



Scottish Law Commission

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ISSUED ON BEHALF OF THE SCOTTISH LAW COMMISSION

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DAMAGES FOR PSYCHIATRIC INJURY

The Scottish Law Commission publishes today Discussion Paper (No 120) on Damages for Psychiatric Injury.

Background

In July 2001 the Commission received a reference from the Scottish Ministers to examine the law of Scotland relating to damages for psychiatric injury caused by another person and to make recommendations as to possible changes. The discussion paper concentrates on situations where an individual suffers a psychiatric injury arising from an act or omission of another without any physical or other injury. It is in this area of "pure psychiatric injury" that the problems mainly lie. The paper does not deal with claims for grief and loss of society under the Damages (Scotland) Act 1976 by members of the deceased's immediate family.

The basic requirements for liability

At present a person claiming damages for psychiatric injury must establish that he or she has a medically recognised psychiatric illness or disorder. Mere distress is not enough. This distinction should remain, but the Commission asks whether a compensatable psychiatric injury should have to be significantly disabling as well as medically recognised.

Damages are awarded only if the psychiatric injury arises from a sudden shock - the impact of a horrifying event or experience. This restriction means that parents seeing their child die over the course of several days cannot claim damages for any resulting psychiatric injuries. The Commission proposes that the shock requirement should be abolished.

Foreseeability

Generally damages are claimable only if the psychiatric injury was a reasonably foreseeable consequence of the wrongdoer's act or omission. However, damages can be awarded for an unforeseeable psychiatric injury whenever the victim was at risk of some physical injury. It does not matter that the victim escaped physical injury. The Commission proposes that damages for an unforeseeable psychiatric injury should be claimable only if the victim suffered a physical injury as well.

Primary victims and secondary victims

Generally speaking, a primary victim is somebody who was directly involved in the incident while a secondary victim merely witnessed the death or injury of others. The distinction is important because before there can be liability a secondary victim must: (a) have a close tie of love and affection with the dead or injured person, (b) have been sufficiently close in time and space to the incident or its immediate aftermath and (c) have perceived the incident or its immediate aftermath directly through his or her own unaided senses.

Primary victims The Commission considers that primary victims should no longer be defined as those within the range of foreseeable physical danger. Where an accident occurred at work it may be difficult to decide who is a primary victim if a group was engaged on the same job. The Commission proposes that the test should be whether the victim's psychiatric injury was foreseeable. Moreover, other types of primary victim have since been recognised where no physical danger was involved, such as a man being wrongly imprisoned due to his lawyers failing to look for witnesses who would have established his innocence.

At present rescuers can claim damages for psychiatric injury only if they themselves were at risk of physical injury. The Commission suggests that this is an unreasonable restriction. The rescuers' psychiatric injuries will usually arise from what they see and hear rather than

from fears for their own safety. Direct involvement in the immediate aftermath should suffice.

Secondary victims The Commission thinks that it should continue to be a requirement that secondary victims have a close tie of love and affection with the dead or injured person. Bystanders should have no claim where an accident involves strangers. Allowing unrelated bystanders to claim would extend liability too far where, for example, a fatal crash occurred in a town centre. The parents, spouse, fiancé(e) and children of an dead or injured person are currently regarded as having a close tie; others have to prove that a close tie existed. The Commission asks whether there should be a list of those who would be deemed to have a close tie, and if so who should be listed; and whether people not on the list (such as a friend) should be able to claim if they could show that there was in fact a close tie of love and affection.

The other existing criteria - being present at and witnessing the accident or its immediate aftermath - should in the Commission's view be abolished. They can give rise to unjust results. For example, a mother who is told by telephone of her son's fatal injuries can claim if she rushes to hospital in time to see him die, but not if she is too distraught to go.

Primary victim responsible for own injuries

To what extent, if any, should the fact that an accident was caused by the primary victim affect a secondary victim's claim for damages? Suppose parents suffer psychiatric injuries from seeing their daughter severely injured in a car accident for which she was 70% to blame. The current position is not clear. The Commission raises the question whether (like their daughter) the parents should be able to claim from the defender only 30% of the damages otherwise due. In theory they should be entitled to recover the remaining 70% from their daughter, although in practice few people sue their own relatives unless they are insured.

The next steps

The Discussion Paper sets out possible reforms. The Commission looks forward to receiving comments from a wide variety of people with an interest in this area of the law. The consultation period lasts until 30 November 2002. After that the Commission will reconsider matters in the light of the responses received and will make its final recommendations for reform in a Report to the Scottish Ministers. It is intended to submit this report in the first half of 2003.

NOTES TO EDITORS

1. The Scottish Law Commission was set up in 1965 to promote the reform of the law of Scotland. The Chairman is the Honourable Lord Eassie. The other Commissioners are currently Mr Patrick S Hodge QC, Professor Gerard Maher, Professor Kenneth G C Reid and Professor Joseph M Thomson.
2. Further information can be obtained by contacting Professor Thomson, Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR (Tel: 0131 668 2131, Fax: 0131 662 4900, e-mail: info@scotlawcom.gov.uk.)
3. The paper may be viewed on our website at www.scotlawcom.gov.uk or purchased from The Stationery Office Bookshops.