

RESPONSE FORM

DISCUSSION PAPER ON DAMAGES FOR PERSONAL INJURY

We hope that by using this form it will be easier for you to respond to the proposals or questions set out in the Discussion Paper. Respondents who wish to address only some of the questions and proposals may do so. The form reproduces the proposals/questions as summarised at the end of the paper and allows you to enter comments in a box after each one. At the end of the form, there is also space for any general comments you may have.

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We may also (i) publish responses on our website (either in full or in some other way such as re-formatted or summarised); and (ii) attribute comments and publish a list of respondents' names.

In order to access any box for comments, press the shortcut key F11 and it will take you to the next box you wish to enter text into. If you are commenting on only a few of the proposals, continue using F11 until you arrive at the box you wish to access. To return to a previous box press Ctrl+Page Up or press Ctrl+Home to return to the beginning of the form.

Please save the completed response form to your own system as a Word document and send it as an email attachment to info@scotlawcom.gov.uk. Comments not on the response form may be submitted via said email address or by using the [general comments form](http://www.scotlawcom.gov.uk/contact-us#sendcomments) on our website. If you prefer you can send comments by post to the Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR.

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**Summary of Questions**

1. Do consultees have any comments on economic impact?

 (Paragraph 1.18)

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| **Comments on Question 1**«InsertTextHere» |

2. (a) Do you consider that the definition of “relative” in section 13(1) of the 1982 Act should be amended to include children/parents, grandchildren/grandparents, and siblings who are accepted as part of the family?

(b) Do you consider that there is any other category of “relative” which should be included?

 (Paragraph 2.20)

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| **Comments on Question 2**«InsertTextHere» |

3. Should the definition in s 13(1)(b) be amended to include ex-partners?

 (Paragraph 2.32)

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| **Comments on Question 3**«InsertTextHere» |

4. (a) Do you consider that section 8 of the 1982 Act should be extended to claims in respect of necessary services provided gratuitously to an injured person by individuals who are not family members?

(b) If so, should an individual who is not a family member be regarded as providing services gratuitously if he or she provides them without having any contractual right to payment in respect of their provision, and otherwise than in the course of a business, profession or vocation; or according to some other formula and, if so, what?

 (Paragraph 2.44)

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| **Comments on Question 4**«InsertTextHere» |

5. (a) Do you consider that section 8 of the 1982 Act should be extended to claims in respect of necessary services provided gratuitously to an injured person by bodies or organisations such as charities?

 (b) If so, should legislation prescribe how damages should be assessed or should it be a matter left to the discretion of the courts?

 (c) If you consider that legislation should so prescribe, what factors do you consider that the court attention should be directed to? For example should the court be directed to consider “such sum as represents reasonable remuneration for those services and repayment of reasonable expenses incurred in connection therewith” an appropriate means of assessment or should a concept of reasonable notional costs be adopted? Or some other way of assessment?

 (Paragraph 2.44)

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| **Comments on Question 5**«InsertTextHere» |

6. Should damages be recoverable in respect of gratuitous provision of services to an injured person where the person providing them is the defender?

 (Paragraph 2.50)

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| **Comments on Question 6**«InsertTextHere» |

7. (a) Do you consider that section 9 of the 1982 Act should be extended so as to entitle the injured person to obtain damages for personal services which had been provided gratuitously by the injured person to a third party who is not his or her relative?

 (b) If so, should the injured person be under an obligation to account to such a third party for those damages ?

 (Paragraph 2.61)

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| **Comments on Question 7**«InsertTextHere» |

8. (a) Do you consider that there are any problems with the deductibility of social security benefits from awards of damages?

 (b) If so, could you outline those problems? Do you have any solutions to suggest?

 (Paragraph 3.21)

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| **Comments on Question 8**«InsertTextHere» |

9. Do you consider that benevolent payments, or payments from insurance policies which the injured person has wholly arranged and contributed to, should continue not to be deductible from an award of damages?

 (Paragraph 3.35)

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| **Comments on Question 9**«InsertTextHere» |

10. (a) In the context of payments to injured employees arising from permanent health insurance and other similar schemes, do you consider that clarification or reform of section 10 of the Administration of Justice Act 1982 is required?

 (b) If so, could you outline the essential elements of any clarification or reform which you suggest?

 (c) In particular, would you favour an approach in which the law was clarified to make it clear that where an employee contributes financially, as a minimum through paying tax and NIC on membership of the scheme as a benefit, then any payments made under that policy should not be deducted?

 (Paragraph 3.58)

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| **Comments on Question 10**«InsertTextHere» |

11. Do you agree with the proposition that section 2(4) of the 1948 Act should remain in force?

 (Paragraph 3.67)

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| **Comments on Question 11**«InsertTextHere» |

12. Do you consider that any further reform of the existing regime in relation to the costs of an injured person’s medical treatment is necessary?

 (Paragraph 3.72)

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| **Comments on Question 12**«InsertTextHere» |

13. Do you agree that the default position should be that the responsible person rather than the state should pay for the cost of care and accommodation provided to an injured person?

 (Paragraph 3.93)

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| **Comments on Question 13**«InsertTextHere» |

14. Do you agree that an injured person should be entitled to opt for private care and accommodation rather than rely on local authority provision?

 (Paragraph 3.93)

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| **Comments on Question 14**«InsertTextHere» |

15. Do you have any other comments?

(Paragraph 3.93)

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| **Comments on Question 15**«InsertTextHere» |

16. Do you favour all, some or none of the following options?

(a) the award of damages to an injured person who opts for local authority provision should include the cost of making any payments levied by the local authority for that provision;

(b) where an injured person receives but does not pay for local authority care and accommodation, an award of damages should be made to the local authority to cover the cost of providing it;

(c) where an injured person opts for private care and accommodation, and the award of damages covers the cost of obtaining it, provision should be made to avoid double recovery by, for example, having some procedure equivalent to that in the English Court of Protection.

 (Paragraph 3.101)

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| **Comments on Question 16**«InsertTextHere» |

17. Have you any other suggestions for reform in this area?

 (Paragraph 3.101)

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| **Comments on Quesion 17**«InsertTextHere» |

18. (a) Do you agree that, with the exception of asbestos-related disease, there is no general need for reform of the law of provisional damages?

 (b) If you disagree, can you describe what needs reformed and, if so, what reforms you would propose?

 (Paragraph 4.11)

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| **Comments on Question 18**«InsertTextHere» |

19. Do you consider that there is a problem with the way provisional damages operate in cases involving asbestos-related disease claims?

 (Paragraph 4.41)

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| **Comments on Question 19**«InsertTextHere» |

20. If so, do you favour:

(a) providing that a diagnosis of pleural plaques would not, on the basis of time bar, preclude further action at any future time;

(b) providing that a claim for asbestos-related pleural plaques (or pleural thickening or asbestosis) itself would become time-barred 3 years after diagnosis but that claims for any subsequent related disease such as mesothelioma would not be so time- barred;

(c) creating a provision parallel to the Limitation (Childhood Abuse) (Scotland) Act 2017; or

(d) another solution, and if so, what?

 (Paragraph 4.41)

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| **Comments on Question 20**«InsertTextHere» |

21. Please give reasons for your choice in question 20.

 (Paragraph 4.41)

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| **Comments on Question 21**«InsertTextHere» |

22. Additionally, do you consider that the establishment of liability should be capable of being deferred, by agreement between the parties, to a later point should a subsequent more serious condition emerge?

 (Paragraph 4.41)

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| **Comments on Question 22**«InsertTextHere» |

23. Are there any problems at present with the operation of section 13? If so, please describe them and give examples where possible.

 (Paragraph 5.10)

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| **Comments on Question 23**«InsertTextHere» |

24.If there are problems, how do you consider these might be resolved?  Specifically, do you think the court should have regard to the same matters that it has to consider when determining an application under section 11(1) of the 1995 Act, or are there other or additional matters that the court should consider?

 (Paragraph 5.10)

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| **Comments on Question 24**«InsertTextHere» |

25. Do you consider that it should be mandatory for the parents or a guardian to report to the Accountant of Court, especially where a child will be largely dependent upon an award of damages for the rest of their life? Or do you consider that the imposition of such a reporting requirement is a matter best left to the discretion of the court?

 (Paragraph 5.22)

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| **Comments on Question 25**«InsertTextHere» |

26. (a) Do you consider that a court should have a duty, when about to grant decree in a claim for damages for a child, to make inquiries about the future administration of any funds and property to be held for the child, and, if the court considers it necessary, to remit the case to the Accountant of Court for a report in terms of section 13?

 (b) If so, should such a duty be expressed in a Practice Note/Direction; in a Rule of Court; or in some other way?

 (Paragraph 5.22)

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| **Comments on Question 26**«InsertTextHere» |

27. Where the court orders an award of damages to be paid directly to the child, do you consider that the wide discretion afforded to the court remains appropriate, or ought this discretion be curtailed by requiring the court to consider factors such as the amount of the award and the capacity of the child?

 (Paragraph 5.27)

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| **Comments on Question 27**«InsertTextHere» |

28. If you consider that the court ought to be required to take account of specific factors, are there any other factors, other than the amount of the award and the capacity of the child, that the court ought to have regard to?

 (Paragraph 5.27)

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| **Comments on Question 28**«InsertTextHere» |

29. (a) Do you consider that section 13 allows the court to direct payment of damages into a trust?

 **(**b) If so, do you consider that such payments may be made into a bare trust or a substantive trust or both?

(c)Do you have any examples? Can you give details?

(d) Do you consider that section 13 should permit transfer to persons other than those listed in section 13(2)(a) and (b)? If so, to whom?

(e) To what extent do you consider that a court is able to define the purpose of such a trust, and the powers of the trustees, in particular in the context of directions or restrictions concerning the beneficiaries or the residue of the trust estate?

(f) Do you consider that there is a need for reform? If so, what needs to be reformed, and do you have any solutions to suggest?

 (Paragraph 5.27)

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| **Comments on Question 29**«InsertTextHere» |

30. Do you agree that the power to make an order that money be paid to the sheriff clerk should be retained meantime?

 (Paragraph 5.29)

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| **Comments on Question 30**«InsertTextHere» |

31. Do you consider that any other reform is necessary in this context? If so, what?

 (Paragraph 5.29)

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| **Comments on Question 31**«InsertTextHere» |

32. Do you consider that there is adequate provision to enable application to be made in court proceedings for an appropriate order relating to the management of sums already paid in respect of damages awarded to a child? If not, please give reasons or examples.

 (Paragraph 5.34)

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| **Comments on Question 32**«InsertTextHere» |

33. What do you think might explain the low usage of the provisions that involve the Accountant of Court?

 (Paragraph 5.46)

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| **Comments on Question 33**«InsertTextHere» |

34. What might increase use of these provisions?

 (Paragraph 5.46)

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| **Comments on Question 34**«InsertTextHere» |

35. Do you consider that there is a need for independent oversight when it is proposed to set up a trust for damages for personal injury awarded to a child?

 (Paragraph 5.62)

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| **Comments on Question 35**«InsertTextHere» |

36.Should such oversight be necessary in all cases, or only in certain specific circumstances? If the latter, what type of circumstances?

 (Paragraph 5.62)

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| **Comments on Question 36**«InsertTextHere» |

37. If oversight is necessary, should it be achieved by:

 (a) providing that a draft of the proposed trust deed be sent to the Accountant of Court for consideration and approval of its terms, including the suitability of the choice of trustees; and

 (b) such oversight by the Accountant of Court also being triggered by any significant change in circumstances such as where there is a substantial increase in the assets held in trust following a final settlement, or where there is a change of trustees; or

 (c) another process? If so, what? (Paragraph 5.62)

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| **Comments on Question 37**«InsertTextHere» |

38. Are PITs the only type of trusts used for managing awards of damages to children or are there others? If you have experience of other types of trust being used could you give examples?

 (Paragraph 5.62)

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| **Comments on Question 38**«InsertTextHere» |

39. Are there any other issues that arise in relation to the Accountant of Court or to the courts’ management or to the courts’ management and safeguarding of awards of damages to children? If so, please describe those issues and how they may be resolved.

 (Paragraph 5.76)

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| **Comments on Question 39**«InsertTextHere» |

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| **General Comments**«InsertTextHere» |

Thank you for taking the time to respond to this Discussion Paper. Your comments are appreciated and will be taken into consideration when preparing a report containing our final recommendations.