the work of the Scottish Law Commission, we will consolidate and update the existing legislation to bring it into the 21st century”.

We are grateful to the Scottish Law Commission for its valuable work in reviewing and recommending reforms for important aspects of the law on claims for damages relating to personal injury.

The Commission’s 2004 report on *Damages for Psychiatric Injury* and, to a degree, its 2008 report on *Damages for Wrongful Death* suggested various means of improving the way in which mental harm is addressed by the law. Chapter 2 of this paper considers aspects of these Reports. Its 2007 report on *Personal Injury Actions: Limitation and Prescribed Claims* (Chapter 3 of this paper) made proposals for clarifying and improving the law on time-bar.

However, in the light of matters raised in the Scottish Parliament and our own dialogue with stakeholders, we are aware that concerns remain, in some quarters, about aspects of key proposals for reform. We believe, therefore, that further work is warranted, in order to focus on the key points and secure a clear understanding of

the implications as we move to consolidate reform of damages law as recommended by the Commission.

To facilitate that, we wish to engage with stakeholders so that we may take account of all relevant perspectives in making progress.

I am pleased, therefore, to publish for consultation this paper on issues in the law on damages for personal injury. I look forward to considering the responses.

A handwritten signature in black ink, appearing to read 'R. Cunningham', with a stylized flourish at the end.

Roseanna Cunningham MSP
Minister for Community Safety and Legal Affairs

1. INTRODUCTION

“Awards of damages are compensatory in nature, not punitive: the aim is to put the victim – or his family – in the position in which he would have been had he not been injured, so far as money can achieve this”

Scottish Law Commission, Report on Damages for Wrongful Death (September 2008)

Background

1.01 The Scottish Government has given a manifesto commitment to “reform the law of damages”. Damages for personal injury are the amount of money negotiated between pursuers and defenders, or awarded by the courts, to compensate the pursuer for the injury and loss suffered as a result of the wrongdoing of the defender.

1.02 Awards of damages are not intended to penalise the defender. Their purpose is, as far as possible, to restore the victim or his/her family, to the position they would have been in had the wrongful harm not occurred (*restitutio in integrum*).

1.03 If a civil action for damages for personal injury is to be successful – and aside from the practical question of whether the wrongdoer has the means to pay any award, either directly (e.g. with his/her own assets) or indirectly (e.g. through the existence of a relevant insurance policy) – evidence needs to demonstrate on the balance of probabilities that:

- ◆ there was a breach of a duty of care owed to a person;
- ◆ that breach of duty caused the person real harm;
- ◆ that harm was reasonably foreseeable as a result of that breach; and
- ◆ the person or entity that failed to fulfil the duty of care behaved deliberately or negligently (i.e. the behaviour fell below the standard expected of a reasonable person).

1.04 It is also necessary for a civil action for damages to be brought within a defined period of the personal injury coming to light. This period, commonly called “time-bar”, is set out in the Prescription and Limitation (Scotland) Act 1973. The period aims¹ to strike an appropriate balance between the rights of individuals who may wish to make a claim for personal injury having a reasonable opportunity to do so and on the other hand, the protection of all individuals and organisations against open-ended civil liability.

¹ As noted in the SLC’s Discussion Paper and elsewhere in this paper, there are other important aims. As the SLC said, provisions on limitation “are often seen simply as a protection for a defender against stale claims. However, they also serve a wider purpose.”

Aim

1.05 It is important that our civil law keeps pace with modern life and delivers justice as efficiently and effectively as possible. The broad principle underlying this consultation is that the law on key aspects of damages for personal injury should be modernised and simplified, particularly with regard to the criteria determining eligibility to make a claim for damages and also the timescales within which a claim should be made.

1.06 The consultation seeks views on what the Government's approach should be on aspects of:

- the Scottish Law Commission's (the Commission) proposals for reform of the law on damages for psychiatric injury as outlined in Chapter 2;
- the Commission's proposals for reform of the law on prescription and limitation (also known as "time bar") for actions for personal injury (both psychiatric and physical) as outlined in Chapter 3.
- a range of related issues such as the Discount Rate; Interest on Damages and Periodical Payments as outlined in Chapter 4.

1.07 The proposals in Chapters 2 and 3 come from a series of three reports, with recommendations for reform and draft legislation, published by the Commission on different aspects of the law on civil actions relating to damages for personal injury. One report – on *Damages for Wrongful Death*² – has in large part already been implemented, following earlier consultation, through the Damages (Scotland) Act 2011. Along with one outstanding matter from that report, issues from the other two reports – on *Damages for Psychiatric Injury*³ and on *Personal Injury Actions: Limitation and Prescribed Claims*⁴ – are now the subject of this consultation.

Further Policy Development

1.08 The Government takes the view that, in principle, there could be merit in legislating along the broad lines suggested by the Commission in these reports. Therefore, subject to the views of consultees on detailed aspects, the Government anticipates legislating in the Scottish Parliament in the current session (2011-2016) to reform the law on damages for psychiatric injury and the law on limitation.

1.09 Further examination of some detailed aspects of the new provisions proposed by the Commission reports is necessary, because:

- a number of stakeholders have expressed concerns in relation to some particular aspects of the recommendations; and

² The report is available at www.scotlawcom.gov.uk/download_file/view/350 and the preceding discussion paper is available at www.scotlawcom.gov.uk/download_file/view/115.

³ The report is available at www.scotlawcom.gov.uk/download_file/view/237 and the preceding discussion paper is available at www.scotlawcom.gov.uk/download_file/view/129.

⁴ The report is available at www.scotlawcom.gov.uk/download_file/view/393 and the preceding discussion paper is available at www.scotlawcom.gov.uk/download_file/view/122.

- since the reports were published, there have been developments – for example, in the judicial and legislative spheres – which may well be of relevance to consideration of the issues.

1.10 It is important to ensure that any resulting legislation is robust and durable, with no unintended consequences and that it takes account of all relevant perspectives, including equalities considerations and any potential financial and regulatory implications.

1.11 This paper does not seek to repeat the detailed consideration of all aspects of the Commission reports, but is restricted to exploring and seeking views from consultees on specific points and also seeks views on whether the proposals for reform will meet the Scottish Government's intent of modernising the law of damages for psychiatric injury and the law of limitation to reflect modern day society. Responses to the consultation will inform the development of legislative proposals. Readers are directed to the relevant Commission discussion paper, report and draft legislation for information in more depth on the development of the Commission's proposals.

1.12 In addition, as part of the consultation process, we hope to be able to gather information to enable us to assess the impact and costs of implementing any of the proposals, or indeed of not doing so, from the perspective of a range of interests. Previous experience in this area has revealed that such information can be difficult to access.

1.13 As regards psychiatric injury, the Commission's 2004 report stated that "our recommendations have been framed with the intention of not increasing liability to any substantial extent.... Overall, we expect the effects of our recommendations to be fairly neutral." The Commission did not venture an assessment of the potential implications for liability of the recommendations in its 2007 and 2008 reports.

1.14 It is important that we produce as robust financial and other impact assessments as possible if, following consultation, we are to take forward legislation. The Financial Memorandum etc will be subject to close scrutiny by the Scottish Parliament.

1.15 At a number of points throughout the paper there will be broadly framed questions seeking responses on the costs and benefits/drawbacks of implementing the proposals. It would be extremely helpful if you could consider these questions and respond (with an explanation) in so far as it is possible for you to do so, drawing on specific evidence and/or wider knowledge, experience and expertise.

2. PSYCHIATRIC INJURY

“The common law rules which apply only to reparation for mental harm ... should be replaced by a statutory obligation to make reparation for wrongfully caused mental harm”

Scottish Law Commission, Report on Damages for Psychiatric Injury (August 2004)

Introduction

2.01 If a person suffers a psychiatric injury as a result of the fault of another, there may be a case for an award of damages. The existing common law rules have been developed by the courts over the past century. The rules are complex and widely considered to be in need of reform.

2.02 The Scottish Ministers invited the Commission to review the law in this area and make appropriate recommendations for reform. The Commission’s Report on *Damages for Psychiatric Injury* (Scot Law Com No 196) was published in August 2004: its recommendations are reproduced in the appendix to this chapter.

2.03 In addition, the issue of psychiatric injury which arises in relation to the wrongfully-caused death of a loved one was subsequently addressed in the Commission’s Report on *Damages for Wrongful Death* (Scot Law Com No 213), which was published in September 2008: its recommendation in that regard is also reproduced in the appendix to this chapter.

2.04 The 2004 report and recommendations have not been the subject of significant discussion since publication. On the other hand, the Commission’s 2008 report and recommendations have been the subject of several consultation exercises and, in relation to many of the issues, have resulted in new legislation: the Damages (Scotland) Act 2011. One aspect of the reform agenda proposed by the 2008 report, however, has not been dealt with thus far: that is the one which relates to psychiatric injury arising from the wrongfully-caused death of a relative.

2.05 To better inform our position on the area of psychiatric injury, the Scottish Government invites views on specific features of the law on damages for psychiatric injury and psychiatric injury caused by wrongful death.

Current law

2.06 The Commission described the current law on delictual liability for psychiatric harm as “an unprincipled set of rules with a number of defects”. The 2004 Report identified six main defects in the present common law rules in the sphere of pure psychiatric injury as follows:

- “Victims are divided into two categories, primary victims and secondary victims. The two categories have different rules for compensation, yet the boundary between them is unclear.”

- “While, in general, liability arises only if the injury to the victim is reasonably foreseeable by the wrongdoer, a primary victim may recover for an unforeseeable psychiatric injury if some physical injury was foreseeable but did not occur.”
- “For secondary victims at least, compensation is awarded only if they have suffered a shock – the sudden appreciation by sight or sound of a horrifying event.”
- “Secondary victims can recover only if they meet the so-called Alcock⁵ criteria:
(There must be a close tie of love and affection between the secondary victim and the injured person; The secondary victim must have been present at the accident or at its immediate aftermath; and The secondary victim’s psychiatric injury must have been caused by direct perception (i.e. through his or her own unaided senses) of the accident or its immediate aftermath.)”
- “Secondary victims can recover only if their psychiatric injuries were foreseeable in a person of “ordinary fortitude” – a legal construct that is difficult to evaluate.”
- “Rescuers are treated as primary rather than secondary victims in that they do not have to meet the Alcock criteria. However, they may well have to have feared for their own safety.”

2.07 Having identified this range of defects and taking account of Lord Steyn’s observation, in *Frost v Chief Constable of South Yorkshire Police*, that “... the law on the recovery of compensation for pure psychiatric harm is a patchwork quilt of distinctions which are difficult to justify... It must be left to Parliament to undertake the task of radical law reform”, the Commission’s 2004 report concluded that the existing common law rules should be replaced by a new statutory scheme.

2.08 Against this background:

Q2(a) do you agree that the 2004 report’s summary of defects in the existing common law is a reasonably full and accurate one in today’s circumstances?

YES / NO

Q2(b) do you agree in principle that existing common law rules which apply only to reparation for mental harm should be replaced by a statutory obligation to make reparation for wrongfully caused mental harm?

YES / NO

Please explain and, where possible, provide evidence for your answers.

⁵ The ‘Alcock criteria’ are derived from the case of *Alcock v Chief Constable of South Yorkshire Police* (1992).

Recommendations for reform

2.09 Broadly, the Commission recommended the introduction of a “principled yet flexible framework”. Paragraph 1.9 of the Report summarised what its recommendations would provide:

‘(i) There would be no liability for mental harm, whether caused intentionally or unintentionally, if a person could reasonably be expected to endure it without seeking damages. People would be expected to put up with mental harm resulting from bereavements and the normal stresses or vicissitudes of life or the particular life that they lead.

(ii) The wrongdoer would be liable for unintentionally caused mental harm only if it constituted a medically recognised mental disorder and was a reasonably foreseeable consequence of the wrongdoer’s act or omission.

(iii) A person who suffers unintended mental harm as a consequence of witnessing or learning of an incident (in which he or she was not directly involved) would not be entitled to damages unless he or she had a close relationship with another person killed, injured or imperilled in the incident or was acting as a rescuer in relation to the incident. These requirements would be in addition to those in (ii) above.’

2.10 Paragraph 1.10 of the Report set out the main changes to the current law:

- ◆ it will no longer be necessary that the mental harm is induced by ‘shock’,
- ◆ victims will no longer be classed as primary or secondary,
- ◆ **all** victims will be expected to be resilient in the face of the ordinary ‘vicissitudes’ of life,
- ◆ damages will only be available for mental harm caused by hearing of or witnessing an incident if the parties had a close relationship, and
- ◆ there will be no liability for unintentional mental harm if it was not reasonably foreseeable, unless it arose from another type of harm e.g. a physical injury for which there is liability and the mental harm was not too remote.

2.11 The underlying objective of the framework proposed by the Commission is to strike a proper balance in the approach of the law and the following section of this paper will explore three key changes aimed at ensuring that that balance is struck:

- ◆ **Individual resilience** - so that there would be no liability for any mental harm caused intentionally or unintentionally, if a person could be reasonably expected to endure it without seeking damages

- ◆ **Foreseeability** - so that a person who causes unintentional mental harm will only be liable if the harm constitutes a medically recognised mental disorder and it was a reasonably foreseeable consequence of the wrongful behaviour
- ◆ **No direct involvement in the incident** – so that in those cases where the psychiatrically injured person was not directly involved in the incident, but suffered mental harm as a result of witnessing or learning about the incident, there would be no liability unless that person either (i) had a close relationship with someone who was killed, injured or imperilled in the incident or (ii) was acting as a rescuer in relation to the incident.

Individual Resilience

2.12 An existing restriction in Scots law is that, as regards a secondary victim, a defender is not liable to pay damages in relation to a psychiatric injury which would not have been expected to occur in someone of “ordinary fortitude”. After considering whether this level of resilience should in future be extended to apply to primary as well as secondary victims, the Commission eventually concluded that, for reasons of practice and principle, it should not. This reflects the Commission view that the concept provides an artificial and unsatisfactory mechanism for protecting defenders against claims from exceptionally vulnerable individuals and, therefore, should be applied to neither category of victim.

2.13 Against this background:

Q2(c) do you agree that the concept of ‘ordinary fortitude’ is unsatisfactory and, therefore, should no longer be a consideration in assessing whether a victim should be able to seek damages for his/her psychiatric injury?

YES / NO

Please explain and, where possible, provide evidence for your answers.

2.14 As an alternative to providing that a defender is not liable if a person of ‘ordinary fortitude’ could have coped with the event in question, the approach preferred by the Commission is to specify that:

“(a) There should be a general restriction on the statutory obligation to make reparation for wrongfully caused mental harm if the mental harm is of such a nature that a person in the position of the victim could reasonably be expected to endure it without seeking reparation

(b) A person should reasonably be expected to endure mental harm without seeking reparation if, for example, it results from:

(i) the normal stresses or vicissitudes of life or of the type of life which that person leads; or

(ii) bereavements or losses of a type which persons can reasonably expect to suffer in the course of their lives.”

2.15 Before determining whether to adopt this recommendation in whole or in part, there are aspects which are worthy of careful consideration.

2.16 A general question arises as to whether the proposal that harm will only be eligible for damages if it arose outwith the routine ups and downs of life provides a necessary and sufficient restriction on liability for mental harm.

2.17 More specific questions arise from that part of the second limb of the proposed restriction, which suggests that a victim should not be able to secure damages for mental harm that arises from experiences which could be seen as being part-and-parcel of “the type of life which that person leads”. The intended effect of this provision is that damages would be precluded in relation to psychiatric injuries which arise from experiences which, although atypical for the general population, are not atypical for the particular category of person into which the injured person falls.

Examples:

(1) Where it is known that occupants of senior executive positions in certain highly-competitive commercial environments will experience stressful working conditions, then they should be expected to be able to cope with such conditions. Therefore, if they incur a psychiatric injury as a result of stressful working conditions, they should not be able to secure damages unless the level of stress was truly exceptional not just by everyday standards, but also by the standards of that particular environment;

(2) As part of their job members of the emergency services and armed forces are likely to be involved in traumatic events, and they should be expected to be able to cope with such events. Therefore, if they incur a psychiatric injury as a result of involvement in traumatic events, they should not be able to secure damages unless the level of trauma was truly exceptional not just by everyday standards, but also by the standards of their role.

2.18 On this latter point, the Commission explains that, although there must be allowance for exceptional circumstances, “society expects that members of such professions should be able to accommodate the stresses inherent in their work and that any resultant mental harm should be endured without seeking reparation”. It is for consideration as to how far such an expectation may be justified and whether the approach recommended by the Commission strikes the most appropriate balance between such a societal expectation and the rights of individuals who are employed in high-risk occupations.

2.19 Against this background:

Q2(d) do you agree that an appropriate balance between the right of an injured person to secure damages and the right of a defender to expect a certain level mental resilience in individuals would be achieved by the recommended focus on the stresses or vicissitudes of life or of the type of life that person leads?

YES / NO

Please explain and, where possible, provide evidence/describe situations where such an approach might produce unfair outcomes.

Reasonable Forseeability

2.20 In the case of *Page v Smith* the House of Lords ruled that unforeseeable psychiatric injury, where there had been a risk of physical injury even though that physical injury had not actually occurred, could qualify for an award of damages. The Commission has noted, however, that it can be argued that this is not consistent with “conventional delictual theory” which requires an actual physical injury following the breach of a duty of care, and that there is a difference between physical harm and psychiatric harm which should be recognised.

2.21 The current law on liability, as underscored by the ruling in *Page v Smith*, provides that a person who sustains mental harm without physical harm may secure damages, even though only physical harm was a reasonably foreseeable outcome of the wrongdoing in question. The Commission concluded that this approach is unduly wide and, in order to limit liability further where mental harm is caused unintentionally, recommended that the common law rules on delict which apply to reparation for physical harm should apply to the statutory obligation to make reparation for mental harm. Thus, as regards a medically recognised mental disorder sustained by a victim as a consequence of someone else’s wrongdoing, the Commission proposes in recommendation 6 that for mental harm the wrongdoer should be liable only if he/she:

“foresaw, or could reasonably have foreseen, at the time of the act causing the harm, that the act was likely to cause a person in the position of the victim to suffer such harm”

2.22 This proposal appears to have merit in terms of legal principle, but it is for consideration whether it may in practice lead to injustice in some situations. For example, where negligence leads to a victim incurring a relatively minor injury (e.g. a prick from a discarded needle or a small break in the skin caused by a nipping pet) which is negligible in physical terms but which leads to a relatively significant psychological reaction (e.g. because the victim fears the possibility of contracting a serious disease), the question is whether the recommended approach would prevent a claim for the psychological reaction and, if so, whether that is just.

2.23 Against this background:

Q2(e) do you agree that, where physical harm is reasonably foreseeable but mental harm is not, and a victim sustains only mental harm, the negligent party should not be held liable?

YES / NO

Please explain and, where possible, provide evidence for your answer.

No direct involvement in the incident

2.24 As well as protecting defenders against liability where psychiatric injury is not reasonably foreseeable, the law has traditionally also excluded liability where the injured person was somewhat removed from the wrongdoing and the resultant harm. In line with that traditional approach, the Commission took the view that “where mental harm is caused by witnessing or learning of a distressing event or harm caused to others by a wrongful act, it is sound policy that in general the victim should not be able to claim damages against the wrongdoer. It would be unacceptable both in social and economic terms if a wrongdoer was potentially liable to anyone who sustained mental harm merely by observing or learning of wrongful conduct and any effect that that wrongful conduct might have on third parties”. However, while recommending that as a general rule it should not be possible for people to secure damages if they develop a mental disorder because of wrongdoing in which they personally were not directly involved, the Commission suggests two limited but important exceptions to that restriction.

Exception 1 - where the victim was acting as a rescuer in relation to the incident.

Exception 2 - where the victim had a close relationship with a person injured or killed, or at risk of being killed or injured, in the incident.

2.25 In other words, it should be possible (provided the other standard criteria are satisfied e.g. as regards individual resilience and reasonable foreseeability of injury) for someone to secure damages if, having not been directly involved in the incident, they subsequently intervened as a rescuer in an attempt to save people or property and as a result of that altruistic act developed a mental disorder. This would in essence overturn the rule derived from the House of Lords decision in *Frost v. Chief Constable of South Yorkshire Police (1999)*, which the Commission concluded is “too restrictive”.

2.26 For the purposes of Exception 2 the term “close relationship” is defined as comprising “strong ties of affection, loyalty or personal responsibility” and including:

- any of a defined list of relatives, unless evidence proves that they did not have such a relationship with the person in the incident;
- any other person (e.g. a friend, neighbour, colleague), if evidence proves that they had such a relationship with the person in the incident;

and would mean that (provided the other standard criteria are satisfied e.g. as regards individual resilience and reasonable foreseeability of injury), even though they were not directly involved in the incident, they could seek damages for mental disorder arising from it.

2.27 Against this background:

Q2(f) do you agree that there should be a general prohibition on obtaining damages for a mental disorder where the victim has sustained that injury as a result of witnessing or learning of an incident, without being involved directly in it?

YES / NO

Q2(g) do you agree that it is appropriate to except rescuers from the general prohibition?

YES / NO

Q2(h) do you agree that it is appropriate to except those in close relationship with anyone killed, injured or imperilled by the accident from the general prohibition?

YES / NO

Q2(i) do you agree that these two exceptions strike the appropriate balance between the right of an injured person to secure damages and the right of a defender?

YES / NO

Please explain and, where possible, provide evidence for your answers.

2.28 This paper has highlighted a few key elements of the Commission's proposed framework. That is not to say that the other elements lack significance, and the Government would welcome comment on any / all of them, not least where comments are supported by evidence / experience. That is true of recommendations proposing reform (set out in the appendix to this chapter); it is also true of aspects where recommendations favour the *status quo*. Comment would also be welcome on the extent to which, for future claims and potential litigation, the proposed framework provides both flexibility of approach and certainty of outcome.

2.29 Against this background:

Q2(j) do you agree that other recommendations in the Commission's report are appropriate?

YES / NO

Q2(k) do you agree that the proposed framework strikes the appropriate balance between flexibility of approach and certainty of outcome?

YES / NO

Please explain and, where possible, provide evidence for your answer.

II. Psychiatric Injury caused by a Wrongful Death

2.30 The wrongful death of relative – e.g. from a negligently-caused industrial disease, or as the result of someone else’s dangerous driving – can be the source of significant emotional and economic loss. Through the Damages (Scotland) Act 2011 the law provides that bereaved relatives may seek damages from the wrongdoer to compensate for such losses.

2.31 In some cases, the reaction of bereaved relatives to a wrongful death may go beyond ‘normal’ distress and heartache and involve the development of a psychiatric condition which represents an injury in itself. In such cases, a question arises as to what extent, if any, a relative’s claim under the 2011 Act may take account of such a psychiatric injury (i.e. without having to demonstrate, as would be required in other circumstances, that the wrongdoer owed a duty of care to the injured relative as well as to the deceased). There are inconsistent court decisions, which precede the 2011 legislation, on this point which are relevant to the interpretation of section 4(3)(b) of the 2011 Act.

2.32 The court’s decision in *Gillies v. Lynch (2002)* suggested that it was right to take account of psychiatric injury in this manner. Lord Macfadyen commented:

“It seems to me to be quite artificial to attempt to draw a borderline between grief caused by bereavement and psychiatric illness caused by bereavement. If the relative’s emotional reaction to bereavement is of such a degree as to amount to psychiatric illness, I see no logic in treating it as something different from grief.”

2.33 However, in the decision in *Ross v. Pryde (2004)* Temporary Judge R F MacDonald QC explicitly disagreed with that view. He said:

“I am not in agreement with Lord Macfadyen that it is quite artificial to attempt to draw a borderline between grief caused by bereavement and psychiatric illness caused by bereavement and that, if the relative’s emotional reaction to bereavement is of such a degree as to amount to psychiatric illness, there is no logic in treating it as something different from grief. In my opinion the borderline between a natural human emotion and a pathological condition in the form of a psychiatric illness is not an artificial one and there is nothing illogical in differentiating between the two.”

2.34 In its 2008 report on *Damages for Wrongful Death*, the Scottish Law Commission sided squarely with the approach taken in *Ross v. Pryde*. The report concluded that “where a relative suffers a mental illness as a result of a death, that illness - and any derivative economic loss - is not reparable under section 1(4) [of the Damages (Scotland) 1976 Act]”. This reflects the view that “the purpose of section 1(4)(b) of the Damages (Scotland) Act 1976 was to provide damages for the relative’s “grief and sorrow” caused by the victim’s death... the emotions ordinarily experienced as a consequence of the death of a loved one.” The Commission suggested that in cases involving a

recognised psychiatric injury, damages should be sought under a separate heading and “the pursuer will have to establish that the defender owed her a duty of care - independent from that owed to the deceased - to prevent the pursuer sustaining mental harm: this would only arise if the pursuer was a primary victim of the defender's wrongful conduct or the Alcock criteria were satisfied.”

2.35 When the issue was considered by the Scottish Parliament's Justice Committee in 2010, during scrutiny of what became the 2011 Act, there was conflicting evidence. In its Stage 1 report, it was stated that “the Committee does not believe it would be appropriate for the Parliament to make a decisive choice between the conflicting Outer House decisions now, before it has been possible to enact any wider reform of the law of damages for psychiatric injury...” . Consequently, the 2011 Act did not address this particular issue and the law was left essentially unchanged pending “either a decisive Inner House ruling on the matter or until separate legislation on damages for psychiatric injury can address the issue in a more considered and comprehensive way”.

2.36 Against this background:

Q2(l) do you agree that it should not be possible for a bereaved relative to secure damages for psychiatric injury under section 4(3)(b) of the 2011 Act?

YES / NO

Please explain and, where possible, provide evidence for your answers.

Impact

2.37 To assist the Scottish Government in assessing the potential financial impact for the various parties of the proposals in this chapter (and while recognising that the amount of damages awarded will depend on the financial circumstances specific to each pursuer), we would welcome any material from consultees which could inform consideration of this important aspect and help in our preparation of a Business and Regulatory Impact Assessment and also the Financial Memorandum which would accompany any Bill.

Q2(m) what do you think the impact of implementing these proposals in full would be particularly in relation to the issues below?

Is it likely that more or fewer actions will be raised?

Is it likely that more or fewer cases come to court?

Is it likely that more or fewer cases will be settled out of court?

Is it likely that cases will require more or less preparation time?

Is it likely that cases will require more or less court time?

Is it likely that there will be more or fewer awards of damages?

Is it likely that awards of damages will be higher or lower?

Can you quantify the benefits for pursuers?

**Can you quantify the benefits for defenders?
Can you quantify the drawbacks for pursuers?
Can you quantify the drawbacks for defenders?**

Please explain and, where possible, provide evidence for your answers

Detailed views on the impact of any specific elements of the proposals would also be welcome.

2.38 We are also required to assess the impact of our policies on people according to certain protected characteristics. These are age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race and religion or belief. We have so far not identified ways in which the proposals on reform of the law of damages for psychiatric injury will impact positively or negatively on different groups of people with protected characteristics. However, in the context of psychiatric injury claims, factors such as age and sex may, for example, have a bearing on the amount of awards. This may mean that some groups may possibly be differently affected by the proposals for reform.

Q2(n) do you consider that the proposals for the reform of damages for psychiatric injury will affect people, either positively or negatively with the following protected characteristics (age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race and religion or belief)?

YES/NO

Please explain and, where possible, provide evidence for your answers.

PSYCHIATRIC INJURY: SCOTTISH LAW COMMISSION RECOMMENDATIONS

In recent reports the Commission has produced a series of recommendations on the law on damages for psychiatric injury: these are detailed below. The Commission has also produced draft Bills to give legislative effect to these recommendations: the draft Bills may be found within the Commission's reports.

Report on Damages for Psychiatric Injury (2004)

1. The common law rules which apply only to reparation for mental harm including the rules on liability for "nervous shock" should be replaced by a statutory obligation to make reparation for wrongfully caused mental harm.
2. The legislation abolishing the common law rules relating to delictual liability for mental harm should make clear that the abolition does not affect:
 - (a) the right to obtain damages for mental harm resulting from any other type of harm to the claimant for which there is delictual liability; or
 - (b) the right to obtain damages for distress, anxiety, grief or sorrow where the claim is made by a relative of a deceased person under section 1(4)(a) or (b) of the Damages (Scotland) Act 1976.
3.
 - (a) For the purpose of the statutory liability to make reparation for mental harm, mental harm should mean any harm to a person's mental state, mental functioning or well-being whether or not it amounts to a medically recognised mental disorder.
 - (b) Where the mental harm is caused unintentionally there should be no statutory liability to make reparation unless the mental harm amounts to a medically recognised mental disorder.
4.
 - (a) In determining whether a person is under a statutory obligation to make reparation for mental harm, the common law rules of delict which apply to reparation for physical harm should also apply to reparation for mental harm:
 - (b) In determining whether a person is under such an obligation, any enactment which applies to reparation for harm caused to a person should apply to reparation for mental harm in the same way as to reparation for physical harm, unless the contrary is provided in that enactment.
5.
 - (a) There should be a general restriction on the statutory obligation to make reparation for wrongfully caused mental harm if the mental harm is of such a nature that a person in the position of the victim could reasonably be expected to endure it without seeking reparation.

- (b) A person should reasonably be expected to endure mental harm without seeking reparation if, for example, it results from:
- (i) the normal stresses or vicissitudes of life or of the type of life which that person leads; or
 - (ii) bereavements or losses of a type which persons can reasonably expect to suffer in the course of their lives.
6. A person should be liable for causing mental harm unintentionally only if the harm amounts to a medically recognised mental disorder and the person foresaw, or could reasonably have foreseen, at the time of the act causing the harm, that the act was likely to cause a person in the position of the victim to suffer such harm.
7. (a) Where a victim suffers a mental disorder by witnessing or learning of an incident in which he or she was not directly involved, as a general rule there should be no liability on the wrongdoer to make reparation.
- (b) An incident for these purposes includes:
- (i) any act or event which can cause distress to a person witnessing or learning of it; and
 - (ii) the harm caused to persons, other than the person suffering the mental disorder, as a result of the wrongful conduct.
- (c) For these purposes the act or event may be caused intentionally or otherwise and may or may not have caused physical or mental harm.
8. The restriction on suing for reparation where the victim has sustained a mental disorder by witnessing or learning of an incident should not apply if the victim was acting as a rescuer in relation to the incident.
9. (a) The restriction on suing for reparation where the victim has sustained mental harm by witnessing or learning of an incident should not apply if, at the time of the incident, the victim had a close relationship with a person injured or killed, or at risk of being killed or injured, in the incident.
- (b) For this purpose, a close relationship means the type of relationship which exists between persons bound to each other by strong ties of affection, loyalty or personal responsibility.
10. (a) The following persons should be presumed to have a close relationship for this purpose: spouses, cohabitants of the same or different sexes, parents and children, persons who have been accepted by other persons as children of their family, grandparents and grandchildren, siblings and persons who have the characteristics of siblings as they have been brought up together in the same household.

(b) This presumption may be rebutted by evidence that the persons in question did not in fact have a close relationship with each other at the relevant time.

Report on Damages for Wrongful Death (2008)

14. A grief and companionship award should not include damages in respect of a mental illness suffered by a relative as a consequence of the victim's death.

3. TIME-BAR

“it is important, in the interest of the efficient administration of justice, that claims should be brought and decided promptly”

Scottish Law Commission, Discussion Paper on Personal Injury Actions: Limitation and Prescribed Claims (February 2006)

Introduction

3.01 In order to be able to raise an action for damages in the civil courts for any form of personal injury, it must be done within the timeframe set out in the Prescription and Limitation (Scotland) Act 1973. Prescription and limitation are different in form and concept but both have the effect of ‘time-barring’ a claim.

3.02 Prescription is the process of acquiring or losing rights or associated obligations as a result of the passage of time. Prescription may be both positive and negative. An example of the former would be, enabling an individual who has possessed land openly, peaceably and without interruption for 10 years or more to obtain a good title to it. Negative prescription is a rule of substantive law, which entirely extinguishes rights and associated obligations. There is no judicial discretion to set aside prescription.

3.03 Limitation differs from prescription in that it is a procedural rule rather than substantive law. In relation to personal injury actions there is a 3-year limitation period. This means that an individual has to begin any personal injury action within 3 years of the injury being sustained or within 3 years of the individual knowing that the injury has been sustained. Limitation is not absolute in the same way as prescription. The court does have some discretion to allow an action to be commenced after the 3 year limitation has lapsed if on the evidence presented to them they consider that it would be equitable to do so.

3.04 An essential aim⁶ of time-barring actions is to strike an appropriate balance between, on the one hand, the rights of individuals who may wish to make a claim for personal injury and who should have a reasonable opportunity to do so and on the other, the protection of all individuals and organisations against open-ended civil liability. It has to accommodate a wide range of personal injuries, whether they are immediately apparent (e.g. as with a broken leg arising from a road traffic accident) or whether they are effectively latent for many years (e.g. as with mesothelioma arising from exposure to asbestos some decades before). It must also be able to accommodate not only physical injuries, but injuries of a psychiatric nature as well. Moreover, it must recognise and take account of the fact that the circumstances and capabilities of injured people can vary greatly.

3.05 There have been concerns that the current law in relation to limitation – and in relation to the associated area of prescription – may not always

⁶ As noted in the SLC’s Discussion Paper and elsewhere in this paper, there are other important aims. As the SLC said, provisions on limitation “are often seen simply as a protection for a defender against stale claims. However, they also serve a wider purpose.”

succeed in striking an appropriate balance. For example, it has been noted that there have been:

- “concerns expressed by practitioners involved in personal injury litigation in the Scottish courts and others representing people with claims for compensation for occupational diseases that certain provisions of the Prescription and Limitation (Scotland) Act 1973 were not operating fairly”⁷,
- “concerns... about the position of people who may have been subject to abuse while they were children in educational institutions run by local authorities or religious orders or other charitable bodies, but whose claims for damages were extinguished by the long negative prescription prior to 26 September 1984”⁸.

3.06 Consequently, the Scottish Ministers invited the Commission to review the law and make appropriate recommendations for reform. The Commission’s Report on *Personal Injury Actions: Limitation and Prescribed Claims* (Scot Law Com No 207) was published in December 2007 and contained a series of recommendations.

3.07 A number of the recommendations do not propose to change the existing law but rather, following an examination of the current law and how it operates, confirm that the existing provisions should be retained. These recommendations are detailed in the Appendix to this chapter and are, with the exception of personal injury claims which are extinguished by negative prescription before 1984, not subject to any further discussion in this paper.

3.08 This paper will discuss issues around the emergence of additional or subsequent injuries; the length of the limitation period and the application of judicial discretion in assessing whether or not limitation should apply to a personal injury claim.

3.09 We accept without further discussion the remaining recommendations in the Commission report but would welcome any particular comment on these recommendations.

⁷ Scottish Law Commission Report, para 1.3.

⁸ Scottish Law Commission Report, para 1.5.

Prescription

Recommendations 18 and 19

18. Claims in respect of personal injury which were extinguished by negative prescription before 1984 should not be revived.
19. A special category of claims in respect of personal injury resulting from institutional childhood abuse which were extinguished by negative prescription before 1984, and which would allow this category only to be revived, should not be created.

3.10 Prior to 26 September 1984, Scots law on personal injury long negative prescription provided that a right/obligation ceased to exist if a claim had not been made within 20 years. This meant that if a right/obligation in respect of damages came into being on 25 September 1964 it would have been entirely extinguished on 25 September 1984 if no action had been taken to make a claim in that time.

3.11 Reforms introduced in September 1984 by the Prescription and Limitation (Scotland) Act 1984 brought this law to an end. The effect was that any rights/obligations which had not previously been extinguished by prescription would not be extinguished in future and would exist indefinitely subject to the normal rules on limitation. This change was not applied retrospectively which means that rights/obligations which had been extinguished by prescription were not revived.

3.12 Put simply if an individual suffered a personal injury prior to 26 September 1964, the law of prescription applies and they have no right to bring a claim. If however the personal injury occurred after 26 September 1964, the law of prescription does not apply and the individual is able to bring a claim – although limitation as outlined in paragraph 3.03 above would apply.

3.13 The Commission considered whether there was a case for retrospectively undoing the effects of prescription, despite the passage of several decades, in order to enable claims in respect of the extinguished rights/obligations which had initially arisen prior to September 1964. Through recommendations 18-19, the Commission argued very clearly against such a course. In a carefully argued assessment, which considered the case in relation to the retrospective revival of right/obligations for personal injuries generally and personal injuries arising from institutional childhood abuse specifically, and which took particular account of developments elsewhere, the Commission concluded that there were compelling reasons why this could not and should not be attempted.

3.14 As regards whether the effects of prescription could be retrospectively undone, particular attention requires to be paid to the European Convention on Human Rights, bearing in mind that the Scottish Parliament has no power

to pass legislation which conflicts with the rights guaranteed by that Convention. The Commission noted that:

“In light of the case law on the Convention, there is a real possibility that the retrospective imposition of liability on a person upon whom no liability currently existed for events which occurred in the past would contravene Article 1 of the First Protocol to the Convention, in that it involves an interference with the peaceful enjoyment of his "possessions" (or property); the imposition of such liability could require the payment of compensation out of his assets and thus the depletion of his "possessions". This result is not certain; not every case of retrospective or retroactive legislation affecting property rights will necessarily contravene Article 1 of the First Protocol. ... Nevertheless, we consider that any retrospective or retroactive legislation in this area would undoubtedly raise serious human rights issues and might well be held to be incompatible with the European Convention on Human Rights.”

3.15 More recently the Scottish Human Rights Commission (SHRC) published a paper which reviewed international law and, specifically, looked afresh at the Scottish Law Commission’s comments on the implications of the European Convention on Human Rights and concluded that the European Court of Human Rights case law was not emphatic. Whilst this is an issue which will require careful legal analysis, the question remains as to whether – even if it were feasible – it would be desirable to cause the revival of prescribed personal injury claims.

3.16 In general, retrospective application also raises difficulties because: -

- Individuals take actions based on the law which exists at the time and retrospective application may interfere unfairly.
- It may cause incidents which occurred in the past to be judged against current standards.
- Witnesses may have died; individuals may have difficulty recalling what happened a long time ago; and evidence may no longer be available.

3.17 The Scottish Government accepts the recommendations of the Commission and agreed that prescribed claims should not be revived. This was on the basis that any events would have occurred before September 1964 and reviving very old cases would be difficult in respect of retrospection and European Convention on Human Rights.

Q3(a) do you agree that – for all personal injuries, regardless of the nature and circumstances of the personal injury – even if it were lawful to do so, it would not be advisable to seek to revive prescribed claims (i.e. claims relating to events before September 1964)?

YES / NO

Please explain and, where possible, provide evidence for your answers

The Length of the Limitation Period

Recommendation 9

9. Personal injury actions should be subject to a five-year limitation period.

3.18 This section considers what would be an appropriate duration for a standard limitation period, i.e. how long should pursuers usually have to raise a claim, once they have become aware of all the relevant statutory facts and are not under a disability? That period is currently 3 years (sometimes known as the triennium). After that period has expired, a pursuer loses the automatic right to raise a claim for damages.

3.19 The Commission, through recommendation 9, has proposed that the duration should be extended, with a period of 5 years being allotted to the pursuer. The Commission considered that whilst 3 years was appropriate several decades ago, there were strong arguments now for extending that period. Particular attention was paid to the practical difficulties inherent in pursuing claims for injuries which have emerged many years after the actual cause – industrial diseases such as mesothelioma were a key concern, but similar considerations could also be associated, for example, with researching claims for psychiatric injury and mental harm arising from past physical or sexual abuse. In support of its recommendation, the Commission noted too that it is “not easy to justify the distinction that is made between cases of personal injury and cases of loss or damage to property”.

3.20 While this recommendation seems unlikely to be unduly problematic, a concern has been raised that, as many cases are currently litigated at the end of the 3 year period, the effect of changing this to 5 years is likely to move things back by 2 years, with consequent delay (and possible detriment) to a just outcome and potential increase in costs: while some considered the effect of the proposed change was likely to be cost neutral. Moreover, in contrast to the Commission, some stakeholders suggested that data retrieval and record keeping is getting much better and the means of accessing historical data is improving constantly, so it should be possible to pursue claims more quickly.

Q3(b) do you agree that the standard limitation period should be raised to 5 years?

YES / NO

Please explain and, where possible, provide evidence for your answer.

3.21 The Commission considered but rejected the option of introducing different limitation periods for different types of personal injury claims – for example, with occupational disease claims – or, potentially, claims relating to physical or sexual abuse in childhood – being subject to a longer time-limit than other personal injury claims. In reaching its conclusion, the Commission

noted that to attempt to differentiate in such a manner “could give rise to doubt and uncertainty in individual cases; this would frequently have to be resolved by the courts”.

Q3(c) do you agree that it is appropriate to have a single standard limitation period for all types of personal injury claim, instead of different periods for different types of injury?

YES / NO

Please explain and, where possible, provide evidence for your answer.

Judicial Discretion

Recommendation 15

15. Section 19A of the 1973 Act should be amended to include the following non-exhaustive list of matters to which the court may have regard in determining whether to allow an action to be brought:
- (a) the period which has elapsed since the right of action accrued;
 - (b) why it is that the action has not been brought timeously;
 - (c) what effect (if any) the length of time that has passed since the right of action accrued is likely to have had on the defender's ability to defend the action, and generally on the availability and quality of evidence;
 - (d) the conduct of the pursuer and in particular how expeditious he was in seeking legal and (where appropriate) medical or other expert advice and in intimating a claim for damages to the defender;
 - (e) the quality and nature of the legal and (where appropriate) medical or other advice obtained by the pursuer;
 - (f) the conduct of the defender and in particular how he has responded (if at all) to any relevant request for information made to him by the pursuer;
 - (g) what other remedy (if any) the pursuer has if he is not allowed to bring the action;
 - (h) any other matter which appears to the court to be relevant;
- and there should be no hierarchy among the matters listed.

3.22 With respect to personal injuries, the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 introduced a discretionary power to the courts to override the 3 year limitation period (new Section 19A of the 1973 Act) where equitable to do so and so allow a claim outwith the limitation period. The discretion is unfettered and, aside from the consideration of what is equitable, the legislation does not specify any factors which the court should take into account or disregard when exercising its discretion. Over time,

however, a number of court cases have pointed to factors which may be relevant: the Commission concluded that judges undertake an exercise in balancing the prejudices likely to be suffered by the parties.

3.23 The discretionary power undeniably increases uncertainty and from the defenders' perspective it diminishes the confidence that can be taken, once the standard limitation period has expired, that there is no prospect of being pursued for damages. On the other hand, from the pursuers' perspective, there has been criticism that the power has been exercised too sparingly – i.e. that the courts' practical interpretation of the provision has not fully met society's expectations. This latter criticism has been particularly associated with claims for damages for historic childhood abuse.

3.24 The House of Lords decision in the case of *Bowden v Poor Sisters of Nazareth*, provided an authoritative ruling on the interpretation and application of Section 19A. In that case, which related to events in the 1960s and 1970s and so to claims that in the ordinary course of things would long have been time-barred, Lord Hope noted that in considering whether to exercise discretion:

“it seems more in accord with the legislative policy that the pursuer's lost right should not be revived than that the defender should have a spent liability re-imposed on him. The burden rests on the party who seeks to obtain the benefit of the remedy. The court must, of course, give full weight to his explanation for the delay and the equitable considerations that it gives rise to. But proof that the defender will be exposed to the real possibility of significant prejudice will usually determine the issue in his favour.”

3.25 On the one hand, it is fully recognised that the impact of severe and prolonged abuse of the vulnerable, notably children, can have a traumatic and paralysing impact for many years to come – the practical capacity to actually initiate legal proceedings may simply be absent in such circumstances. It would seem indeed hard, therefore, if the survivors of such abuse, when they eventually begin to emerge from that state of effective incapacity and seek to address their experience, find that in fact the law does not any longer provide them with any avenue to take action.

3.26 On the other hand, however, it is clearly recognised – as has been stated at the outset of this chapter – that, as a general rule, if individuals or organisations are to be accused of wrongdoing, they have a right to expect such accusations to be made and tested within a reasonable time period, rather than many years, or even many decades, after the events in question. Either way, judges may only base their decisions – including the exercise of their discretion - on the evidence placed before them.

3.27 And it is also relevant to bear in mind that, as the years and decades pass, not only is the quantity and quality of relevant evidence (e.g. documentation, witness memories) likely to erode, there may well have been other important developments. Standards which prevailed at the time may no longer be appropriate. For example, relevant to the *Bowden* case was The

Administration of Children's Homes (Scotland) Act 1959 which contained provision for the exceptional use of corporal punishment in children's homes in Scotland. Today this sort of provision would be completely unacceptable such is the movement over time in what is and what is not socially acceptable.

3.28 Equally during the prolonged time that it has taken the pursuer's capacity to develop to the extent that he or she is now ready and able to initiate legal proceedings, the defender may also have changed, perhaps beyond all recognition – for example, an organisation which was severely deficient several decades ago, whether judged against the standards of the past or today's, may in recent years have been operating according to best practice: how far would justice be served if such an organisation were to be opened up to legal proceedings in relation to the failings of its predecessor?

3.29 These are, indeed, significant and difficult issues. Accepting that in principle the law should not ignore the particular difficulties faced by survivors of childhood abuse, for example, the question arises as to how much further account should be taken of such special circumstances and how that might most appropriately be effected.

3.30 In their report, the Commission has recommended (Recommendation 15) an adjustment to the way in which the discretionary power is configured. Reflecting the conclusion that, contrary to the views of the majority of its consultees, statutory guidance could be "helpful in focusing and structuring pleadings [and] would also assist courts in exercising their discretion under section 19A".

Q3(d) do you agree there should be a statutory, non-exhaustive list of matters relevant to determining whether it would be equitable for the courts to exercise discretion to allow an action to be brought outwith the limitation period?

YES / NO

Please explain and, where possible, provide evidence for your answers.

3.31 It is also for consideration whether other reforms – beyond the introduction of the Scottish Law Commission proposal for a statutory, non-exhaustive list of matters which may be taken into account – could contribute to ensuring that discretion can and will be (and seen to be) exercised equitably.

Q3(e) do you have views on potential options for reforms beyond those proposed by the Scottish Law Commission?

YES / NO

If yes, please explain and, where possible, provide evidence for your answers.

The Subsequent Emergence of an Additional Injury

Recommendation 3

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.

3.32 It is important to recognise that the basic limitation period requires to be qualified to accommodate the different facts and circumstances of potential personal injury claims. For example, it is an established feature of the law that some allowance should be made for individuals who have been injured but who lack the **knowledge** or the **ability** to initiate a claim – this is because it would seem unjust if a potential pursuer with good grounds for a claim for damages for personal injury ran out of time because he/she either lacked knowledge of the injury or lacked the ability to act on that knowledge.

3.33 Currently, Scots law provides that the limitation period begins to run from the latest of the following dates:

- a) the date on which the injuries were sustained, or (where the causal act/omission was a continuing one) the date on which the relevant act/omission ceased; or
- b) the date on which the pursuer became (or could reasonably have been expected to become) aware of all the following facts—
 - (i) that the injuries were sufficiently serious to justify bringing an action of damages, on the assumption that the defender did not dispute liability and was able to satisfy a decree; and
 - (ii) that the injuries were attributable to an act/omission; and
 - (iii) that the defender was a person (or the employer or principal of such a person) to whose act/omission the injuries were attributable.

3.34 In other words, unless and until an injured person has awareness (i.e. has knowledge) of the material severity of his/her injury and of the cause of the injury and of the identity of the person responsible for wrongfully causing the injury, there is no expectation that he/she should act to make a claim: the limitation period does not begin to run.

Example

September 1999 - Mr A is involved in a road traffic accident, he does not experience any apparent physical injury, save for feeling the effects of 'whiplash' he does not attend a doctor and takes no action.

September 2005 - Mr A starts to experience chronic neck pain, he attends a doctor and hospital as an outpatient. Medical advice concludes that the pain is likely to be the result of a previous trauma. Mr A makes the connection to his earlier road traffic accident and at this point raises a personal injury action.

This action complies with the law of limitations as the action is raised within 3 years of Mr A becoming aware that he has sustained an injury even though the injury was sustained 7 years before.

3.35 The Commission explained that the provisions summarised at subparagraph 3.33 (b) above – which embody what is known as the “date of knowledge” or “discoverability test” – represent an important protection for would-be pursuers. Without some such provision, the limitation period would begin to run from the date that injury was inflicted and, for injuries which are latent and do not emerge until several years later (e.g. asbestos-related conditions and some psychiatric conditions), the injured party might become aware of the injury only after the limitation period had expired. In principle, therefore, retention of this protection for pursuers – as proposed by recommendation 1 of the Commission’s report – seems fully justified.

3.36 As well as considering the generality of factors around the knowledge which may be relevant for triggering the running of any limitation period, the Commission considered those particular situations in which a single delictual (i.e. wrongful) act results in two distinct injuries, the emergence and knowledge of which may be separated by many years. The Commission proposed, through recommendation 3, that “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”.

3.37 The Commission’s recommendation in this area aimed at changing Scots law as interpreted by the Inner House in the case of *Carnegie v Lord Advocate* (2001). In that case, a soldier had not pursued timeously a potential claim for damages for physical injuries arising from assaults and maltreatment, but was nevertheless permitted to pursue a claim for damages for psychological injuries which had developed some years later even though they were due to the same assaults and maltreatment. The *Carnegie* approach would result in a pursuer who could establish that the emergence of a further injury was wholly separate and distinct to an earlier injury would have the right to raise an action for the later injury even if they had not done so for the earlier injury. The Commission noted that they were not aware of any other system of law that adopted this approach. Those arguments also appear to have been endorsed in academic circles⁹.

3.38 Subsequently, the Inner House itself returned to the issue, in the case of *Aitchison v Glasgow City Council* (2010), where the Lord President sitting as part of a bench of five senior judges – concluded that *Carnegie* had been

⁹ see Russell, E. 'Cheerio Carnegie', 2010 Scots Law Times News 81

wrongly decided and that in fact, Scots law had always been as the Commission recommends it should be.

3.39 In reviewing these issues, it is recognised that the Commission and, in the subsequent *Aitchison* case, the Inner House marshalled extremely cogent arguments around the fundamental principle that following a delictual act a single cause of action arises, in which all associated damages must be sought. The Commission highlighted that although the approach adopted in *Carnegie* might appear initially attractive; it presented a number of practical difficulties and was liable to produce anomalous results.

3.40 Nevertheless, it must also be recognised that a range of stakeholders have very serious concerns about the practical implications of such an approach – those concerns focusing very much on the difficult and complex cases which involve the delayed emergence of a fatal industrial disease or a debilitating psychiatric injury.

Example:

July 1980 - Mrs C suffers physical and sexual abuse. At this time she does not pursue an action as she tries to suppress the memories and put the experience behind her.

December 2010 - Mrs C is subsequently diagnosed with a serious psychiatric condition consequential to the abuse she suffered in 1980.

This injury is distinct from the physical harm suffered previously but would not give rise to a fresh date of knowledge and therefore Mrs C is unable to raise an action.

3.41 On the other hand, the court in *Aitchison* noted that the problems occasioned by late-emerging injuries are not new and have always been a feature of personal injury litigation. In *Aitchison*, the court highlighted the potential difficulty in many cases of deciding whether a later-emerging condition was wholly distinct and that there seemed to be no reason in principle why damages in the one case should be irrecoverable as of right but in the other be recoverable. In *Aitchison* the court's view was that there will always be hard cases however the line is drawn and the discretionary remedy provided by section 19A of the 1973 Act caters for these.

3.42 The effect of the law as it currently stands following *Aitchison* and as it stood before *Carnegie* is that damages can be obtained for the immediate injury. Pursuers who wish to protect their position against the risk that a significantly more serious physical or psychiatric injury might emerge in future will require to initiate a claim timeously or reach agreement that the time bar point will not be taken for subsequent injuries. Where a subsequent claim is time-barred, the court can be asked to use its discretion under section 19A to allow the action to continue.

3.43 The Scottish Government is interested in exploring whether the approach in Carnegie or any alternative approaches to the law as it now stands in Aitchison would better reflect where the balance should lie between interests of the pursuer and the defender. If the approach in Carnegie is to be followed, the Scottish Government would like the views of consultees on how the practical difficulties and anomalous results identified by the Commission and the court in Aitchison can be addressed.

Q3(f) do you agree that it is in the interests of justice that there should be only one limitation period following the discovery of a harmful act, during which all claims for damages for associated injuries must be brought?

YES / NO

Q3(g) do you consider that there should be any exceptions to this principle?

YES / NO

If yes please give examples of the exceptions.

Q3(h) how would you suggest that the difficulties and anomalies identified by the Scottish Law Commission (in their report at paragraphs 2.17 – 2.24) and the Court in Aitchison might be overcome?

3.44 The Scottish Government has also been made aware of the potential for injustice in circumstances where it was known that the initial harm was actionable but where decisions not to litigate at that time were taken in good faith in reliance on the rule in Carnegie as the injured party's greater concern was with the risk of the later emergence of a more serious consequence of the original injury. These are circumstances where the discretionary remedy in section 19A may be relevant. We would also refer consultees to the discussion earlier in this paper about possible amendments to section 19A including a clearer list of factors that the court may be directed to consider in balancing the prejudice that may be caused to either party.

Q3(i) do you consider there is a need to make provision for cases where it was known that the initial harm was actionable but where decisions not to litigate were taken in good faith in reliance on the rule in Carnegie before it was overturned by the Court in Aitchison?

YES / NO

Please explain and, where possible, provide evidence for your answers.

Impact

3.45 As in Chapter 2, to assist the Scottish Government in assessing the potential financial impact, for the various parties, of the proposals in this

chapter (and while recognising that the amount of damages awarded will depend on the financial circumstances specific to each pursuer), we would welcome any material from consultees which could inform consideration of this important aspect and help in our preparation of a Business and Regulatory Impact Assessment and also the Financial Memorandum which would accompany any Bill.

Q3(j) what do you think the impact of implementing these proposals in full would be particularly in relation to the issues below?

- Is it likely that more or fewer actions will be raised?**
- Is it likely that more or fewer cases come to court?**
- Is it likely that more or fewer cases will be settled out of court?**
- Is it likely that cases will require more or less preparation time?**
- Is it likely that cases will require more or less court time?**
- Is it likely that there will be more or fewer awards of damages?**
- Is it likely that awards of damages will be higher or lower?**
- Can you quantify the benefits for pursuers?**
- Can you quantify the benefits for defenders?**
- Can you quantify the drawbacks for pursuers?**
- Can you quantify the drawbacks for defenders?**

Please explain and, where possible, provide evidence for your answers.

In addition, detailed views on the impact of any specific elements of the proposals would also be welcome, for example is it likely that actions for material but relatively minor injuries were raised as a matter of course, albeit settled provisionally, to avoid future claims from being disallowed?

3.46 We are also required to assess the impact of our policies on people according to certain protected characteristics. These are age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race and religion or belief. We have so far not identified ways in which the proposals on reform of the law of limitation for personal injury actions will impact positively or negatively on different groups of people with protected characteristics.

Q3(k) do you consider that the proposals for the reform of the law of limitation for personal injury actions will affect people, either positively or negatively with the following protected characteristics (age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race and religion or belief)?

YES / NO

Please explain and, where possible, provide evidence for your answers.

Appendix to Chapter 3

Report on Personal Injury Actions: Limitation and Prescribed Claims (2007) - Recommendations not subject to discussion in this paper

1. The Prescription and Limitation (Scotland) Act 1973 should continue to include a "date of knowledge" as the starting date for the running of the limitation period.
2. The test in section 17(2)(b)(i) of the 1973 Act should be replaced by the following test:

"that the pursuer's injuries were sufficiently serious to justify his bringing an action of damages (no account being taken, for the purposes of this subparagraph, of the prospects of success in that action or of whether any person against whom it was brought would be able to satisfy a decree)".
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.
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".
6. The legislation on date of knowledge should continue to contain a constructive awareness test.
7. The current statutory test of whether it was "reasonably practicable" for the pursuer to become aware of a relevant fact should not be retained.
8. The awareness test should contain an element of subjectivity; consequently the limitation period should not run while the pursuer was, in the opinion of the court, excusably unaware of one or more of the statutory facts.
10. The references in sections 17(3) and 18(3) of the 1973 Act to "legal disability by reason of unsoundness of mind" should be replaced by a reference to the pursuer's being incapable for the purposes of the Adults with Incapacity (Scotland) Act 2000 by virtue of section 1(6) of that Act.
11. The reference to incapacity should not be qualified so as to be confined to the adult concerned being incapable by reason of mental or physical disability of making, communicating, or understanding decisions respecting the making of a claim for damages for the personal injury in question.

12. The appointment of a guardian should not lift the suspension of the running of time by reason of the incapacity of the adult in question.
13. Judicial discretion to allow a time-barred action to proceed should be retained.
14. The exercise of judicial discretion should not be subject to a time limit.
16. There should be no amendment of the present law on onus of averment and proof in relation to limitation issues.
17. There is no need for change to the procedure in personal injury actions in the Court of Session to facilitate resolution of limitation issues as a preliminary issue.

4. THE WIDER REFORM AGENDA: BEFORE AND AFTER

4.01 Looking beyond the potential reforms that are the focus of the preceding chapters, this chapter seeks views on the impact of recent legislative reforms and on the scope for future legislative reforms, as regards substantive rights and obligations in relation to damages for personal injury.

4.02 Such reforms should be considered against the background of work to progress a programme of systemic reforms of Scotland's civil court structures and procedures. These systemic reforms, which are being informed by Lord Gill's review of the civil court system and Sheriff Principal Taylor's review of the costs of litigation¹⁰, are not addressed directly in this paper but should be kept in mind as they are likely to influence how substantive rights and obligations are enforced.

I. Recent Legislative Reform

4.03 In the past five years, three Acts of the Scottish Parliament have made significant provision in the area of damages for personal injury.

Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007¹¹

4.04 The 2007 Act, which came into force on 27 April 2007, had the central aim of ensuring that – as an exception to the normal rule – a person dying of mesothelioma could secure damages without thereby preventing members of his/her immediate family making a future claim for damages for distress, grief and loss of society.

4.05 The legislation was introduced in September 2006 by the then Scottish Executive following a consultation exercise in July-August 2006, which itself followed expressions of concern in Parliament about the dilemma faced by mesothelioma sufferers – i.e. that they could pursue a claim for damages on their own behalf only if they were prepared to accept the consequence that their immediate families would not thereafter be able to pursue claims for damages for emotional harm. The Scottish Law Commission subsequently recommended, in the report on *Damages for Wrongful Death* (2008), that “where a victim dies of mesothelioma, his relatives should retain title to sue for non-patrimonial loss although the victim has excluded or discharged liability before his death”, in accordance with the 2007 Act.

4.06 At the time that it was enacted, the overall financial implications of the 2007 Act were predicted to be relatively limited. That was the view of the Scottish Executive and, after taking evidence, had also been the conclusion of

¹⁰ Information about Lord Gill's review and the Government's response is at www.scotcourts.gov.uk/civilcourtsreview and www.scotland.gov.uk/Publications/2010/11/09114610/0 respectively. Information about Sheriff Principal Taylor's ongoing review is at www.taylorreview.org.

¹¹ The Policy Memorandum and Explanatory Memorandum (including the Financial Memorandum) associated with the 2007 Act are available at www.scottish.parliament.uk/parliamentarybusiness/Bills/24941.aspx. (Technically, the provisions of the 2007 Act were repealed in July 2011 by the Damages (Scotland) Act 2011, but in substance they were continued thereafter by section 5 of the 2011 Act.)

Parliament's Justice 1 Committee in its report at Stage 1. The Executive's estimate had been that there would be additional costs, primarily for business and the State, in the region of:

- £1.1m p.a. at the outset, on the assumption that legislation would initially result in an additional 15 claims p.a.¹² from the relatives of deceased mesothelioma sufferers and that the average award to them would be £72,000;
- peaking at £1.5m p.a. around 2013, on the assumption of a 33% increase in mesothelioma deaths by then;
- and declining thereafter.

4.07 Against this background:

Q4(a) do you consider that the way in which the 2007 Act is working in practice is achieving its central aim of ensuring that a person dying of mesothelioma can secure damages without thereby preventing members of his/her immediate family making a future claim for damages for distress, grief and loss of society?

YES / NO

Q4(b) do you consider that the way in which the 2007 Act is working in practice is having positive or negative impacts / side-effects?

YES / NO

Please provide examples of positive and negative impacts, explain and provide evidence.

Q4(c) do you consider that the Scottish Government's financial estimates were largely accurate, insofar as they forecast:

(i) the number of additional claims? YES / NO

(ii) the average level of costs associated with those additional claims?

YES / NO

(iii) the overall financial implications of the 2007 Act?

YES / NO

Please explain and, where possible, provide evidence for your answers.

¹² The level of additional claims was estimated on the basis described in paragraph 17 of the Financial Memorandum, i.e. that 100 mesothelioma claims settled annually, with 85% of those being settled by the immediate family following the death of the sufferer, meaning that "claims newly facilitated by the proposed change in legislation will only arise in some 15% of cases".

Damages (Asbestos-related Conditions) (Scotland) Act 2009¹³

4.08 The 2009 Act, which came into force on 17 June 2009¹⁴, had the central aim of ensuring that – notwithstanding a House of Lords ruling in October 2007 – certain asymptomatic asbestos-related conditions (such as pleural plaques) are recognised in Scots law as constituting actionable harm for the purposes of an action of damages, rather than being considered to be negligible.

4.09 The legislation was introduced in June 2008 by the Scottish Government following consultation on a Partial Regulatory Impact Assessment in February-April 2008, which itself followed expressions of concern in Parliament about the potential implications in Scotland of the House of Lords ruling. Although it came into force in June 2009, the full impact of this legislation was delayed by judicial review proceedings. Those proceedings concluded in October 2011, when the UK Supreme Court (like the Outer and Inner Houses of the Court of Session, in January 2010 and April 2011 respectively) upheld the legality of the legislation. Subsequently, the Lord President has issued a Direction (No.2 of 2012) in relation to the handling of actions for damages arising from the legislation.

4.10 At the time that it was enacted, the overall financial implications of the 2009 Act were difficult to forecast with accuracy. In revised estimates produced in February 2009, utilising a range of assumptions, including that:

- the actual number of claims for damages for pleural plaques was likely to have been between 220 and 358 in 2005,
- the average annual rate of increase in claim numbers could be between 4.5% and 9%, to a possible peak in 2015 of between 341 and 848 claims;
- the success rate for claims could range between 75% and 80%;
- the cost of each successful claim could be around £25,000 (with just under two thirds being attributable to legal costs, and just over a third representing compensation to the pursuer), while the cost of each unsuccessful claim could be at most £10,000 (all being attributable to legal costs);

the Scottish Government concluded tentatively that by 2015 the annual cost could be:

- between £5.8m and £16.6m for business;
- between £0.7m and £1.0m for local authorities;
- between £0.5m and £0.8m for the Department of Business, Enterprise and Regulatory Reform;

¹³ The Policy Memorandum and Explanatory Memorandum (including the Financial Memorandum) associated with the 2009 Act are available at www.scottish.parliament.uk/parliamentarybusiness/Bills/16218.aspx.

¹⁴ While the 2009 Act came into force on 17 June 2009, it provided (i) that period between 17 October 2007 and that date should be “left out of account” for limitation purposes (i.e. that the running of the time-bar clock should effectively be treated as having been frozen for that 18 month period) and (ii) that its central provisions should be “treated for all purposes as having always had effect”.

- between £0.3m and £0.4m for the Ministry of Defence;
- between £0.1m and £0.2m for the Scottish Court Service.

4.11 Against this background:

Q4(d) do you consider that the way in which the 2009 Act is working in practice is achieving its central aim of ensuring that a person with pleural plaques (or one of the other specified asymptomatic asbestos-related conditions) may pursue an action of damages in the same way as a person with any other non-negligible personal injury?

YES / NO

Q4(e) do you consider that the way in which the 2009 Act is working in practice is having positive or negative impacts / side-effects?

YES / NO

Please provide examples of positive and negative impacts, explain and provide evidence.

Q4(f) do you consider that the Scottish Government's financial estimates were largely accurate, insofar as they forecast:

(i) the number of claims

YES / NO

(ii) the average level of costs associated with those claims

YES / NO

(iii) the overall financial implications of the 2009 Act?

YES / NO

Please explain and, where possible, provide evidence for your answers.

Damages (Scotland) Act 2011¹⁵

4.12 The 2011 Act, which came into force on 7 July 2011, had the central aim of bringing greater clarity and accuracy to Scots law so far as it relates to damages for fatal personal injuries, reducing requirements for potentially intrusive, protracted and costly investigations, and thereby facilitating the swift and fair settlement of claims.

4.13 The legislation was introduced in June 2010 as a Members Bill, following consultation undertaken in 2009, and took forward recommendations made by the Scottish Law Commission in their report *Damages for Wrongful Death* (2008). The Scottish Government supported the legislation and, taking account of representations (notably, responses to a consultation exercise

¹⁵ The Policy Memorandum and Explanatory Memorandum (including the Financial Memorandum) associated with the 2011 Act are available at www.scottish.parliament.uk/parliamentarybusiness/Bills/18113.aspx.

which it undertook over the summer of 2010), promoted amendments as it went through Parliament. As enacted, the legislation's key innovations included:

- a) in relation to a victim's claim for future patrimonial loss, standardising the calculation of his/her reasonable living expenses at 25% of his/her projected future net income in all cases (unless doing so would produce a "manifestly and materially unfair result").
- b) in relation to a relatives' claim for loss of financial support (where the relatives include a spouse, civil partner, cohabitant or dependent child), standardising the calculation of the total loss of support at 75% of the deceased's projected future net income in all cases (unless doing so would produce a "manifestly and materially unfair result").
- c) in relation to a relatives' claim for loss of financial support, requiring that any multiplier is applied from date of the interlocutor (rather than the date of death) and only in respect of future loss of support.

4.14 At the time that it was enacted, the overall financial implications of the 2011 Act were difficult to forecast with accuracy. There had been considerable criticism in Parliament of the Financial Memorandum that had been submitted in June 2010, when the legislation had been introduced. Subsequently, in September 2010, the Finance Committee invited the Scottish Government to provide a rapid assessment of the legislation's financial implications, taking account of new data provided by Thompsons Solicitors. That assessment (which pre-dated the adoption of amendments which could affect the financial implications) tentatively concluded that:

- there would probably be little or no impact on the number of damages awards from defenders to pursuers, but potentially significant impact on the value of those awards;
- aggregate awards could increase by between £4.7m and £5.9m p.a., which in turn reflected tentative conclusions that:
 - for a **fatal accident claim**, the average award could increase by 94% (i.e. by £92,794, from £98,865 to £191,659);
 - for a **fatal mesothelioma claim**, the average award could increase by 49% (i.e. by £32,421, from £65,959 to £98,380);
 - for a **live mesothelioma claim**, the average award could increase by 29% (i.e. by £23,016, from £79,524 to £102,540);
- the biggest beneficiaries would probably be relatively high earners.

4.15 Against this background:

Q4(g) do you consider that the way in which the 2011 Act is working in practice is achieving its central aim of bringing greater clarity and accuracy to Scots law so far as it relates to damages for fatal personal injuries, reducing requirements for potentially

intrusive, protracted and costly investigations, and thereby facilitating the swift and fair settlement of claims?

YES / NO

Q4(h) do you consider that the way in which the 2011 Act is working in practice is having positive or negative impacts / side-effects?

YES / NO

Please provide examples of positive and negative impacts, explain and provide evidence.

Q4(i) do you consider that the Scottish Government's financial estimates were largely accurate, insofar as they forecast:

(i) the impact on the number of claims

YES / NO

(ii) the level of award in respect of those claims

YES / NO

(iii) the overall financial implications of the 2011 Act?

YES / NO

Please explain and, where possible, provide evidence for your answers.

II. Future Legislative Reform

Discount Rate

4.16 When there is an award of damages in respect of a personal injury claim, it is generally paid as a lump sum. The pursuer therefore receives, in one go, all the compensation for future loss of earnings etc, perhaps for many years into the future. As this sum may then be invested by the pursuer, who would consequently receive additional interest payments, there would be the prospect of the pursuer in effect being over-compensated unless some countervailing mechanism is in place. The mechanism that is in place for this purpose is known as the 'discount rate': essentially the court makes a deduction to reflect the anticipated level of interest that the pursuer might reasonably be expected to earn and, by virtue of section 1 of the Damages Act 1996, in determining the size of that deduction (i.e. "in determining the return to be expected from the investment of a sum awarded as damages") the courts will generally be guided by the views of the Scottish Ministers as expressed in subordinate legislation (i.e. by the "rate of return ... prescribed by an order made by [the Scottish Ministers]").

4.17 This discount rate is currently 2.5%, having last been prescribed by the Scottish Ministers in 2002. For England, Wales and Northern Ireland, the

discount rate is also currently 2.5%, having last been set for those jurisdictions by the Lord Chancellor in 2001. In setting the rate, Ministers took account both of the purpose established by the primary legislation and of the views of the House of Lords, expressed in a judgement in *Wells v Wells*, as to the sort of considerations that are relevant in fulfilling that purpose. In particular, attention was focused on the anticipated risk-averse nature of pursuers (given the apparent need to ensure that their future financial security is not jeopardised by taking unnecessary risks with their lump sum award) and, in that regard, the special relevance of low-risk/low-yield Index-Linked Government Stock.

4.18 At the time that the rate was prescribed by the Scottish Ministers in 2002, an undertaking was given that “the Executive will shortly consult interested bodies about various matters to do with damages for personal injuries, including questions about what mechanism Scottish Ministers should adopt in future changes to the rate”. In the event, however, that consultation exercise did not materialise.

4.19 Scottish Ministers, jointly with the UK Government and the Department of Justice, Northern Ireland, are now reviewing the current 2.5% rate within the framework established by the primary legislation and *Wells v Wells* in order to establish whether it remains appropriate for fulfilling the established purpose in today’s changed economic climate, following a consultation which closed on 23 October - ‘*Damages Act 1996: The Discount Rate – How Should It Be Set*’. We are in the process of analysing the responses to that consultation and will publish a response in due course.

Periodical Payments

4.20 As mentioned previously, when there is an award of damages in respect of a personal injury, it is generally paid as a lump sum. But, however carefully the pursuer’s long-term future losses and needs are estimated, they can rarely be known with certainty, and there is a risk that a lump sum award which underestimates actual requirements may cause the pursuer to suffer hardship. Conversely, an award which overestimates actual requirements may unfairly penalise the defender. An alternative approach, which may help to mitigate such risks, is – through the mechanism of ‘periodical payments’ – to spread payments over an extended period (e.g. annual payments, for the remainder of the pursuer’s life). It may be that greater use of periodical payments offers scope to reflect pursuers’ actual needs and losses more closely than is possible with lump sums.

4.21 At present, where damages for personal injury are payable in Scotland, the courts may make an order for periodical payments, only with the consent of the parties involved. This provision is set out at Section 2 of the Damages Act 1996. This position differs from England and Wales and Northern Ireland, where an amended version of section 2 of the 1996 Act is in effect and, as a result, the courts now have the power to impose an order providing for periodical payments to the injured person without the consent of the parties.

4.22 The issue of periodical payments in Scotland was discussed last year in the case of *D's Parent & Guardian v Greater Glasgow Health Board*¹⁶. This was a rare example of parties in a Scottish case agreeing periodical payments as part of a structured settlement. In his opinion, Lord Stewart offered extensive comment on the settlement and guidance on the use of periodical payments in Scotland. Noting that “the limitations of, not to say objections to, lump sum compensation in catastrophic injury cases have been appreciated for many years”, Lord Stewart proceeded to observe that:

“It is for consideration whether statutory provision ought to be made in Scotland for the payment of damages by periodical payments similar to the provision that has been made for England & Wales and Northern Ireland. Parties were agreed that it would be helpful to have the same provision in Scotland.”

4.23 Against this background:

Q4(j) do you consider that there would be merit in reviewing the existing approach to periodical payments, as currently set out in Scottish version of section 2 of the 1996 Act?

YES / NO

Please explain and, where possible, provide evidence for your answer.

Interest on Damages

4.24 In September 2006, the Scottish Law Commission published a report on *Interest on Debt and Damages*¹⁷, with a draft Bill. The Commission proposed the creation of a statutory right to interest throughout the period from the date when the claimant loses the use of money to which he/she is entitled. It was also proposed that interest should run during the same period and at the same rate regardless of whether the claim is for payment of a contractual debt, a non-contractual debt or damages. The rate of interest would be set at a level which adequately compensates the claimant, rather than one which punishes the debtor for the late payment.

4.25 Amongst the Commission's key proposals, it was suggested that:

- The Court's discretionary power in damages cases (and its duty in personal injury cases) to award interest should be replaced by an entitlement to interest on each head of loss.
- There should be a statutory entitlement to interest in relation to a variety of obligations to pay money, including damages.
- The Interest on Damages (Scotland) Act 1958 and the Interest on Damages (Scotland) Act 1971 should be repealed.
- The test of "wrongful withholding" should be abolished.

¹⁶ *D's Parent and Guardian v Greater Health Board* [2011] CSOH99

¹⁷ The Commission's report can be found at www.scotlawcom.gov.uk/download_file/view/385.

- Reform of the law, as recommended, would place interest on claims for damages on a consistent footing with interest on contractual and other obligations to pay.
- A judicial tender would be presumed to be in full satisfaction of any claim for interest.

4.26 The Scottish Government consulted in January 2008¹⁸ on the full range of recommendations made by the Commission. The responses to that exercise raised a number of important concerns about the proposed legislation¹⁹. As regards interest on damages, the responses suggested that the proposals and their potential effect lacked clarity and relied excessively on judicial discretion, without giving express guidance to the Court.

4.27 Against this background:

Q4(k) do you consider that there would be merit in reviewing again (but this time, separately) the existing approach to interest on damages for personal injury?

YES / NO

Please explain and, where possible, provide evidence for your answer.

¹⁸ The consultation paper can be found at <http://scotland.gov.uk/Publications/2008/01/15144204/0>; the summary and analysis of responses at www.scotland.gov.uk/Publications/2008/05/16121025/1; and the (non-confidential) responses at www.scotland.gov.uk/Publications/2008/05/15104808/0.

¹⁹ Insofar as interest on debt is concerned, in light of responses to the consultation exercise the Scottish Government is not intending to implement the proposals.

ANNEX A. THE CONSULTATION PROCESS AND HOW TO RESPOND TO THIS CONSULTATION

I. The Scottish Government Consultation Process

A.01 Consultation is an essential and important aspect of Scottish Government working methods. Given the wide-ranging areas of work of the Scottish Government, there are many varied types of consultation. However, in general, Scottish Government consultation exercises aim to provide opportunities for all those who wish to express their opinions on a proposed area of work to do so in ways which will inform and enhance that work.

A.02 The Scottish Government encourages consultation that is thorough, effective and appropriate to the issue under consideration and the nature of the target audience. Consultation exercises take account of a wide range of factors, and no two exercises are likely to be the same.

A.03 Typically Scottish Government consultations involve a written paper inviting answers to specific questions or more general views about the material presented. Written papers are distributed to organisations and individuals with an interest in the issue, and they are also placed on the Scottish Government web site enabling a wider audience to access the paper and submit their responses. Consultation exercises may also involve seeking views in a number of different ways, such as through public meetings, focus groups or questionnaire exercises. Copies of all the written responses received to a consultation exercise (except those where the individual or organisation requested confidentiality) are placed in the Scottish Government library at Victoria Quay, Edinburgh (Area GD-Bridge, Victoria Quay, Edinburgh, EH6 6QQ, telephone 0131 244 4560).

A.04 All Scottish Government consultation papers and related publications (e.g., analysis of response reports) can be accessed at: Scottish Government consultations (<http://www.scotland.gov.uk/consultations>).

A.05 The views and suggestions detailed in consultation responses are analysed and used as part of the decision making process, along with a range of other available information and evidence. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

A.06 Final decisions on the issues under consideration will also take account of a range of other factors, including other available information and research evidence.

A.07 While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

II. How to Respond to this Consultation Paper

A.08 We are inviting written responses to this consultation paper by 15 March 2013. Please send your response with the completed Respondent Information Form (see "Handling your Response" below), to:

damages@scotland.gsi.gov.uk or

Scottish Government, Civil Law and Legal System, Area 2 West, St Andrew's House, Regent Road, Edinburgh, EH1 3DG.

If you have any queries, please contact the team as above, or on 0131 244 2442 or 0131 244 6931.

A.09 We would be grateful if you would use the consultation questionnaire provided or, where this is not possible, would clearly indicate in your response which questions or parts of the consultation paper you are responding to as this will aid our analysis of the responses received.

A.10 This consultation, and all other Scottish Government consultation exercises, can be viewed online on the consultation web pages of the Scottish Government website at www.scotland.gov.uk/consultations.

A.11 The Scottish Government has an email alert system for consultations (SEconsult: www.scotland.gov.uk/consultations/seconsult.aspx). This system allows stakeholder individuals and organisations to register and receive a weekly email containing details of all new consultations (including web links). SEconsult complements, but in no way replaces SG distribution lists, and is designed to allow stakeholders to keep up to date with all SG consultation activity, and therefore be alerted at the earliest opportunity to those of most interest. We would encourage you to register.

Handling your response

A.12 We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please complete and return the **Respondent Information Form** below as this will ensure that we treat your response appropriately. If you ask for your response not to be published we will regard it as confidential, and we will treat it accordingly.

A.13 All respondents should be aware that the Scottish Government are subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

RESPONDENT INFORMATION FORM: CIVIL LAW OF DAMAGES: [ISSUES IN PERSONAL INJURY] A CONSULTATION PAPER

Please Note That This Form **Must** Be Returned With Your Response To Ensure That We Handle Your Response Appropriately

1. Name/Organisation

Organisation Name

Title Mr Ms Mrs Miss Dr *Please tick as appropriate*

Surname

Forename

2. Postal Address

Postcode	Phone	Email

3. Permissions

I am responding as...

Individual

/

Group/Organisation

Please tick as appropriate

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate Yes

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

Yes, make my response, name and address all available

or

Yes, make my response available, but not my name and address

or

Yes, make my response and name available, but not my address

(c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

Please tick as appropriate Yes
No

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate Yes No

ANNEX B. SUMMARY LIST OF QUESTIONS

B.01 This Annex summarises all the questions that appear in this consultation paper. Respondents should not feel obliged to answer all of them. However, the Scottish Government would appreciate all responses, whether from individuals or from organisations, with views on any or all of these matters.

B.02 Please explain and, where possible, provide evidence for each answer that you give.

Chapter 2: Psychiatric Injury

Q2(a) do you agree that the 2004 report's summary of defects in the existing common law is a reasonably full and accurate one in today's circumstances?

Yes No

Please explain and, where possible, provide evidence:

Q2(b) do you agree in principle that existing common law rules which apply only to reparation for mental harm should be replaced by a statutory obligation to make reparation for wrongfully caused mental harm?

Yes No

Please explain and, where possible, provide evidence:

Q2(c) do you agree that the concept of 'ordinary fortitude' is unsatisfactory and, therefore, should no longer be a consideration in assessing whether a victim should be able to seek damages for his/her psychiatric injury?

Yes No

Please explain and, where possible, provide evidence:

Q2(d) do you agree that an appropriate balance between the right of an injured person to secure damages and the right of a defender to expect a certain level mental resilience in individuals would be achieved by the recommended focus on the stresses or vicissitudes of life or of the type of life that person leads?

Yes

No

Please explain and, where possible, provide evidence/describe situations where such an approach might produce unfair outcomes.

Q2(e) do you agree that, where physical harm is reasonably foreseeable but mental harm is not, and a victim sustains **only** the mental harm, the negligent party should not be held liable?

Yes

No

Please explain and, where possible, provide evidence:

Q2(f) do you agree that there should be a general prohibition on obtaining damages for a mental disorder where the victim has sustained that injury as a result of witnessing or learning of an incident, without being involved directly in it?

Yes

No

Q2(g) do you agree that it is appropriate to except rescuers from the general prohibition?

Yes

No

Q2(h) do you agree that it is appropriate to except those in a close relationship with anyone killed, injured or imperilled by the incident from the general prohibition?

Yes

No

Q2(i) do you agree that these two exceptions strike the appropriate balance between the right of an injured person to secure damages and the right of a defender?

Yes No

Please explain and, where possible, provide evidence:

Q2(j) do you agree that other recommendations in the Commission's report are appropriate?

Yes No

Please explain and, where possible, provide evidence:

Q2(k) do you agree that the proposed framework strikes the appropriate balance between both flexibility of approach and certainty of outcome?

Yes No

Please explain and, where possible, provide evidence:

Q2(l) do you agree that it should not be possible for a bereaved relative to secure damages for psychiatric injury under section 4(3)(b) of the 2011 Act?

Yes No

Please explain and, where possible, provide evidence:

Q2(m) what do you think the impact of implementing these proposals in full would be particularly in relation to the issues below?

- Is it likely that more or fewer actions will be raised?
- Is it likely that more or fewer cases come to court?
- Is it likely that more or fewer cases will be settled out of court?
- Is it likely that cases will require more or less preparation time?
- Is it likely that cases will require more or less court time?
- Is it likely that there will be more of fewer awards of damages?
- Is it likely that awards of damages will be higher or lower?
- Can you quantify the benefits for pursuers?
- Can you quantify the benefits for defenders?
- Can you quantify the drawbacks for pursuers?
- Can you quantify the drawbacks for defenders?

Please explain and, where possible, provide evidence. Detailed views on the impact of any specific elements of the proposals would also be welcome.

Q2(n) do you consider that the proposals for the reform of damages for psychiatric injury will affect people, either positively or negatively with the following protected characteristics (age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race and religion or belief)?

Yes No

Please explain and, where possible, provide evidence:

Chapter 3: Time-Bar

Q3(a) do you agree that – for all personal injuries, regardless of the nature and circumstances of the personal injury – even if it were lawful to do so, it would not be advisable to seek to revive prescribed claims (i.e. claims relating to events before September 1964)?

Yes No

Please explain and, where possible, provide evidence:

Q3(b) do you agree that the standard limitation period should be raised to 5 years?

Yes

No

Please explain and, where possible, provide evidence:

Q3(c) do you agree that it is appropriate to have a single standard limitation period for all types of personal injury claim, instead of different periods for different types of injury?

Yes

No

Please explain and, where possible, provide evidence:

Q3(d) do you agree there should be a statutory, non-exhaustive list of matters relevant to determining whether it would be equitable for the courts to exercise discretion to allow an action to be brought outwith the limitation period?

Yes

No

Please explain and, where possible, provide evidence:

Q3(e) do you have views on potential options for reforms beyond those proposed by the Scottish Law Commission?

Yes

No

Please explain and, where possible, provide evidence:

Q3(f) do you agree that it is in the interests of justice that there should be only one limitation period following the discovery of a harmful act, during which all claims for damages for associated injuries must be brought?

Yes

No

Q3(g) do you consider that there should be any exceptions to this principle?

Yes

No

If yes, please give examples of the exceptions:

Q3(h) how would you suggest that the difficulties and anomalies identified by the Scottish Law Commission (in their report at paragraphs 2.17 – 2.24) and the Court in Aitchison might be overcome?

Please explain and, where possible, provide evidence:

Q3(i) do you consider that there is there a need to make provision for cases where it was known that the initial harm was actionable but where decisions not to litigate were taken in good faith in reliance on the rule in Carnegie before it was overturned by the Court in Aitchison.

Yes

No

Please explain and, where possible, provide evidence:

Q3(j) what do you think the impact of implementing these proposals in full would be particularly in relation to the issues below?

- Is it likely that more or fewer actions will be raised?
- Is it likely that more or fewer cases come to court?
- Is it likely that more or fewer cases will be settled out of court?
- Is it likely that cases will require more or less preparation time?
- Is it likely that cases will require more or less court time?
- Is it likely that there will be more of fewer awards of damages?
- Is it likely that awards of damages will be higher or lower?
- Can you quantify the benefits for pursuers?
- Can you quantify the benefits for defenders?
- Can you quantify the drawbacks for pursuers?
- Can you quantify the drawbacks for defenders?

Please explain and, where possible, provide evidence for your answers. In addition, detailed views on the impact of any specific elements of the proposals would also be welcome, for example, is it likely that actions for material but relatively minor injuries would be raised as a matter of course to avoid future claims from being disallowed?

Q3(k) do you consider that the proposals for the reform of the law of limitation for personal injury actions will affect people, either positively or negatively, with the following protected characteristics (age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race and religion or belief)?

Yes

No

Please explain and, where possible, provide evidence:

Chapter 4: The Wider Reform Agenda: Before and After

Q4(a) do you consider that the way in which the 2007 Act is working in practice is achieving its central aim of ensuring that a person dying of mesothelioma can secure damages without thereby preventing members of his/her immediate family making a future claim for damages for distress, grief and loss of society?

Yes

No

Please explain and, where possible, provide evidence:

Q4(b) do you consider that the way in which the 2007 Act is working in practice is having positive or negative impacts / side-effects?

Yes

No

Please provide examples of positive and negative impacts, explain and provide evidence:

Positive Impacts

Negative Impacts

Q4(c) do you consider that the Scottish Government's financial estimates were largely accurate, insofar as they forecast:

(i) the number of additional claims?

Yes

No

(ii) the average level of costs associated with those additional claims?

Yes

No

(iii) the overall financial implications of the 2007 Act?

Yes

No

Please explain and, where possible, provide evidence:

Q4(d) do you consider that the way in which the 2009 Act is working in practice is achieving its central aim of ensuring that a person with pleural plaques (or one of the other specified asymptomatic asbestos-related conditions) may pursue an action of damages in the same way as a person with any other non-negligible personal injury?

Yes

No

Please explain and, where possible, provide evidence:

Q4(e) do you consider that the way in which the 2009 Act is working in practice is having positive or negative impacts / side-effects?

Yes

No

Please provide examples of positive and negative impacts, explain and provide evidence:

Positive Impacts

Negative Impacts

Q4(f) do you consider that the Scottish Government's financial estimates were largely accurate, insofar as they forecast:

(i) the number of claims?

Yes No

(ii) the average level of costs associated with those claims?

Yes No

(iii) the overall financial implications of the 2009 Act?

Yes No

Please explain and, where possible, provide evidence:

Q4(g) do you consider that the way in which the 2011 Act is working in practice is achieving its central aim of bringing greater clarity and accuracy to Scots law so far as it relates to damages for fatal personal injuries, reducing requirements for potentially intrusive, protracted and costly investigations, and thereby facilitating the swift and fair settlement of claims?

Yes No

Q4(h) do you consider that the way in which the 2011 Act is working in practice is having positive or negative impacts/side-effects?

Yes No

Please provide examples of positive and negative impacts, explain and provide evidence:

Positive Impacts

Negative Impacts

Q4(i) do you consider that the Scottish Government's financial estimates were largely accurate, insofar as they forecast:

(i) the impact on the number of claims?

Yes No

(ii) the level of award in respect of those claims?

Yes No

(iii) the overall financial implications of the 2011 Act?

Yes No

Please explain and, where possible, provide evidence:

Q4(j) do you consider that there would be merit in reviewing the existing approach to periodical payments, as currently set out in Scottish version of section 2 of the 1996 Act?

Yes No

Please explain and, where possible, provide evidence:

Q4(k) do you consider that there would be merit in reviewing again (but this time, separately) the existing approach to interest on damages for personal injury?

Yes No

Please explain and, where possible, provide evidence:

C.01 Where respondents have given permission for their response to be made public and after we have checked that they contain no potentially defamatory material, responses will be made available to the public in the Scottish Government Library (see the attached Respondent Information Form) and on the [Scottish Government consultation](#) web pages. You can make arrangements to view responses by contacting the SG Library on 0131 244 4552. Responses can be copied and sent to you, but a charge may be made for this service.

What happens next?

C.02 Following the closing date, all responses will be analysed and considered along with any other available evidence to help us reach decisions on reform of the civil law of damages relating to personal injury. We aim to issue a report on this consultation process. Subject to comments from consultees, and the availability of Parliamentary time, the Scottish Government anticipates supporting legislation in the Scottish Parliament to implement, with any appropriate enhancements, the recommendations made in the Scottish Law Commission.

Comments and complaints

C.03 If you have any comments or complaints about how this consultation exercise has been conducted, please send them to the contact details provided above.

ANNEX D. RECIPIENT LIST

If you are aware of anyone not on this recipient list who is likely to be interested in this consultation, it would be appreciated if you would draw it to their attention.

Aberdeen Bar Association
Advocate General Scotland
Advocates Personal Injury Law Group
Aegon UK
Aerospace Industry - SBAC
Agency for the Legal Deposit Libraries
Asbestos Action Tayside
Asbestos Removal Contractors Association
ASLEF (The Associated Society of Locomotive Engineers and Firemen)
Association of British Insurers
Association of Chief Police Officers
Association of Personal Injury Lawyers
Association of Run-Off Companies
Association of Scottish Police Superintendants
Association of Sheriffs Principal
Aviva Plc
AXA
Berrymans Lace Mawer
Bonnar and Co
Brake
British Chambers of Commerce
British Lung Foundation
British Medical Association
Brodies Solicitors
Chartered Insurance Institute
Chemicals Industry Association
Church of Scotland Board of Social Responsibility
Clydebank Action on Asbestos
Clydeside Asbestos Group
Citizens Advice Scotland
Confederation of British Industry (CBI)
Confederation of British Industry (CBI) Scotland
Confederation of Paper Industries
Confederation of Shipbuilding and Engineering Union
Consumer Focus Scotland
Convention of Scottish Local Authorities (COSLA)
Cruise Bereavement Care Scotland
Dean of the Faculty of Advocates
District Courts Association
Ecclesiastical Insurance
Edinburgh Bar Association
EEF Manufacturers' Organisation
Esure
Equality and Human Rights Commission
Equality and Human Rights Commission (Scottish Commissioner)

Families of Murdered Children
Federation of Master Builders
Federation of Small Businesses
Financial Services Compensation Scheme
Fire Brigades Union
Fortis Insurance
Forum of Insurance Lawyers
Forum of Private Business
Glasgow Bar Association
GMB (Britain's General Union)
Government Departments
Health in Mind
Institute of Directors
Institute of Occupational Medicine
Judicial Studies Committee
Law Commission for England and Wales
Law Society of Scotland
Lawford Kidd Solicitors
Legal Deposit Libraries
Legal Libraries - Scotland
Lord Advocate's Department
Lord President and the Judges of the Court of Session
Medical Defence Union
Medical Protection Society
McClure and Naismith
Mental Welfare Commission for Scotland
Motor Insurance Bureau
National Federation of Builders
National Federation of Demolition Contractors
Norwich Union
Occupational and Environmental Diseases Association
Petal Support Group
Procurators Fiscal Society
Prudential plc
Resolute Management Services Limited
Royal College of General Practitioners Scotland
Royal College of Physicians Edinburgh
Royal and Sun Alliance
Samaritans
Santander
Scotland's Campaign Against Irresponsible Drivers
Scottish Association for Mental Health
Scottish Chambers of Commerce
Scottish Claims Managers Forum
Scottish Council for Development and Industry
Scottish Churches Parliamentary Office
Scottish Civic Forum
Scottish Court Service
Scottish Interfaith Council
Scottish Engineering
Scottish Financial Enterprise

Scottish Law Agents Society
Scottish Law Commission
Scottish Legal Aid Board
Scottish Local Authorities (Chief Executives)
Scottish MEPs
Scottish Conservative and Unionist Party
Scottish Green Party
Scottish Labour Party
Scottish Liberal Democratic Party
Scottish National Party
Scottish Socialist Party
Scottish Police Federation
Scottish Widows
Scottish Textiles Industry Association
Scottish Trades Union Congress
Sheriffs Association
Simpson and Marwick Solicitors
Society of Local Authority Lawyers and Administrators in Scotland (SOLAR)
Society of Motor Manufacturers and Traders
Solicitors to the Supreme Court
Standard Life
Susan O'Brien QC
Thompsons Solicitors and Solicitor Advocates
TUC (Trades Union Congress)
UCATT (Union of Construction, Allied Trades and Technicians)
Unite the Union
Victim Support Scotland
WS Society
Zurich



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