Civil Law of Damages: Issues in Personal Injury

Scottish Government Response to the Consultation

December 2013

The Scottish Government
Riaghaltas na h-Alba

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Background

The Scottish Government consultation Civil Law of Damages: Issues in Personal Injury ran from 15 December 2012 to 15 March 2013. You can view the consultation paper at: www.scotland.gov.uk/Publications/2012/12/5980/0.

The paper asked a series of questions in relation to proposals to reform the law of damages for personal injury. The proposals were based on a number of Scottish Law Commission (SLC) reports – *Damages for Wrongful Death, Damages for Psychiatric Injury* and *Personal Injury Actions: Limitation and Prescribed Claims* – and included psychiatric injury and issues around time-bar.

In total 45 written responses were received from a range of interests including insurance bodies, legal body representatives, solicitor firms, academics, medical defence unions, bodies representing survivors of historic child abuse, individual members of the public and others.

In addition 2 consultation events (in Edinburgh and Glasgow) were arranged in April 2013, which focussed on the issue of time-bar and were attended by solicitor firms, bodies representing survivors of historic child abuse and those exposed to asbestos, individuals and others. Some attendees provided a written response following these events and these have been considered as part of the wider consultation process. A summary of the views expressed at these events is attached at **Annex A.**

At the end of the formal consultation period, the Scottish Government commissioned independent, external analysis of all the responses received and this has been published at www.scotland.gov.uk on 6 August 2013. The independent analysis report can be viewed along with the full text of individual responses which (where consent to publish was given) can be found at: www.scotland.gov.uk/Publications/2012/12/5980.

The independent analysis, along with the full contents of each individual response (regardless of whether consent to publish was given) along with the views expressed during and consequential to the consultation events, were given full consideration by the Scottish Government in formulating this response. This paper is not meant to capture and comment on every suggestion made in every response, but to rather outline the key actions that the Scottish Government will take as a direct result of the consultation.

In addition to the proposals we specifically consulted on we sought views on a number of the other recommendations contained in the *Personal Injury Actions: Limitation and Prescribed Claims* report. This paper therefore also sets out where we intend to take action in relation to those recommendations.

A Damages Bill was announced by the First Minister as one of the legislative priorities of the Scottish Government's Programme for 2013-2014 on 3 September 2013. The action we intend to take will be delivered through the Damages Bill.

Summary of Action

As part of the Damages Bill, we intend to

- amend the Prescription and Limitation (Scotland) Act 1973 (the 1973 Act) to increase the limitation period for raising an action for damages for personal injury from 3 years to 5 years;
- update the reference in the 1973 Act to 'unsoundness of mind' in relation to the circumstances in which the limitation period does not run;
- provide a list of factors to assist the courts with the exercise of their existing discretion under the 1973 Act to allow an action to proceed when raised after the expiry of the limitation period;
- replace the current assessment under the 1973 Act of 'reasonably practicable' in relation to the date of knowledge test for determining the start of the limitation period, with a more subjective awareness assessment;
- clarify that it should not be possible for a bereaved relative to secure damages for psychiatric injury under the Damages (Scotland) Act 2011;
- provide that courts should have the power to impose periodical payments in relation to awards of damages for personal injury.

The combination of these measures is intended to address some of the practical difficulties inherent in pursuing claims for personal injuries. Extending the limitation period will be particularly helpful in more complex cases, such as industrial disease cases, where a higher degree of investigatory work and more expert reports may be required before an action can be raised. Replacing reasonable practicability with awareness in relation to the date of knowledge test will enable the courts to shift the emphasis from what it is practicable for a pursuer to have knowledge of to what that particular pursuer is aware of. The provision of a detailed list of factors which may be taken into account when exercising their discretion will assist the courts and practitioners in addressing the issues around difficult cases such as actions by survivors of historic child abuse. Providing courts with the power to impose periodical payments in awards of damages, and vary those arrangements will also ameliorate some of the risks associated with lump sum payments of either over or under compensating a pursuer. The power to vary the order offers scope for later variations to better reflect a pursuer's actual needs and losses.

We will not be changing the law as it relates to claims for damages for psychiatric injury; we will retain the principle of 'one action; one harm' in damages law; we will not seek to revive personal injuries claims which prescribed (ceased to exist in law) prior to 26 September 1964 as a result of changes to the law in 1984 and we will not amend the date of knowledge test (as regards determining when the limitation period starts) to remove the assumptions it makes about the injury being 'sufficiently serious'.

Extending the Limitation Period

The current standard limitation period or the length of time that an individual has to raise an action for damages for personal injury is 3 years. After that period has expired, a pursuer loses the automatic right to raise a claim.

We asked 'do you agree that the standard limitation period should be raised to 5 years?'.

What you said

There was a general consensus that it is in the public interest for disputes between parties to be concluded as quickly as possible and most respondents thought that 3 years was sufficient time to raise an action, that a longer time period would risk a reduction in the quality of evidence or increase the risk of a policyholder going into liquidation, and that a longer period of time would generally encourage unnecessary delays and reduce certainty for both the pursuer and the defender.

Those who supported the proposal did so on the basis that cases now required a higher degree of investigatory work and expert reports and that this took longer and that it provided a better balance between the rights of the pursuer and the defender.

The Scottish Government Response

Like the SLC we are convinced by the arguments for an increase to help with cases where a higher degree of investigatory work and more expert reports may be required. These cases may include claims in relation to industrial diseases.

The extension will also bring the limitation period for actions for damages for personal injury in line with the 5 year prescriptive period which applies to obligations relating to debt, reparation or breach of contract etc.. This will address what the SLC and others regard as an anomaly between the limitation periods which apply to damages and other actions.

We will therefore increase the limitation period for damages for personal injury from 3 years to 5 years.

Date of Knowledge Test

The 1973 Act contains a 'date of knowledge' test – sometimes referred to as a 'discoverability' test. The test is used to determine when, in certain circumstances, the limitation period starts to run. The period runs either from the date of the accident in which the injuries were sustained, or from the time that an individual knows that they have an injury (psychological or physical) for which they may raise an action, where that time is later than the first date. This test is set out in the 1973 Act and is assessed by the court. Part of the test comprises certain assumptions in relation to whether or not the injury was sufficiently serious and about what was reasonably practicable for the pursuer to have known.

In our consultation paper we did not specifically ask any questions about this test but consultees were invited to comment on the wider SLC recommendations relating to prescription and limitation which include recommendations about this test. The SLC recommended the following:-

- that the assumptions about sufficiently serious nature of the injury in the 1973 Act should be removed from the date of knowledge test;
- that the assessment of what was 'reasonably practicable' should be replaced by a more subjective assessment of whether or not the pursuer was 'excusably aware'.

What You Said

No comments were received by the Scottish Government to either of these recommendations. The views expressed on this issue by consultees to the SLC's discussion paper were mixed.

The Scottish Government Response

Having considered the impact of these recommendations we are not persuaded that removing the assumptions would be beneficial. The 1973 Act currently provides assumptions that the action would be successful and that liability for the injury would be admitted. The SLC recommended removing these assumptions so that courts could ignore issues about prospects of success and liability. We are not persuaded that this recommendation would result in a different effect to the current position. Whilst we would support a change which discouraged trivial claims we are not clear that this recommendation will achieve that. For that reason we do not intend adopting the recommendation that the assumptions about the 'sufficiently serious' nature of the injury be removed from the date of knowledge test.

We do however agree with the SLC view that the 'reasonably practicable' assessment in the date of knowledge test causes the courts to emphasise in their assessment what is practicable rather than what is reasonable for that pursuer. We agree with the SLC that this assessment should not be retained. The replacement assessment should incorporate an element of subjectivity by enabling the circumstances of the pursuer, such as his/her education, intelligence or occupation to be taken into account. The result would be that the limitation period should not run while the pursuer was in the opinion of the court 'excusably unaware' of the

sufficiently serious nature of the injury, that the injury was attributable to someone's act or omission and the defender is a person to whom the act or omission is attributable.

We will replace the 'reasonably practicable' assessment in the date of knowledge test with a more subjective assessment of whether or not the pursuer was 'excusably aware'.

Legal Disability

The 1973 Act provides for exceptions to the running of the limitation period. These exceptions arise when the person who sustained the injuries was of unsound mind or under the age of 16.

The SLC was of the view that the reference to 'unsoundness of mind', which is undefined in the 1973 Act, required review and is outdated.

In our consultation paper we did not specifically seek views on this proposal but consultees were invited to comment on the wider SLC recommendations relating to prescription and limitation which include this recommendation. The SLC recommended the following:-

- the references in 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.

All of the consultees who commented on this proposal in the SLC's discussion paper expressed agreement with it.

What You Said

No comments were received by the Scottish Government on this recommendation. There was support from all of the consultees who commented on this proposal in the SLC report**.**

The Scottish Government Response

We agree with the SLC that the expression 'unsoundness of mind' is no longer appropriate and has the potential to be offensive. We are also of the view that whilst the expression is undefined it seems to provide for a test of a high standard. We share the view of the SLC that a more helpful reference would be to the definition of incapacity as contained in the Adults with Incapacity (Scotland) Act 2000 but modified so as to link the provisions to the act of raising an action for damages for personal injury. We think this will be a more reasonable and attainable test.

We will therefore replace the references in the 1973 Act to 'unsoundness of mind' with references to being incapable for the purpose of pursuing an action for damages.

Judicial Discretion

In actions for damages for personal injuries, the courts have power under the 1973 Act to allow an action to proceed despite being raised after the expiry of the three year limitation period where the court considers it is equitable to do so. The discretion is unfettered and, aside from the consideration of what is equitable, the 1973 Act does not specify any factors which the court should take into account or disregard when exercising its discretion.

The SLC, whilst accepting that case law generally provides sufficient indication of the factors which the courts consider to be relevant, acknowledged that difficulties in the exercise of the discretion have occurred. The SLC was therefore of the view that a statutory list of factors which a court may consider would be beneficial. A list would help to focus and structure parties' pleadings and arguments on limitation. In turn, having sight of these pleadings and having heard these arguments, the courts would be better placed to consider what is equitable.

We asked '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?'.

What you said

Respondents were evenly split over whether there should be a non-exhaustive list of factors added to the 1973 Act, to which the courts could have regard in deciding whether it would be equitable to exercise their discretion.

Arguments made in favour of introducing a statutory non-exhaustive list of factors included that it would allow the discretion to operate more effectively; it could achieve greater consistency in decisions by courts about exercise of the discretion; and would give practitioners guidance as to the relevant facts and arguments to present to the court.

Others felt that a list of factors was unnecessary. It was commonly thought that the current statutory provisions of the 1973 Act, along with the precedents set by case law, are working well. Four respondents questioned what additional benefits would be gained by the introduction of a list of factors.

The Scottish Government Response

We accept the SLC's reasoning that a list would help to focus and structure parties' pleadings and arguments on limitation, which would in turn, assist the courts. The Scottish Government's intention is not to alter the width of the existing unfettered judicial discretion under the 1973 Act, but we do consider that greater detail can be provided than the SLC recommended, further assisting parties and the courts.

The Sheriffs' Association noted that a list of factors would be particularly helpful. The impact of the Court Reform (Scotland) Bill means that there are likely to be more sheriffs dealing more frequently with personal injuries cases, and/or personal injury

cases of a higher value, than at present. A detailed list of factors should, in particular, prove helpful to them.

We will therefore amend the 1973 Act to provide a detailed non-exhaustive list of factors for the court to consider when asked to exercise its discretion to allow a case to proceed outwith the limitation period. These factors will be potentially applicable to any case, depending on its facts, but in particular it is hoped that a list of factors will help the consideration of hard cases such as those relating to survivors of historic child abuse or latent industrial diseases.

Prescribed claims

Before 26 September 1984, the 1973 Act provided that long negative prescription applied to rights of action for damages for personal injury. So, if a claim was not made within 20 years of the injury, the right of action ceased to exist.

The position was changed by the Prescription and Limitation (Scotland) Act 1984 which amended the 1973 Act. The amendments meant that if a right of action existed (i.e. had not been extinguished by prescription) before 25 September 1984 (the date from which the 1984 Act applied), or came into existence after that date, it would continue in the future and would be subject only to the 1973 Act's provisions on limitation. The amendments did not affect any rights of action which had been subject to prescription and had ceased to exist in law by 1984. As prescription applied after 20 years, those rights of action would have arisen before 25 September 1964.

We asked '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?'

The SLC recommended that such prescribed claims should not be revived. The SLC also considered whether a special category of claims - in respect of personal injury resulting from institutional childhood abuse - should be revived. They recommended against this. The Scottish Government consultation did not ask specifically for views on this recommendation, but views were sought more generally on whether prescribed claims should be revived.

What you said

Around three-quarters (74%) of those who provided a written view agreed that it would not be advisable to seek to revive these prescribed claims. The 26% who disagreed were comprised of individual members of the public and both of the representative bodies in relation to historic child abuse.

The most common argument against reviving prescribed claims was that this would unfairly prejudice defenders who would most likely encounter problems gathering evidence. Five respondents suggested that reviving a claim which had been completely extinguished would be likely to raise issues for defenders under the European Convention of Human Rights.

Two respondents who considered that prescribed claims should be revived argued that it can take many years before survivors of historic child abuse are mentally ready to come forward. Two members of the public described the feeling of not being able to revive such claims as being treated as a "non-person", and being faced once again with people not listening to their story.

The Scottish Government Response

The SLC argued very clearly against the revival of such claims. In a carefully argued assessment, which considered the retrospective revival of claims for personal injuries generally and personal injuries arising from institutional childhood abuse specifically, and which took particular account of developments elsewhere, the SLC concluded that there were compelling reasons why this could not and should not be attempted. We stated in our consultation paper that we accept the SLC's recommendation.

We therefore do not intend to revive prescribed claims for personal injuries.

The subsequent emergence of an additional injury

As explained in the consultation paper, the decision of the court in *Carnegie v Lord Advocate 2001* meant that 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 the pursuer had not done so for the earlier injury. The court in *Aitchison v Glasgow City Council in 2010* concluded that the decision in *Carnegie* was wrong and that the principle of "one action; one harm" remained in place in Scots law.

We asked '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?' **We also asked** 'whether there should be any exceptions to the principle of "one action; one harm"?'.

We asked '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?' **and** 'do you consider that there is a need to make provision for cases where it was not 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*?'.

What You Said

The majority of those who provided a view agreed that it is in the interests of justice that the principle of "one action; one harm" should be retained. There should be only one limitation period which runs following the discovery of a harmful act, during which all claims for damages for injuries associated with that harmful act must be brought. It was argued that this principle brought a degree of certainty for both pursuers and defenders; to do otherwise would result in practical difficulties and increased costs in deciding whether late emerging injuries were wholly distinct or related to the original harmful act; that there should be no exceptions; and that it would be difficult to compile a list of exceptions as too narrow a list would risk a pursuer being unable to make a claim, and too broad a list would risk rendering the limitation period irrelevant.

It was considered that the current wide unfettered discretion enjoyed by the courts under the 1973 Act is an effective means of overriding limitation periods.

Those who disagreed and argued that the principle should not be retained said they considered the principle had serious consequences for both people suffering latent industrial diseases and survivors of historic child abuse.

The Scottish Government Response

We are persuaded by the view that legislating to reverse the effect of the *Aitchison* decision, would not address the problems identified by the SLC. The SLC concluded that where injuries or symptoms emerge over time it may be difficult to determine whether injuries are separate and distinct which in turn is likely to create anomalous decisions. Allowing pursuers to raise more than one action for a harmful act would

go against the basic principle that a single indivisible right of action accrues when a pursuer suffers both injury and loss. Doing so would also reduce certainty and clarity for defenders by creating an open-ended civil liability.

The availability to a successful pursuer of provisional damages acts as protection against the risk that a significantly more serious physical or psychiatric injury might emerge at a later date. If a later claim is raised after the expiry of the limitation period, the court can be asked to use its discretion under the 1973 Act to allow the action to continue.

We therefore agree with the majority of consultees that where a person has failed to, within time limits, progress a claim for an event, the person should not be able to claim for a separate injury which emerges later. As a result, we do not intend to make any amendments to the existing law.

The decision not to change the law must also be seen in the context of our proposals to extend the limitation period from 3 to 5 years; provide for a detailed non-exhaustive list of factors relating to the exercise of the court's discretion; provide a more subjective assessment as part of the date of knowledge test; and update the definition of legal disability as regards when the limitation period does not run.

Periodical Payments

Where there is an award of damages in respect of an injury this may be paid as a lump sum or, where both parties consent, the court may make an order for periodical payments under section 2 of the Damages Act 1996.

We asked 'do you consider that there would be merit in reviewing the existing approach to periodical payments, as currently set out in the Scottish version of section 2 of the 1996 Act?'.

What You Said

There was not only overwhelming support for a review of periodical payments but clear support for putting Scottish courts on the same footing as their counterparts in England, Wales and Northern Ireland by providing them with powers to impose an order for periodical payments without the consent of the parties.

The Scottish Government Response

Our existing law doubtless contributes to the fact that periodical payments are rarely used in Scotland. In a recent and helpful judgement in *D's Parent & Guardian v Greater Glasgow Health Board*[1], in which periodical payments were agreed as part of a structured settlement, Lord Stewart provided extensive comment on the settlement and guidance on the use of periodical payments in Scotland. He noted that the parties would have found it helpful if Scottish courts had similar powers to those in England, Wales and Northern Ireland.

We recognise that periodical payments can ameliorate some of the risks of either over or under compensating a successful pursuer and offer scope in the future to reflect the pursuer's actual needs and losses more closely than is possible with a lump sum payment at the conclusion of the case.

It is therefore our intention to provide Scottish courts with a power to impose a periodical payment order and to vary such orders in the future.

[1] D's Parent and Guardian v Greater Glasgow Health Board [2011] CSOH99.

Grief and Sorrow

Under section 1(4) of the Damages (Scotland) Act 1976 the relative of a deceased person was able to claim for the effect of the death on the relative.

There have been conflicting court decisions on whether or not such a claim by a relative may take account of a psychiatric injury suffered by the relative, beyond the 'normal' distress a relative may suffer on the deceased's death. The court's decision in *Gillies v. Lynch (2002)* suggested that it was right to take account of psychiatric injury in this manner. However, in the decision in *Ross v. Pryde* (2004) the court disagreed with that decision.

In its 2008 report on *Damages for Wrongful Death*, the SLC recommended that new legislation provide that a deceased's relatives be able to seek damages for the emotional and economic loss of the deceased. The Damages (Scotland) Act 2011 ("the 2011 Act") was then passed, reflecting those recommendations.

In its 2008 report, the SLC sided squarely with the approach taken in *Ross v. Pryde* and concluded that psychiatric injury suffered by a relative should not be reparable under the new legislation. The issue was considered by the Scottish Parliament's Justice Committee in 2010 during scrutiny of what became the 2011 Act. In its Stage 1 Report, the Committee said it "does not believe that 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 issue. The result has been that uncertainty has continued about which court decision should be followed.

We therefore asked '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?'.

What You Said

The majority (79%) of those providing a view agreed that it should not be possible for a bereaved relative to secure damages for psychiatric injury under the 2011 Act. Reasons given included the avoidance of different treatment in law for different categories of grief; and the potential for ambiguous and incoherent law if it were possible to secure such damages.

Those who didn't agree did so on the basis that it was difficult to distinguish between 'normal' and 'abnormal' grief and that such a distinction was artificial and unworkable.

The Scottish Government Response

We share the view of the SLC and, having given the issue further consideration as part of the wider consultation for damages for psychiatric injury, we will make provision to ensure that a bereaved relative may not secure damages for psychiatric injury under the 2011 Act. This would not preclude a relative raising an action for

damages for psychiatric injury where the relative is able to establish that the defender owed him/her a duty of care, independent from any duty owed by the defender to the deceased.

Psychiatric Injury

In their 2004 Report on *Damages for Psychiatric Injury* (2004 Report), the SLC described the current law on delictual liability for psychiatric harm as "an unprincipled set of rules with a number of defects" and concluded that the existing common law rules should be replaced by a new statutory scheme. The SLC recommended the introduction of a "principled yet flexible framework".

We asked '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?'.

What You Said

The vast majority (80%) of those who provided a view agreed that the 2004 report's summary of defects is a reasonably full and accurate one.

We asked '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?'.

What you said

Around half (51%) of those who provided a view did not agree that existing common law rules should be replaced by a statutory obligation to make reparation for wrongfully caused mental harm.

We asked '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?'.

What you said

Over half (57%) of those who provided a view did not regard the concept of "ordinary fortitude" as unsatisfactory in this context. The most common argument, largely made by insurance bodies, was that the principle of "ordinary fortitude" is generally understood, having been tested in case law over time, and having become a standard or benchmark.

Three individual members of the public argued that "ordinary fortitude" is a difficult concept to apply to people who may be affected many years later by an experience which has left them vulnerable to psychiatric harm in what may seem to be ordinary contexts.

We asked '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 of 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?'.

What you said

The vast majority (89%) of those who provided a view did not agree that an appropriate balance would be achieved by focusing on the stresses or vicissitudes of life or on the type of life that person leads. Arguments against included that each case should be assessed according to its own specific circumstances and that the terms lacked precision and meaning.

We asked '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?'.

What you said

Over 70% of those who provided a view agreed. There was general agreement with the rationale set out in the consultation document, in particular the view that the current approach is unduly wide, and that there is a need to limit liability further where psychiatric injury is caused unintentionally. Among those who disagreed it was suggested that an artificial division was being proposed between physical and psychiatric injury.

We asked '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?'.

What you said

The vast majority (88%) of those providing a view agreed that there should be a general prohibition in these circumstances.

We asked 'do you agree that it is appropriate to except rescuers from the general prohibition?'

What you said

The vast majority (82%) of those providing a view agreed that it is appropriate to make an exception for rescuers. However, see below in relation to further views expressed on this in relation to a later question in the consultation.

We asked '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?'.

What you said

The majority (81%) of those providing a view agreed.

We asked '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?'.

What you said

Around two-thirds (69%) of those providing a view agreed that the two exceptions would strike the appropriate balance. One issue which re-emerged most commonly in the responses (both by those who agreed and disagreed), was the need for further consideration of the proposal for rescuers to be excepted from the general prohibition (see above). Distinctions were drawn between paid and unpaid rescuers. Distinctions were also drawn between exposure to horrific events in the normal course of employment, and situations where exposure is part of the employment but where additional negligence is identified by those who caused or permitted the rescuer to take part (such as negligence by employers of police or fire and rescue officers).

We asked 'do you agree that other recommendations in the Commission's report are appropriate?."

What you said

Only 4 (15%) of the 26 respondents who provided a view agreed that the other recommendations in the SLC's 2004 report are appropriate. Amongst those who disagreed were all 13 insurance bodies. Their main concern was the SLC's suggestion that psychiatric injury would not need to be induced by shock. According to these respondents, this would increase uncertainty and possibly open the floodgates for more claims. It was also asserted that medical and legal costs could increase as a result, due to complexities in distinguishing psychiatric injury from other forms of mental illness.

We asked 'do you agree that the proposed framework strikes the appropriate balance between both flexibility of approach and certainty of outcome?'.

What you said

Of those who provided a view, 82% did not consider that the proposed framework strikes the appropriate balance between flexibility of approach and certainty of outcome. One commented that "These recommendations as they stand are elegant in their simplicity, but leave too much to judicial discretion in operating core concepts. For practical purposes successful reform requires greater precision in this difficult area".

The Scottish Government Response

While analysis of the responses revealed overall agreement that the current system relating to damages for psychiatric injury has defects, there was no general consensus that what was proposed by the SLC would be an improvement on the current situation. There was, however, a body of support for some limited aspects of the SLC's framework.

Given that what was proposed was a framework, it is not appropriate to progress elements of the framework separately.

The SLC published its Report on ***Damages for Psychiatric*** Injury in 2004 and there is a view that since then the law has been well tested; is now fairly settled; and is being applied consistently.

We therefore do not intend to legislate for a framework for damages for psychiatric injury.

Annex A

Summary of Events

A consultation event was held in Edinburgh on 10 April 2013. This event was attended by both pursuer and defender legal representatives and a representative from the Scottish Human Rights Commission. The issues raised at that event were broadly similar to the issues raised in the written responses to the consultation.

A consultation event was held in Glasgow on 11 April 2013. The event was attended by both pursuer and defender legal representatives and members of the public with an interest in the time-bar issue. The key points made by those who attended this event were:

- There shouldn't be a limitation period under the 1973 Act for historic child abuse survivors.

- Judicial discretion in section 19A of the 1973 Act isn't working for historic child abuse survivors, nor does it work well for asbestos related sufferers where 'date of knowledge' is an issue.

- Extending the limitation period under the 1973 Act for latent industrial diseases would be a step in the right direction.

- The Scots law principle of 'one action; one harm' is unfair.

- A non-exhaustive list of factors as regards judicial discretion under section 19A of the 1973 Act would be helpful but also, a list could have a negative effect in so far as it could become limiting with the potential to narrow what is currently a wide discretion. Judges may focus too much on the factors on the list rather than exercise their open discretion. A list won't necessarily solve the current problems.

A further submission was prepared by an attendee at this event. The submission can be viewed on the Scottish Government website at: www.scotland.gov.uk/Topics/Justice/law/damages/damagesetc.

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