Scottish Law Commission

promoting law reform

(SCOT LAW COM No. 266)

Report on Damages for Personal Injury

report

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Report on Damages for Personal Injury

Laid before the Scottish Parliament by the Scottish Ministers under section 3(2) of the Law Commissions Act 1965

December 2024

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The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 (as amended) for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

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SCOTTISH LAW COMMISSION

Item No 7 of our Eleventh Programme of Law Reform

Report on Damages for Personal Injury

To: Angela Constance MSP, Cabinet Secretary for Justice and Home Affairs

We have the honour to submit to the Scottish Ministers our Report on Damages for Personal Injury

(Signed) ANN PATON, *Chair*
DAVID BARTOS
GILLIAN BLACK
FRANKIE McCARTHY
ANN STEWART

Rachel Rayner, *Chief Executive*
4 December 2024

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Abbreviations

Edelman J, J Varuhas and A Higgins (eds), *McGregor on Damages* (22nd edn, Sweet & Maxwell, 2024).

Abbr: *McGregor on Damages*

Paton A (ed), *McEwan and Paton on Damages for Personal Injuries in Scotland* (Release 67, Sweet & Maxwell, 2023).

Abbr: *McEwan and Paton on Damages*

Royal Commission on Civil Liability and Compensation for Personal Injury, *Report* (HMSO, 1978) Cmnd 7054-I.

Abbr: Pearson Report

Scottish Law Commission, *Discussion Paper on Damages for Personal Injury* (2022) Scot Law Com No 174.

Abbr: Discussion Paper

Glossary

Accountant of Court: The officer of the Court of Session who supervises the conduct of judicial factors; holds *ex officio* certain statutory offices such as Public Guardian; and performs other statutory functions. (See also: 'Public Guardian'; 'judicial factor'.)

Appellate: Relating to appeals, whereby an action is raised by the losing party in a case which takes the case to a higher court in hope of having the existing decision reversed. (See also: 'Court of Appeal'.)

Asbestos: A highly heat-resistant fibrous silicate mineral that can be woven into fabrics and was previously used in brake linings and in fire-resistant and insulating materials. Inhalation of asbestos fibres can result in severe lung disease. Blue and brown asbestos was banned in the UK in 1985, and this ban was extended to white asbestos in 1999. (See also: 'asbestosis', 'mesothelioma', 'pleural plaques', pleural thickening'.)

Asbestosis: A lung disease resulting from the inhalation of asbestos particles, marked by severe fibrosis and a high risk of mesothelioma. (See also: 'asbestos', 'mesothelioma'.)

Case law: Judicial decisions as a source of law.

Causation: For liability to arise, the responsible person must in fact have caused the personal injury. Personal injuries are defined in section 13(1) of the Administration of Justice Act 1982 as: "(a) any disease, and (b) any impairment of a person's physical or mental condition".

Caution: Security by which one party guarantees the payment of another's debt or the due performance of another's obligation or some other legal act such as the administration of a trust estate.

Claimant: A term used in England since April 1999 for a person who makes a claim in the civil courts. (See also: 'injured person'; 'plaintiff'; 'pursuer'.)

Common law: Law which does not stem from a statute book but is laid down in judicial decisions.

Consanguinity: Relationship of persons descended from the same ancestor.

Contributory negligence: Some careless or blameworthy act or omission by the pursuer which contributed, with the defender's fault or negligence, to the pursuer's loss or injury. Since 1945 the court may reduce an award of damages in proportion to the pursuer's share of responsibility for what happened.

Court of Appeal: A court which has jurisdiction to hear appeals. (See also: 'appellate'.)

Court of Protection: A court in England and Wales which makes decisions on behalf of people who lack capacity to make their own decisions.

Damages: A sum of money claimed as compensation for loss, injury or damage resulting from an act or omission of the defender which is in breach of a duty owed. The amount of damages awarded is intended to put the person entitled thereto as nearly as may be in the same position as they were before the harm occurred.

Decree: The final order of a court or arbiter in civil proceedings.

Defendant/defender: A party against whom a civil action has been raised.

Delict: The Scots law term for a civil wrong created by the deliberate or negligent breach of a legal duty, from which a liability to compensate consequential loss and injury may arise. (See also: 'tort'.)

Devolved competence: Legislative authority within the power of the Scottish Parliament.

Ex gratia: Gratuitous, done without recognising any legal obligation to do whatever was done. Thus an *ex gratia* payment may be made to settle a claim without any admission as to liability. (See also: 'extra-judicial'; 'settle'.)

Executor/executrix: A legal representative of a deceased person whose duty it is to wind up the estate of the deceased.

Ex proprio motu: Of a person's own volition or accord: describes a decision made by a judge without being requested by a party to take that course.

Extra-judicial: Not carried out under judicial control; out of court. (See also: 'ex-gratia'; 'settle'.)

Friendly society: A mutual association composed of a body of people who join together for a common financial or social purpose such as insurance, pensions, savings, or co-operative banking.

House of Lords: (i) The second legislative chamber of the United Kingdom (ii) The Appellate Committee of the House of Lords (which used to be the highest appeal court in the United Kingdom until it was replaced by the Supreme Court in October 2009).

Injured person: The person who makes a claim in the civil courts following an injury. (See also: 'claimant'; 'plaintiff'; 'pursuer'.)

Inner House: The part of the Court of Session (Scotland's highest civil court) which is primarily concerned with the court's appellate jurisdiction. (See also: 'appellate'.)

Interlocutor: The official document embodying an order or judgment pronounced by the court.

Judicial factor: A person appointed by a court to hold or administer property in Scotland where it is in dispute or where there is no one who could properly control or administer it. A judicial factor must find caution, and his or her work is supervised by the Accountant of Court. (See also: 'Accountant of Court'.)

Joint minute: A document which forms part of the process in court. In it, parties may state an agreed position on some aspect of the case, or make a procedural application.

Legacy: A bequest of money or other property to a beneficiary conferred by the will of a deceased person.

Legal capacity: The ability to make legally binding contracts or other legal acts (active capacity) or to be held liable for one's acts (passive capacity).

Legislation: Laws enacted by Parliament (See also: 'statute'.)

Legislative competence: Those matters over which a Parliament may lawfully enact statutes. (See also: 'devolved competence'.)

Limitation period: The period within which an action or claim must be raised in court. If an action is raised out of time, the claim will normally be barred.

Mesothelioma: A type of cancer that begins in the tissue that lines the lungs, heart, stomach and other organs, and is usually linked to asbestos exposure. (See also: 'asbestos', 'asbestosis'.)

Parental responsibilities: Legal responsibilities of parents to their children, including the responsibility to safeguard and promote the child's health, development and welfare; to provide appropriate direction and guidance; to act as the child's legal representative; and, if not living with the child, to maintain personal relations and direct contact on a regular basis. (See also: 'parental rights'.)

Parental rights: The right of a parent over a child to decide such matters as the child's residence, education and upbringing and to act as the child's legal representative. (See also: 'parental responsibilities'.)

Pecuniary: Relating to or consisting of money.

Personal injuries: are defined in section 13(1) of the Administration of Justice Act 1982 as: "(a) any disease, and (b) any impairment of a person's physical or mental condition".

Plaintiff: An English law term for a person raising an action in the civil courts. (See also: 'claimant'; 'injured person'; 'pursuer'.)

Pleural plaques: Localised thickening of the lining between the lung and chest wall. The plaques themselves are harmless, but in most cases indicate asbestos exposure. (See also: 'asbestos'.)

Pleural thickening: Thickening of the lining between the lung and chest wall, which can lead to difficulty breathing. Often caused by asbestos exposure. (See also: 'asbestos'.)

Provisional damages: An award of compensation where there is a risk that the original injury could lead to future disease or serious deterioration. Such an award allows the injured person to return to court for further damages if the condition becomes worse than originally thought.

Public Guardian (Office of): The Office of the Public Guardian has a general function to register powers of attorney; supervise those who are appointed to manage the affairs of adults who lack capacity to make their own decisions; and investigate circumstances where the property or finances of incapable adults appear to be at risk. (See also: 'Accountant of Court'.)

Pursuer: The Scots law term for a person raising an action in the civil courts. (See also: 'claimant'; 'injured person'; 'plaintiff'.)

Quantification: The calculation of the appropriate amount of damages.

Quantum: The amount of damages.

Reserved matters: Those matters which are reserved to the UK Parliament by the Scotland Act 1998 and are therefore not within the legislative competence of the Scottish Parliament. (See also: 'devolved competence'; 'legislative competence'.)

Responsible person: The party against whom a claim for damages is made. (See also: 'defendant/defender'.)

Royal Commission: A major ad-hoc formal public inquiry into a defined issue.

Settle: Where an action or legal dispute is terminated on agreed terms. (See also 'ex gratia'; 'extra-judicial'.)

Solatium: Compensation/damages given for injury to feelings or reputation, pain and suffering or loss of expectation of life.

Statute: An Act of the UK or Scottish Parliament, public or private. (See also: 'legislation'.)

Tort: The English law term for delict. (See also: 'delict'.)

Tortfeasor: The person responsible for a tort. (See also: 'tort'.)

Trust: A legal institution under which a person called a trustee owns assets segregated from their own private patrimony and is obliged by law to deal with those assets for the benefit of another (called the 'beneficiary') or the furtherance of a trust purpose.

Undertaking: A promise; an accepted obligation.

This glossary is based on the Law Society of Scotland, *Glossary of Scottish and European Union Legal Terms and Latin Phrases* (2nd edn, 2003).

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2014 Children and Young People (Scotland) Act (asp 7)

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2015 Criminal Justice and Courts Act (c 2)

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2017 Limitation (Childhood Abuse) (Scotland) Act (asp 3)

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2019 Damages (Investment Returns and Periodical Payments) (Scotland) Act (asp 4)

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2020 Children (Scotland) Act (asp 16)

s 1

2024 United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act (asp 1)

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Chapter 1 Introduction

Introduction

1.1 The law of damages for personal injury seeks to put a person who has been injured as a result of negligence or other delictual conduct back into the position they would have been in had the injury not occurred. Statutes and case law provide principles and precedents which assist in the quantification of claims.

1.2 One statute, the Administration of Justice Act 1982,[1] made important changes to the law of damages in Scotland. That Act introduced damages for necessary services rendered by relatives to an injured person[2] and for personal services which an injured person could no longer render to relatives.[3] The Act also clarified which benefits and payments received by the injured person should or should not be taken into account in the assessment of an award of damages.[4] A further innovation introduced by the 1982 Act was the concept of provisional damages, whereby an injured person likely to suffer a future deterioration in their condition can apply to the court for a provisional award of damages, reserving the right to return to the court for further damages in the event of deterioration.[5]

1.3 More than forty years have passed since the enactment of the 1982 Act. During those years, there have been significant changes in both society and the law. For example, the nuclear family[6] is no longer the paradigm in modern society: many more flexible contemporary family structures now exist.[7] In the context of legal developments, statutes have been enacted such as, the Social Security (Recovery of Benefits) Act 1997, the Civil Partnership Act 2004, the Family Law (Scotland) Act 2006, the Damages (Asbestos-related Conditions) (Scotland) Act 2009, the Damages (Scotland) Act 2011, the Marriage and Civil Partnership (Scotland) Act 2014, and the Civil Partnership (Scotland) Act 2021. In addition, the courts have made significant decisions which have affected the direction of the law. Finally, in a socio-legal context, there is greater awareness of the vulnerability of children in the context of damages.

1.4 As a result of those social and legal changes, certain questions have arisen concerning the Scots law governing damages for personal injury. In particular:

- In the context of services rendered to or by an injured person, such as nursing and care services (section 8 of the Administration of Justice Act 1982) or decorating

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[1] A UK statute, Part II of which, namely ss 7 to 14, extends to Scotland only, implementing certain recommendations in our report *Damages for Personal Injuries: Report on (1) Admissibility of Claims for Services (2) Admissible Deductions* (1978) Scot Law Com No 51. It is worth noting that England and Wales do not have a statutory equivalent to sections 8 to 10: their relevant law is entirely common law.

[2] Section 8 of the 1982 Act. For example, nursing care, help with bathing, housekeeping, shopping and emotional support. "Relative" is defined in s 13.

[3] Section 9 of the 1982 Act. For example, childcare, housework, gardening, shopping, DIY, decorating, and home maintenance. "Relative" is defined in s 13.

[4] Section 10 of the 1982 Act. For example, earnings from employment must be deducted, but not a contractual pension or benefit. Section 10 must be read with the specific provisions on deductibility of social security benefits, introduced by the Social Security (Recovery of Benefits) Act 1997.

[5] Section 12 of the 1982 Act.

[6] Commonly understood to mean a married husband and wife and their children, living together as a family unit.

[7] For example, cohabitants and civil partners.

and DIY (section 9 of the 1982 Act), does the current definition of "relative" (section 13 of the 1982 Act) adequately reflect contemporary family structures, or should the definition be broadened?

- Should awards of damages for section 8 and section 9 services be extended beyond the class of "relatives" to include persons such as neighbours or friends?
- Where an injured employee receives payments from a Permanent Health Insurance scheme arranged by their employer, should those payments be deducted from the employee's damages for wage loss? An apparent conflict between Scottish authority (*Lewicki v Brown & Root Wimpey Highland Fabricators Ltd*[8]) and English authority (*Gaca v Pirelli General plc*[9]) has caused difficulties.
- Should someone who has suffered negligent exposure to asbestos be barred from raising an action for mesothelioma because of a much earlier (unlitigated) diagnosis of pleural plaques?
- Should damages awarded to young children be more closely monitored?

1.5 This Report examines these questions and related issues, identifies difficulties and discrepancies in the current law, and recommends reforms.

Background to the Report

1.6 Previous work by the Scottish Law Commission on damages for personal injury can be found in:

- Scot Law Com No 51: Damages for Personal Injuries: Report on (1) Admissibility of Claims for Services (2) Admissible Deductions (1978).
- Scot Law Com No 64: Report on Section 5 of the Damages (Scotland) Act 1976 (1981).
- Scot Law Com No 74: Prescription and the Limitation of Actions: Report on Personal Injuries Actions and Private International Law Questions (1983).
- Scot Law Com No 134: Report on The Effect of Death on Damages (1992).
- Scot Law Com No 196: Report on Damages for Psychiatric Injury (2004).
- Scot Law Com No 207: Report on Personal Injury Actions: Limitation and Prescribed Claims (2007).
- Scot Law Com No 213: Report on Damages for Wrongful Death (2008).

1.7 The proposal that we should examine the further issues outlined in paragraph 1.4 above attracted support in the responses to our consultation on the Tenth Programme of Law Reform.[10] The project was duly included in the Programme, which was approved by the Scottish Government.

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[8] 1996 SLT 145 (Outer House); 1996 SC 200 (Inner House).
[9] [2004] 1 WLR 2683.
[10] (2018) Scot Law Com No 250.

1.8 In February 2022 we published a Discussion Paper[11] outlining the existing law, and identifying aspects which might require modernisation, simplification, or clarification. We are grateful to all those who took time to respond to the consultation.

Structure of the Report

1.9 In this Report, we adopt the following structure. Chapter 2 deals with the law concerning necessary services rendered by a relative to an injured person (section 8 of the 1982 Act), and also personal services which the injured person is unable to render to a relative because of the injury (section 9 of the 1982 Act). Chapter 3 focuses on deductions from awards of damages (section 10 of the 1982 Act), including Permanent Health Insurance schemes and the cases of *Lewicki* and *Gaca.* Chapter 4 discusses provisional damages (section 12 of the 1982 Act) and asbestos-related disease, with particular emphasis on an issue of time-bar arising from a diagnosis of an asymptomatic condition (e.g., pleural plaques). Chapter 5 focuses on awards of damages to children, and the possible need for greater supervision of those awards. Chapter 6 lists our recommendations for law reform. There are four appendices.

Legislative competence

1.10 In terms of section 29 of the Scotland Act 1998, a provision is outside the competence of the Scottish Parliament if, among other things, it relates to reserved matters as defined in Schedule 5 to that Act. The law of damages for personal injuries in Scotland is not a reserved matter. Thus, in our view, the provisions enacting the recommendations are within the legislative competence of the Scottish Parliament. We do not consider that an order under section 104 of the 1998 Act is required.[12]

1.11 Furthermore, in our view, the provisions enacting the recommendations would be compatible with the requirements of the European Convention on Human Rights[13] and the requirements of the United Nations Convention on the Rights of the Child.[14]

Commencement and transitional provisions

1.12 If the Scottish Government decides to implement any or all of the recommendations contained in this Report, appropriate commencement and transitional provisions may be required. Commencement of the Bill provisions is a matter for the Scottish Government. However, section 8 of the draft Bill provides that it and section 9 (Short title) of the Bill will come into force on the day after Royal Assent. The other provisions of this Act come into force on such day as Scottish Ministers may by regulations appoint. Section 8(3) provides that commencement regulations may include transitional, transitory, or saving provision and make different provision for different purposes.

1.13 It seems to us that, in particular, section 1 of the Bill may require transitional, transitory or saving provisions. New sections 17ZA(7)-(9) and 18ZZA(3)-(4) capture our policy intention in relation to actions where damages claimed include damages for certain injuries attributable to asbestos exposure.

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[11] *Discussion Paper on Damages for Personal Injury* (2022) Scot Law Com No 174.
[12] The 1982 Act has already been amended by Scottish Acts. For example, by the Damages (Scotland) Act 2011.
[13] Scotland Act 1998, s 29(2)(d).
[14] As defined in section 1(2) of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024.

Business and Regulatory Impact Assessment ("BRIA")

1.14 The Scottish Government requires a BRIA to accompany proposed legislation. This is published on our website. We are grateful to those who provided information that assisted in its preparation, notably, the nine responses from consultees who provided their view on the economic impact of any of the reforms described in the Discussion Paper.

1.15 The principal conclusion of the BRIA is that any increase in relation to the extent of recoverable claims is likely to be reflected in slight increases in insurance premiums. Consultees told us that if, as a result of the recommendations in this Report, the costs to defenders of personal injury claims increase, consumers may expect to pay marginally higher insurance premiums.

1.16 The BRIA identifies a number of specific economic impacts including:

- The redefinition of "relative" in the Administration of Justice Act 1982, together with the extension of section 8 of that Act to non-relatives, may cause some increase in damages claimed by victims suffering personal injury as a result of negligence. It is possible that insurance premiums (for example, vehicle insurance) may increase slightly.
- Clarification of the deductibility or otherwise of payments made to an injured employee from a Permanent Health Insurance scheme is likely to bring increased certainty and fairness and reduce litigation costs.
- A new legislative provision concerning the pleural plaques time-bar problem is likely to bring increased certainty and fairness, and also to reduce litigation costs, but may increase the damages payable for asbestos-related conditions.
- Increased supervision of awards of damages made to children may require increased court time and additional resources in the office of the Accountant of Court.

1.17 Whilst we acknowledge that there may be a small increase to insurance premiums, we are of the view that this economic impact is offset by improving the experience of participants in damages cases by (i) modernising the law to better reflect Scotland today, (ii) enabling access to justice by widening the variety of persons eligible to bring a claim, (iii) removing obvious unfairness in the current law and the associated anxiety and stress this causes for individuals and families, particularly in relation to those suffering from an asbestos-related disease, (iv) providing clarity on numerous aspects of the law which in turn will reduce both the time and cost involved in bringing a claim, (v) assisting legal practitioners in providing advice to their clients on how cases will be managed by the court and (vi) providing decision makers with clear guidance in terms of the policy objectives and relevant considerations underlying the test for making awards.

1.18 We anticipate that there may be initial training and familiarisation costs, principally for legal practitioners, the Accountant of Court and the judiciary, and perhaps also for other professionals in relevant fields. However, these costs would be relatively small and generally incurred only on first implementation of the proposed legislation.

1.19 Overall, we note that legislative reforms to damages for personal injury may have an economic impact and may lead to a slight increase in insurance premiums and claims for damages. Nevertheless, we recommend reform where such reform is, in our view, necessary or desirable.

Acknowledgments

1.20 Responses to the Discussion Paper came from practitioners, representative bodies of practitioners and the judiciary, trade unions, a government body, insurers, academics, a business, a member of the Scottish Parliament, a support group, and members of the public. We are grateful to the individuals and organisations who responded to the Discussion Paper. A list of respondents is provided in Appendix B.

1.21 We established an Advisory Group in 2019. The Group met during the project, both in person and virtually. We also established a specialist asbestos-related disease sub-group in 2023. The sub-group met in person and also provided thoughts on early version of section 1 of the draft Bill. The assistance of the Advisory Group and the sub-group has been invaluable. We are grateful to the members for their contributions. Members of the Advisory Group and the sub-group are listed in Appendix C.

1.22 Finally, our thanks go to the Accountant of Court and her staff, who made a major contribution to this project, assisting in the development of policy and the formulation of certain recommendations.

Chapter 2 Awards of damages for services rendered to or by an injured person

Introduction

2.1 In Chapter 2 of the Discussion Paper,[1] we considered sections 8 and 9 of the Administration of Justice Act 1982 ("the 1982 Act") which concern awards of damages for services rendered to an injured person (i.e. where a relative cares for the injured person as a result of their injuries) or by an injured person (i.e. where the injured person is unable to continue providing services to their relative because of their injuries). At present, claims under both sections 8 and 9 are restricted to "relatives", as defined in section 13(1) of the 1982 Act. In our Discussion Paper, we asked consultees (i) whether the current definition of relative remains appropriate and (ii) whether claims under sections 8 and 9 should be restricted to "relatives" or extended to others, such as friends or neighbours.

2.2 In this Chapter, we reflect on the responses to the questions posed in Chapter 2 of the Discussion Paper, consider amending the definition of "relative" under section 13(1) of the 1982 Act and examine the implications of extending the definitions of eligible claimants for claims under sections 8 and 9 beyond relatives.

Current law

2.3 As part of our 1978 report,[2] we conducted a review of the common law concerning the right of an injured person's relative to receive damages for "necessary services" they have rendered to the injured person as a consequence of their injuries (i.e. as a consequence of the delictual act of the responsible person). We also considered whether Scots law should allow an injured person to claim damages for their inability to provide "personal services" to their family in circumstances where they would, but for their injury, have provided those services. The recommendations made in the 1978 report were given effect in Part II of the Administration of Justice Act 1982.

2.4 Section 8 of the 1982 Act provides a mechanism for the recovery of damages for necessary services that have been rendered to an injured person as a consequence of their injuries. Section 8 as amended provides:

> **"8 Services rendered to injured person**
>
> (1) Where necessary services have been rendered to the injured person by a relative in consequence of the injuries in question, then, unless the relative has expressly agreed in the knowledge that an action for damages has been raised or is in contemplation that no payment should be made in respect of those

[1] See Discussion Paper on Damages for Personal Injuries (2022) Scot Law Com No 174, pages 5–20.
[2] Scottish Law Commission, *Damages for Personal Injuries: Report on (1) Admissibility of Claims for Services and (2) Admissible Deductions* (1978) Scot Law Com No 51, Part I.

services, the responsible person shall be liable to pay to the injured person by way of damages such sum as represents reasonable remuneration for those services and repayment of reasonable expenses incurred in connection therewith.

(2) The injured person shall be under an obligation to account to the relative for any damages recovered from the responsible person under subsection (1) above."

2.5 "Necessary services" are not defined in the legislation but have been held to include services such as nursing care, housekeeping, shopping, and emotional support.[3] An individual will only be entitled to compensation under section 8 where they are a relative of the injured person.[4] Where services have been rendered by someone other than a relative, damages will be recoverable by the injured person only if there exists a contractual arrangement between the injured person and the person providing those services.

2.6 Section 9 of the 1982 Act allows the injured person to recover damages for personal services that the injured person would have, but for their injury, provided to their family:

"9 Services to injured person's relative

(1) The responsible person shall be liable to pay to the injured person a reasonable sum by way of damages in respect of the inability of the injured person to render the personal services referred to in subsection (3) below."

2.7 "Personal services" are defined in subsection (3):

"(3) The personal services referred to in subsection (1) above are personal services—

(a) which were or might have been expected to have been rendered by the injured person before the occurrence of the act or omission giving rise to liability,

(b) of a kind which, when rendered by a person other than a relative, would ordinarily be obtainable on payment, and

(c) which the injured person but for the injuries in question might have been expected to render gratuitously to a relative."

2.8 Unlike section 8, section 9 does not require the injured person to account to the relative for any damages received: the inability to provide personal services is seen as a loss suffered by the injured person, not the relative to whom those personal services would otherwise have been rendered. While this may seem counterintuitive, the rationale is explained in our 1978 report:

"…It may be objected that it is not the injured person himself but his family who suffer the loss. We think, however, that this is an artificial way of looking at the matter. The injured person will normally have some earning capacity outside the family which he

[3] *McEwan and Paton on Damages*, para 12-02.
[4] On the definition of "relative", see paras 2.9–2.42 below.

will have lost as a result of the accident. Within the family group, for practical reasons, a system of division of labour and pooling of income obtains in which, though in law the services are rendered gratuitously, they are in practice a species of counterpart for the benefits which that member receives as a member of the family group. If by reason of an accident a member of the family group loses the ability to offer the appropriate counterpart for the benefits he receives, he should be compensated for this loss."[5]

Should the definition of "relative" be expanded?

Background

2.9 At present, claims under both section 8 and section 9 are restricted to "relatives", as defined in section 13(1) of the 1982 Act:

> "…'relative', in relation to the injured person means—
>
> (a) the spouse or divorced spouse;
>
> (aa) the civil partner or former civil partner;
>
> (b) any person, not being the spouse of the injured person, who was, at the time of the act or omission giving rise to liability in the responsible person, living with the injured person as husband or wife;
>
> (ba) any person, not being the civil partner of the injured person, who was, at the time of the act or omission giving rise to liability in the responsible person, living with the injured person as the civil partner of the injured person;
>
> (c) any ascendant or descendant;
>
> (d) any brother, sister, uncle or aunt; or any issue of any such person;
>
> (e) any person accepted by the injured person as a child of his family."

2.10 Section 13 also has to be read subject to section 4 of the Marriage and Civil Partnership (Scotland) Act 2014. Section 4 provides that references in legislation (within devolved competence) to people who are (or were) married should be read as referring to both same and different sex married couples, and references to two people who are (or were) not married but living together as if husband and wife should be read as referring to both same and different sex cohabitating couples. References to two persons of the same sex who are (or were) living together as if they are (or were) in a civil partnership ceases to have effect. Therefore, the reference to people living together as if in a civil partnership in section 13(1)(ba) ceases to have effect by virtue of section 4(4) of the 2014 Act.

2.11 It seems that the underlying intention in relation to the definition of "relative" in the 1982 Act (as expressed in the 1978 Report) was that services rendered by or to those members of the family group who, in a fatal accident claim, would be entitled to claim damages for loss of support, are the only ones which should be covered. The definition was therefore based on that set out in schedule 1 of the Damages (Scotland) Act 1976.

[5] Scot Law Com No 51, para 38.

2.12 Damages for wrongful death are now governed instead by the Damages (Scotland) Act 2011. The definition of "relative" as set out in section 14(1) of the 2011 Act provides for persons *accepted as*[6] the parent, grandparent, grandchild or sibling of the deceased following a fatal injury to be treated as a "relative" for the purposes of "loss of society" claims. This means that, at present, there is a difference between the definition of relative in the 2011 Act and the definition of relative in the 1982 Act. The latter does not make such allowances for persons accepted as part of the family (with the exception of children accepted as part of the family).

Responses to the Discussion Paper

2.13 In our Discussion Paper, we asked the following questions:

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

Question 2(a)

2.14 Twenty-eight consultees[7] responded to this Question. All consultees were in favour of amending the definition of "relative" in section 13(1) of the 1982 Act to include children/parents, grandchildren/grandparents, and siblings who are accepted as part of the family.

2.15 Two main reasons were given to justify support for the amendment, namely, (i) the desire to achieve consistency with the Damages (Scotland) Act 2011 (fatal claims) and provide equal treatment of relatives in both fatal and non-fatal cases, and (ii) the need for the law to be adapted to keep pace with societal changes.

Discussion

2.16 Seeking to align personal injury law in this area to improve fairness and consistency was supported by several consultees. Action on Asbestos suggested that such an amendment would ensure the equal treatment of relatives in both fatal and non-fatal cases. Kennedys Law similarly emphasised the need for consistency, stating that similar policy considerations should apply when assessing those caught by the statutory definition of "relative".

2.17 Digby Brown expressed concern with the current situation:

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[6] For example, someone not related by blood but treated as part of the family.

[7] Zurich Insurance, Stuart McMillan, Ronald Conway, Clyde & Co, Association of Personal Injury Lawyers, Stagecoach, Forum of Insurance Lawyers, University of Aberdeen, Tom Marshall, Unite the Union, Senators of the College of Justice, Aviva Insurance, Digby Brown, Thompsons, Drummond Miller, Faculty of Advocates, DAC Beachcroft, Horwich Farrelly, Association of British Insurers, Society of Solicitor Advocates, Forum of Scottish Claims Managers, FOCIS, Direct Line Group, NFU Mutual, Kennedys, Law Society of Scotland, Medical and Dental Defence Union, Action on Asbestos.

> "There seems no good reason for retaining the current differences, such as the omission of a person accepted by the injured person as a grandchild of his family, and the narrower definition of "sibling", and as a result, excluding services provided by those relatives from the damages claimed by the injured party."

2.18 The Faculty of Advocates commented that it is unjust to exclude a person who has been accepted as part of an injured person's family. Tom Marshall advised that it makes sense to include those persons who are an accepted part of an injured person's family, since the persons who are actually rendering services to the injured person are likely to be considered by the injured person as part of their family at the time of or after the injury, rather than necessarily those persons with whom they have always had a familial relationship. Drummond Miller also picked up on this point: "By the very fact that services are being provided by them [those accepted as relatives] … it indicates that the nature of the relationship is the same as the relationship the pursuer would have had with the current defined 'relative'…"

2.19 An equally important consideration is that the family makeup in Scotland, and public policy in relation to family law, has changed significantly since the 1982 Act was enacted. In modern Scotland, it is common for persons to accept, for example, their partner's children from a previous relationship into their family – leading to family units in which siblings, parents, grandparents, etc. are connected by family bond, even if not by consanguinity. The Senators of the College of Justice recognised this in their response and advise that a wider definition would "reflect the perception of the concept of the wider family in the modern context". Clyde & Co also point out that the make-up of the modern family differs from that of the average family in the 1980s. They explain that many do not have spouses or civil partners and may not live with a significant other as a spouse or a civil partner. As such, they argue that it is not unreasonable to extend the definition of relative to the wider family group.

2.20 We agree with all of the above observations. There is a gradual (but evident) rise in the number of 'non-nuclear' families. These responses made evident the need to reform this particular provision to ensure that the law keeps pace with, and reflects, societal change. We also note that section 8 claims are only competent where there is a pre-existing basis for that claim: that is, where the injured person has in fact received services from the relative and those services were necessary because of their injury. An expansion of section 8 would not entitle additional family members to a windfall from the injured person's damages claim – it would simply allow the recovery of reasonable remuneration for services that the family member is already providing.

2.21 We therefore recommend that:

1. **The definition of "relative" in section 13(1) of the Administration of Justice Act 1982 should be amended to include persons accepted into family as a parent, grandparent, sibling or grandchild of the injured person.**

(Draft Bill, section 5)

Question 2(b)

Responses to the Discussion Paper

2.22 Twenty-four consultees answered this Question. Eighteen[8] answered negatively. Six[9] answered positively.

2.23 Of the responses submitted in favour of any further amendment of section 13, three consultees[10] suggested that the definition should be extended to cover "any person accepted by the injured person or deceased as a member of his family." Action on Asbestos similarly suggested that the category of "relative" should be made flexible, so as to reflect modern societal familial structures. They explained that this would be a more effective approach, allowing the inclusion of individuals whom the injured person includes in their own definition of family. Two consultees[11] supported further amendment so as to bring the definition in the 1982 Act entirely in line with the definition in the 2011 Act.

2.24 Those that opposed further amendment did so mainly on the basis that the amendment proposed in Question 2(a) would be sufficient, and that any further extension would be excessive.

Discussion

2.25 The majority of consultees opposed any further amendment of the provision to include other categories of "relative". Several consultees who responded in favour of further amendment suggested that the definition should be extended to cover any person accepted by the injured person or deceased as a member of his family. While initially this appears to be an appealing approach to redefining the term "relative", concerns that such an extension would be excessive are not ill-founded. There may be a risk of extending the field of potential claimants far beyond the parameters currently accepted by society as representing bona fide members of a family. We are persuaded by the majority of consultees that further amendment to section 13(1), by way of including other categories of "relative", is not necessary at this time. The amendment we recommend to the definition of "relative" in Question 2(a) above goes far enough.

Question 3

Responses to the Discussion Paper

2.26 Question 3 asks consultees whether the definition of "relative" in section 13(1)(b) should be amended so as to include ex-partners. Of the 28 consultees who responded to this Question, 19[12] supported amending the definition in such a manner, seven[13] opposed such an amendment and two[14] suggested alternatives.

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[8] Zurich Insurance, Clyde & Co, Stagecoach, Forum of Insurance Lawyers, University of Aberdeen, Senators of the College of Justice, Aviva Insurance, Digby Brown, DAC Beachcroft, Horwich Farrelly, Association of British Insurers, Society of Solicitor Advocates, Forum of Scottish Claims Managers, Direct Line Group, NFU Mutual, Kennedys, Law Society of Scotland, Association of Personal Injury Lawyers.
[9] Ronald Conway, Unite the Union, Thompsons, Faculty of Advocates, FOCIS, Action on Asbestos.
[10] Unite the Union, Faculty of Advocates, Thompsons.
[11] FOCIS and Ronald Conway.
[12] Association of Personal Injury Lawyers, Ronald Conway, Stagecoach, FOIL, University of Aberdeen, Tom Marshall, Unite the Union, Senators of the College of Justice, Aviva, Digby Brown, Thompsons, Drummond Miller, Faculty of Advocates, DAC Beachcroft, Forum of Scottish Claims Managers, FOCIS, Direct Line Group, NFU Mutual, Action on Asbestos.
[13] Stuart McMillan MSP, Zurich Insurance, Horwich Farrelly, Association of British Insurers, Society of Solicitor Advocates, Law Society of Scotland, Medical and Dental Defence Union of Scotland.
[14] Clyde & Co, Kennedys.

2.27 Amongst those supporting such an amendment, a number of consultees explained that for the sake of consistency, the definition of "relative" in section 13 should include ex-partners to bring it into line with section 14 of the 2011 Act, which allows former partners to claim for loss of financial support in cases relating to death.

2.28 Other consultees referred to societal changes and the need for the law to reflect modern familial structures. Action on Asbestos, the Association of Personal Injury Lawyers and Digby Brown suggested that such an amendment would reflect the reality of modern family life, including the increasing prevalence of blended families [15]. Similarly, Thompsons Solicitors said that it is common for former partners to provide gratuitous personal services, rendering any definition of "relative" excluding ex-partners incomplete and unreflective of the realities of the provision of care.

2.29 It is also worth noting the response of Drummond Miller, who make the point that many long-term committed relationships are purposely not marked by marriage or civil partnership, despite having the same level of commitment and interdependency as those formalised relationships. They therefore propose that no distinction should be made between the two.

2.30 Those opposing such an amendment provided a variety of reasons for their view. Several thought that the extension to section 13 proposed in Question 2(a) goes far enough. Horwich Farrelly Scotland said that they were not aware of "any evidence to suggest that there is a failure to deliver justice which requires the statutory definition to be extended to apply to an ex-partner who was not a spouse or civil partner".

2.31 The Medical and Dental Defence Union of Scotland felt strongly that the desire to bring the definition of relative in section 13 into line with the definition in section 14 of the 2011 Act was flawed.

> "No. While we can see that it could be tempting to introduce ex-partners to dovetail with the definitions used in the Damages (Scotland) Act 2011, there are important policy reasons against so doing. An ex-partner of the deceased is entitled to claim for loss of support under section 4(3)(a), but is not entitled to claim for loss of society under section 4(3)(b). The availability to an ex-partner of a claim for loss of support reflects that the deceased person may have had a legal obligation to support them, but nothing more. This view is bolstered by the fact that under section 7(1) of the 2011 Act, assessment of compensation for loss of support is to be restricted for ex-partners, in a way that it is not restricted for current partners. It would be contrary to logic if an award of damages was to be available in respect of an ex-partner providing necessary services, when parliament has determined that such an individual should not be entitled to damages for loss of society in the event that their ex-partner has died. It is entirely appropriate for ex-partners to remain excluded from the definition in section 13 and, accordingly, from the scope of services claims under sections 8 and 9."

2.32 While recognising the case, in principle, for such an amendment to section 13, the Association of British Insurers expressed concern regarding the extent to which such an amendment would broaden the definition of "relative" under the provision. They suggest,

[15] A blended family is a family formed when two people come together and bring a child or children from previous relationships.

instead, an exploration of tests which may be applied to ensure that the definition does not become excessively broad, and that ex-partners only fall within the definition in certain circumstances. They suggest the use of Lord Armstrong's discussion of "living together as man and wife" in *Dewar v Graham's Dairies Ltd*[16] as a starting point for exploring whether an ex-partner should fall within the definition of section 13, but caution that additional safeguards would still need to be introduced, alongside a requirement for suitable supporting evidence.

Discussion

2.33 We are aware that it is increasingly common for individuals to choose not to formalise their enduring relationships through marriage or civil partnership, but to live together as cohabiting partners. A definition of "cohabitant" is provided in section 25 of the Family Law (Scotland) Act 2006:

> **"25. Meaning of "cohabitant" in sections 26 to 29.**
>
> (1) In sections 26 to 29, "cohabitant" means either member of a couple consisting of—
>
> (a) a man and a woman who are (or were) living together as if they were husband and wife; or
>
> (b) two persons of the same sex who are (or were) living together as if they were civil partners."

2.34 As with the amendment to include children/parents, grandchildren/grandparents, and siblings, the same considerations of social change apply. An increasing number of individuals in long-term committed relationships are making the deliberate decision not to formalise their relationships by pursuing a marriage or civil partnership.

2.35 If an injured person has previously been married or in a civil partnership when their injury occurs, their ex-spouse or ex-civil partner is currently defined as a relative under section 13 and is therefore eligible for remuneration under section 8 of the 1982 Act, as discussed above. However, if the injured person is not married or in a civil partnership, their ex-cohabiting partner is not eligible.

2.36 We are of the view that it should not be the case that ex-cohabitants who had previously been in relationships that exhibited the same level of care, love, loyalty, and affection as formalised relationships be excluded from section 13 and from seeking appropriate remedies.

2.37 While the minority of consultees opposing this amendment raised concerns regarding the widening of the scope of "relative" under section 13, we do not consider such a widening to be excessive. Such an amendment would, as with children/parents and grandchildren/grandparents accepted as part of the injured person's family, widen the scope only to the extent necessary to keep pace with societal developments and, moreover, would only allow recovery where an ex-cohabitee is in fact providing services to the injured person: it would not automatically entitle ex-cohabitees to a windfall from the injured person's award of damages. We are therefore of the view that legislating to amend section 13(1)(b) to include

[16] [2016] CSOH 151; [2016] 11 WLUK 67.

ex-cohabitants is the appropriate way forward. The recommendation below and section 5 of the draft Bill implements this approach.

Report on Cohabitation

2.38 We acknowledge this Commission's Report on Cohabitation,[17] which was published in November 2022. The report recommends reform of the current definition of "cohabitant" in section 25 of the Family Law (Scotland) Act 2006. It proposes a new definition of "cohabitant" to be defined as "a member of a couple who are or were living together in an enduring family relationship". This definition of cohabitant is widely framed to permit the court to consider whether a person is or was a cohabitant on a case by case basis, having regard to their whole circumstances. It aims to protect against claims at the end of brief or casual relationships where there has been no economic interdependence.

2.39 As the Report on Cohabitation is under consideration and has not yet been implemented, we have made our recommendation in this Report using the current law which is based on cohabitants living as if married or in a civil partnership with the injured person. Section 5(2)(d) of the draft Bill therefore provides an amendment to section 13 of the 1982 Act to substitute for current sub-paragraphs (b) the following, "a person who (b) not being the spouse or civil partner of the injured person, who is living or has lived with the injured person as if married to the injured person".

2.40 However, should the position change and the Scottish Parliament implement the recommendations in the Report on Cohabitation, including the recommended reform of the definition of "cohabitant", an alternative amendment to section 13 of the 1982 Act to take account of this could be:

> "any person who is the cohabitant or former cohabitant of the injured person".

2.41 This amendment would capture ex-cohabitants as is our policy intention.

2.42 We therefore recommend that:

2. The definition of "relative" in section 13(1) of the Administration of Justice Act 1982 should be expanded to include ex-cohabitants of the injured person.

(Draft Bill, section 5)

Should section 8 be extended to non-relatives?

Background

2.43 Putting aside the issue of how to define "relative", there is a wider question of whether it is appropriate to restrict section 8 awards to relatives. Under the current law, a neighbour or friend who provides services to the injured person would not be entitled to remuneration from the responsible person under section 8. In this part of the Report, we consider the rationale for excluding non-relatives from section 8 and the case for reform.

[17] (2022) Scot Law Com No 261.

2.44 In our 1978 report, we recommended that section 8 be restricted to relatives only. We said that:

> "… [s]ervices rendered by persons within the family group are often motivated by a high sense of duty, and in order to render them members of the family may be prepared to make considerable sacrifices, including leaving their employment. But they may expect, in the long run, to receive some benefit as a counterpart, though not necessarily a benefit of a tangible nature. That such services are frequently rendered by persons within the family group is a matter of common experience and is reasonably foreseeable. The occasions on which persons outside the family group render such services are less frequent, and less readily foreseeable. When they are rendered they are normally given in a spirit of disinterested philanthropy, without any prospect or even thought of benefits in counterpart. In our view, it is only within the family group that there is a demonstrable social need to allow recovery in respect of services rendered …."[18]

2.45 The report adds that to include non-relatives might (i) make settlement or litigation more difficult and (ii) increase the number of spurious claims.[19]

2.46 Our 1978 report differed from the position adopted by the Law Commission of England and Wales, which recommended in 1973 that services provided "by members of the family or by friends" should be remunerated.[20]

2.47 As we stated in our Discussion Paper, we think there is a case to review the policy position set out in our 1978 report:

> "Where necessary services have been given gratuitously in consequence of the injuries in question, we see no policy reason why the responsible person should avoid liability to pay damages representing reasonable remuneration for those services, and the repayment of expenses, solely on the basis that the services were provided by an individual who is not a relative ...."[21]

2.48 As of 2022, 36% of households in Scotland consist of a single adult living alone, compared to 19% at the time of the 1971 census.[22] While living alone does not of itself mean that there will be no support from family members, it is perhaps indicative that such a person may depend alternatively or additionally upon a friend or neighbour for necessary services. These shifting demographics suggest that the view of this Commission in 1978 – that "it is only within the family group that there is a demonstrable social need to allow recovery in respect of services rendered"[23] – is a view which has become outdated.

Responses to the Discussion Paper

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[18] (1978) Scot Law Com No 51, para 20.
[19] Ibid.
[20] Law Commission of England and Wales, *Personal Injury Litigation – Assessment of Damages* (1973) Law Com No 56, para 112. This position was endorsed by the Pearson Report, vol 1, para 346. See also the Law Commission's later report, *Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits* (1999) Law Com No 262, para 3.60.
[21] Discussion Paper, para 2.34.
[22] National Records of Scotland, "Households and Dwellings in Scotland, 2022" (2023), p 7.
[23] Scot Law Com No 51, para 20.

2.49 Accordingly, in our Discussion Paper we asked consultees:

> "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?"

2.50 Twenty-seven consultees responded to Question 4(a): 16 supported extending section 8 to non-relatives,[24] ten opposed such an extension,[25] and one consultee supported the extension only in exceptional circumstances.[26]

2.51 In common with the responses we received to Question 3, a number of consultees supported an extension to section 8 on the grounds that social attitudes had changed since the publication of our 1978 report[27] and that it is now more common for individuals to rely on their friends or neighbours for help. Thompsons Solicitors and Unite the Union told us that they frequently encounter cases where it is friends and neighbours, rather than relatives, who are providing essential services to the injured person following their injury.

2.52 The University of Aberdeen School of Law said that the injured person should not be disadvantaged because of a failure to enter into a contractual arrangement with a person, other than a relative, who has provided services. They said that "there is considerable artifice in requiring such agreements where they would not usually be created in the ordinary course of friendly or neighbourly behaviour. It would not generally occur even to a person who was reasonably vigilant and astute about their legal position to do so". Similarly, Tom Marshall said that "there is no rational basis for distinguishing between one type of person providing those services and another".

2.53 Amongst consultees opposed to extending section 8, many claimed that to do so would lead to an increase in spurious claims, add to the complexity of proceedings and require more cases to go to proof. Aviva Insurance told us that the defender in section 8 claims is often "entirely in the dark" as to family dynamics and the true extent of the services rendered to the injured person, with the defender only having an opportunity to investigate this if the case goes to proof; to extend section 8 further would result in more cases running to proof and "would have the effect of prolonging cases to the detriment of Pursuers and Defenders and utilising valuable court resources in the process".

2.54 The Association of British Insurers, DAC Beachcroft and NFU Mutual pointed out that section 57 of the Criminal Justice and Courts Act 2015 means that, in England and Wales, a

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[24] Ronald Conway, APIL, the University of Aberdeen School of Law, Tom Marshall, Unite the Union, Digby Brown, Thompsons Solicitors, Drummond Miller, Faculty of Advocates, Society of Solicitor Advocates, Direct Line Group, Kennedys Law, Law Society of Scotland, Action on Asbestos, Senators of the College of Justice, and Zurich Insurance.

[25] Stuart McMillan MSP, Stagecoach Group, FOIL, Aviva Insurance, DAC Beachcroft, Horwich Farrelly Scotland, Association of British Insurers, Forum of Scottish Claim Managers, NFU Mutual, and MDDUS.

[26] Clyde & Co.

[27] See para 2.27 above.

personal injury claimant may have their entire claim dismissed if they are found to have been fundamentally dishonest. There is no equivalent provision in Scotland.

2.55 Of the 16 consultees in favour of extending section 8, ten[28] supported the recommended definition of gratuitous services in Question 4(b) and six went into more detail on the quantification of these damages.[29] Action on Asbestos, Kennedys Law and Thompsons Solicitors suggested that the same quantification should apply to both relatives and non-relatives. The Society of Solicitor Advocates recommended that quantification be calculated using a set hourly rate to be increased by the Retail Price Index; Direct Line Group recommended a commercial rate minus 25% be used, to reflect the gratuitous nature of the services. Tom Marshall said that quantification should be left to the courts.

Discussion

2.56 We agree with the majority of consultees that social change since the publication of our 1978 report means that to distinguish between services rendered by relatives and by non-relatives is no longer reasonable. As we noted above,[30] there has been a marked increase in the number of single-person households in Scotland, and it can therefore be expected that family members may no longer be the exclusive providers of necessary services, and that friends or neighbours may also assist. Thompsons Solicitors and Unite the Union told us that this expectation is borne out in their practice. As the University of Aberdeen said, "there is considerable artifice" in requiring an injured person to enter into contractual arrangements with a friend or neighbour in order to recover for these services, where these are not required in the case of relatives.

2.57 However, we appreciate the concerns expressed by a sizeable minority of consultees that an extension of section 8 claims might result in difficulties for defenders. With the broader definition of "relative", and the extension of section 8 to neighbours and friends, it may be less easy for defenders to ascertain who has rendered services, why, and how they became involved with the injured person. Accordingly, we invite the Scottish Civil Justice Council (and in particular the Personal Injury Committee) to consider issuing a Practice Note or Rule of Court requiring a pursuer to lodge an affidavit in support of a claim regarding services under section 8 rendered by a non-relative, giving such information as the note or rule specifies. The Committee might also wish to consider whether such an affidavit requirement should apply to *all* section 8 services claims (whether a relative's or non-relative's), with a view to clarifying the facts, assisting with the resolution of the case, and avoiding the unnecessary use of court time. Finally, to assist with the efficient disposal of personal injury actions, the Committee might wish to consider whether claims for services in terms of section 9 of the Administration of Justice Act 1982 would benefit from a similar affidavit requirement (although our recommendations at paragraphs 2.59 relate solely to section 8 of the 1982 Act).

2.58 On the definition of "gratuitous services", in response to Question 4(b), we recommend that a person – relative or non-relative – be regarded as providing services gratuitously where

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[28] Ronald Conway, Zurich Insurance, APIL, University of Aberdeen School of Law, Unite the Union, Digby Brown, Drummond Miller, Faculty of Advocates, Law Society of Scotland, Senators of the College of Justice. (Aviva Insurance and the Association of British Insurers, while opposed to the extension in Question 4(a), were supportive of the recommended test in Question 4(b) if such an extension were to be recommended).

[29] Tom Marshall, Thompsons Solicitors, Society of Solicitor Advocates, Direct Line Group, Kennedys Law, Action on Asbestos.

[30] At para 2.48.

they are provided without a contractual right to payment and otherwise than in the course of a business, profession or vocation. We do not make any recommendation regarding the quantification of these damages.

2.59 We therefore make the following recommendations:

3. Section 8 of the Administration of Justice Act 1982 should be extended to claims in respect of necessary services provided to the injured person by an individual who is not a relative of the injured person.

(Draft Bill, section 2)

4. Section 8 of the Administration of Justice Act 1982 should be amended to provide that services rendered by any person are recoverable so long as the services are provided (a) without a contractual right to payment or (b) otherwise than in the course of a business, profession or vocation.

(Draft Bill, section 2)

5. The Personal Injury Committee of the Scottish Civil Justice Council should consider introducing a Rule of Court, applying to the sheriff court and the Court of Session, to the effect that a pursuer bringing a claim under section 8 of the Administration of Justice Act 1982 is required to produce an affidavit declaring:

(a) the identity of any person who has provided or is providing necessary services that are the subject of the claim;

(b) the relationship between the pursuer and that service provider or those service providers;

(c) the nature of the services provided;

(d) that the pursuer has informed the service provider that the pursuer is making a claim under section 8; and

(e) that the pursuer undertakes to account to the service provider for any damages obtained under section 8.

Should section 8 be extended to charitable bodies?

Background

2.60 A further question we considered in our Discussion Paper was whether section 8 should be extended so that charitable bodies and other voluntary organisations could recover expenses for the cost of providing care to the injured person. This is now the case in England and Wales, following *Drake v Foster Wheeler Ltd*[31] and *Witham's Executrix v Steve Hill Ltd*.[32] In *Drake*, the court made an award for the notional cost of the care provided to the injured person by a charitable hospice, amounting to 62% of the hospice's running costs (the

[31] [2010] EWHC 2004 (QB), [2011] 1 All ER 63.
[32] [2020] EWHC 299 (QB), [2020] PIQR Q4.

percentage of the hospice's costs not funded by donations). However, the court in *Witham's Executrix* held that there is no reason to make a notional award, preferring instead to make an award covering the entire actual cost of providing services to the injured person.

2.61 In our Discussion Paper, we asked consultees whether section 8 should be extended to include charitable and voluntary organisations and, if so, how damages should be assessed (i.e. should the approach in *Drake* or the approach in *Witham's Executrix* be followed). In particular, we asked:

> "Is there a clear distinction to be drawn between (on the one hand) individuals who choose to give their services to particular individuals gratuitously and (on the other) organisations or bodies which offer their services gratuitously to all those who ask for or need them, such that section 8 claims should extend to the first category but not to the second? It does not seem to us that any principle of the law of damages requires that the second category be excluded. There are, however, plainly serious issues of policy about whether such an extension would be appropriate."[33]

Responses to the Discussion Paper

2.62 Accordingly, we asked consultees:

> "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's 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" as an appropriate means of assessment or should a concept of reasonable notional costs be adopted? Or some other way of assessment?"

2.63 Twenty-seven consultees responded to part (a) of this question. Ten were in favour of extending section 8 claims to include charities;[34] 17 were opposed.[35]

2.64 Of those consultees in favour of extending section 8 to include charities, several said that it is the duty of the responsible person to pay for services that have been made necessary as a result of the responsible person's actions, and that the responsible person should not be absolved of this duty by charitable endeavour. Drummond Miller noted that charities will often be providing services to the injured person at the expense of providing services to another

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[33] Discussion Paper, para 2.42.
[34] Stuart McMillan MSP, Ronald Conway, APIL, Tom Marshall, Unite the Union, Digby Brown, Thompsons Solicitors, Drummond Miller, Society of Solicitor Advocates, Action on Asbestos.
[35] Zurich Insurance, Clyde & Co, Stagecoach Group, FOIL, University of Aberdeen School of Law, Senators of the College of Justice, Aviva Insurance, Faculty of Advocates, DAC Beachcroft, Horwich Farrelly Scotland, Association of British Insurers, Forum of Scottish Claim Managers, Direct Line Group, NFU Mutual, Kennedys Law, Law Society of Scotland, Medical and Dental Defence Union.

person in need, and that the responsible person should not be able to avoid payment "due to the fact that another organisation has stepped in … and so it is fair for the charity to receive some recompense for the care provided".

2.65 Action on Asbestos drew our attention to the services that charities provide, such as emotional and psychological support, that are not readily available elsewhere and cannot always be rendered by friends or family members. Under the current law, services such as these cannot be recovered under section 8.

2.66 A key point of disagreement between those in favour of extending section 8 and those opposed was whether the nature of "charitable" bodies was a reason to distinguish them from a friend, relative or neighbour providing services. Whereas Digby Brown said that "there is no reasonable basis for distinguishing" charities from private individuals, many of the consultees opposed to extending section 8 disagreed. For example, the Senators of the College of Justice said that:

> "… there is a distinction to be drawn between (i) individuals who provide gratuitous care or services out of love, affection, loyalty or compassion, and (ii) charitable bodies, for whom the provision of care and services simply reflects the *raison d'etre* of the organisation concerned. We consider that there is a possibility that the extension of section 8 to claims in respect of necessary services provided by charitable organisations might be perceived as running contrary to the public perception of the concept of registered charities, the vocational purposes of which are to assist those in need, without compensation."

2.67 The Senators made an additional observation: that any extension of section 8 may motivate charities to prioritise cases that raise the possibility of recovery – to the detriment of other, deserving, cases.

Discussion

2.68 As mentioned above, it seems to us that the pertinent issue is whether the nature of charities – as bodies that exist "to assist those in need, without compensation" – is a relevant distinction from a private individual that means it is right to exclude them from section 8.

2.69 We are persuaded by the view of the majority of consultees that this is a relevant distinction. To allow charities to recover damages for the services they provide risks undermining their ethos: to help those in need without favour, recourse, or benefit. Accordingly, we are of the view that section 8 of the 1982 Act should not be extended to cover services provided by bodies or organisations such as charities.

2.70 As we are not recommending reform in response to Question 5(a), we do not propose to address Questions 5(b) or 5(c).

Necessary services provided by the defender

Background

2.71 Before leaving section 8 there is one further issue to consider: where the responsible person is the one providing services to the injured person,[36] should the responsible person be entitled to compensation under section 8? The position in English law is that such services are not recoverable, following the House of Lords decision in *Hunt v Severs*.[37] In *Hunt*, Lord Bridge of Harwich said that "there can be no ground in public policy" for requiring the responsible person to pay to the pursuer a sum of money which the pursuer will then be under an obligation to pay back to the responsible person.[38] Lord Bridge of Harwich also disapproved of any argument that remuneration for the responsible person's services could be recoverable where it would not be the responsible person directly, but the responsible person's insurer, who would meet the cost of this remuneration:[39]

> "The short answer, in my judgment, to [counsel's] contention is that its acceptance would represent a novel and radical departure in the law of a kind which only the legislature may properly effect. At common law the circumstance that a defendant is contractually indemnified by a third party against a particular legal liability can have no relevance whatever to the measure of that liability."[40]

2.72 While this reasoning is sound, there has been some criticism of this position owing to its practical effect. Where the person in the best position to provide necessary services is also the responsible person, the pursuer may have to receive those services from some other relative – at greater inconvenience – in order to make a claim under section 8. Alternatively, the pursuer may be required to enter into a contractual arrangement with outside professionals for the provision of necessary services, so making the claim more expensive for defenders and insurers. For these reasons, the Law Commission of England and Wales recommended the reversal of the decision in *Hunt*,[41] although, at the time of publication, this recommendation has not been taken forward.

Responses to the Discussion Paper

2.73 In our Discussion Paper, we asked consultees:

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

2.74 Twenty-three consultees responded to this question. Ten were in favour of allowing recovery of damages in respect of gratuitous services provided by the defender[42] and twelve were opposed.[43] The Law Society of Scotland told us that their members were split on this question, and they offered no firm view. They said:

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[36] e.g. where the injuries resulted from a road traffic collision for which the injured person's spouse was responsible.
[37] [1994] 2 AC 350. The position in *Hunt* was adopted into Scots law by the Outer House in *Kozikowska v Kozikowsi* 1996 SLT 386.
[38] [1994] 2 AC 350, p 363.
[39] An argument that was later accepted by the Australian High Court in *Kars v Kars* (1996) 141 ALR 37.
[40] [1994] 2 AC 350, p 363.
[41] Law Commission of England and Wales, *Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits* (1999) Law Com No 262, para 3.76.
[42] APIL, University of Aberdeen School of Law, Unite the Union, Digby Brown, Thompsons Solicitors, Drummond Miller, Faculty of Advocates, Society of Solicitor Advocates, Action on Asbestos, Tom Marshall.
[43] Stuart McMillan MSP, Zurich Insurance, Clyde & Co, Stagecoach Group, FOIL, Senators of the College of Justice, Aviva Insurance, DAC Beachcroft, Forum of Scottish Claim Managers, Direct Line Group, NFU Mutual, Kennedys Law.

> "On the one hand, the Defender may be the only person available to provide gratuitous care to the accident victim. The situation often arises where the Defender is the driver in a road traffic accident and causes injuries to a relative. The only alternative would be to pay for professional assistance which would invariably be more costly and may not result in the ad-hoc care provision that is most often required on a daily basis.
>
> However, that goes against the principle that the Defender should not benefit from their own wrong-doing. Those representing Defenders do not agree with sidestepping the fundamental principle that a negligent wrongdoer ought not to benefit financially from their own negligence, per *Kozikowska v Kozikowski (No. 1),* 1996 S.L.T. 386, following the House of Lords decision in *Hunt v Severs,* [1994] 2 A.C. 350. While appreciating that there are cases where a negligent party may be the only person who can provide services, more serious claims in which significant assistance is required will inevitably result in care costs being sought, ensuring justice is done. In more modest claims, Defenders' agents do not consider this justifies departing from the principle mentioned above."

2.75 As in their response to Question 4, the University of Aberdeen were in favour of extending the law as the current narrow scope of section 8 requires pursuers to enter into "artificial" contractual arrangements before they can recover damages. A similar view was expressed by other consultees in favour of extending section 8: that there is no good reason to disincentivise the responsible person from providing essential services where they are best placed to do so.

2.76 Consultees opposed to extending section 8 endorsed the current law as set out in *Hunt v Severs* and *Kozikowska v Kozikowski*,[44] and said that there was no case for reversing these precedents. DAC Beachcroft said that:

> "The courts recognised that it is fundamentally wrong to 'reward' a negligent party who also falls within the category of 'relative'. That relative who then provides gratuitous services to the victim does so by way of moral obligation recognised as public policy. The suggestion that society considers that gratuitous care in those circumstances should have some 'value' is flawed."

Discussion

2.77 We recognise the cogency of the arguments put forward by those in favour of extending section 8 to include defenders. In particular, where the responsible person is insured with respect to the damages, and the responsible person is also in the best position to provide necessary services to the injured person, it is arguable that the responsible person should be reimbursed for the provision of those services.

2.78 The cases "for" and "against" allowing a defender to be compensated under section 8 are well explained by the Law Society of Scotland in their consultation response as set out above in paragraph 2.74.

2.79 However, we do not believe that there is sufficient ground for reform. To extend section 8 to the defender would contravene one of the most basic principles of the law of delict;

[44] [1994] 2 AC 350; 1996 SLT 386.

entitling the defender to reimbursement out of the pursuer's damages award in respect of an injury the defender caused would contradict the principle of *ex turpi causa non oritur actio*, which bars a person from receiving damages which arise from their own delictual liability. Any such change to the law would risk allowing the defender to benefit from their own wrongdoing. Moreover, as the Law Society point out, more serious claims will require paid care from professionals or others. Accordingly, we are of the view that section 8 of the Administration of Justice Act 1982 should not be extended to cover services provided by the responsible person.

Should section 9 be extended to non-relatives?

Background

2.80 Whereas section 8 of the 1982 Act concerns compensation payable to relatives who are providing necessary services to the injured person, section 9 concerns compensation payable to the injured person for the fact that they are no longer able to provide personal services to their relatives.[45]

2.81 If, as we recommend, section 8 is extended to non-relatives,[46] the question arises whether section 9 should likewise be extended to allow the injured person to recover compensation where they are no longer able to provide personal services to persons outwith their family.

2.82 In our 1978 report, this Commission maintained that section 9 claims should be restricted to personal services provided to members of the injured person's family:

> "… Within the family group, for practical reasons, a system of division of labour and pooling of income obtains in which, though in law the services are rendered gratuitously, they are in practice a species of counterpart for the benefits which that member receives as a member of the family group. If by reason of an accident a member of the family group loses the ability to offer the appropriate counterpart for the benefits he receives, he should be compensated for this loss. In this sense we are not advocating a departure from the principle of reasonable foresight as the test of liability for damages, since the system which we have described reflects the normal pattern of family relations in this country. The same test of reasonable foresight, however, would seem to exclude the application of this principle outside the family group. The law cannot take into account unusual instances of gratuitous philanthropy. The Royal Commission, in endorsing this approach, said that:
>
> > 'the loss suffered by those not dependent on the plaintiff seems to us to be altogether more remote."[47]

2.83 In our Discussion Paper, we noted the difficulty in extending section 9 claims to services provided to non-relatives.[48] We said that the loss of personal services provided to a non-relative must be regarded as a loss suffered by that non-relative, not by the injured person. Whereas within the family "a system of division of labour and pooling of income obtains" such that the injured person's inability to continue to provide services to family

[45] For a summary of s 9, see paras 2.6–2.8 above.
[46] See para 2.59 above.
[47] (1978) Scot Law Com No 51, para 38 (footnote references omitted).
[48] Discussion Paper, paras 2.55–2.57.

members can be described as a loss to the injured person, such a division of labour does not obtain in the same way outside of the family group.

2.84 Considering this, the loss of the provision of personal services to a non-relative is a loss to that non-relative, rather than a loss to the injured person. Claims of this nature would have more in common with claims under section 8 than with the existing section 9 and, while it would be possible to devise a mechanism by which the injured person would be required to account to the non-relative for any compensation under a section 9 claim,[49] this tends to suggest that such a loss is too remote to be recoverable.

Responses to the Discussion Paper

2.85 In our Discussion Paper, we asked consultees:

> "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?"

2.86 Twenty-seven consultees responded to Question 7(a). Twelve were in favour of extending section 9[50] and 14 were opposed.[51] The Senators of the College of Justice did not express a firm view either way.

2.87 In favour of extending section 9, the University of Aberdeen argued that it is "reasonably foreseeable" that the injured person will be unable to render personal services to non-relatives as a consequence of their injuries, and the loss is, therefore, not too remote to be recoverable. A similar argument regarding remoteness and foreseeability was put forward by other consultees, including Digby Brown, Drummond Miller, and the Association of Personal Injury Lawyers.

2.88 Consultees opposed to extending section 9 took the opposite view. Their position was well expressed by the Faculty of Advocates:

> "The Faculty considers that the loss which the extension of section 9 would be intended to address would be too remote to justify the significant innovation which the suggested extension would represent. The loss under contemplation is that of a person outwith the family group and the personal services themselves would be rendered outwith the family group. That loss may therefore readily be distinguished from the loss addressed by the present section 9: the loss there is suffered by the injured person, characterised as the loss of their ability to offer a counterpart in kind for the benefits that they receive

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[49] See e.g. s 8(2) of the 1982 Act.

[50] Ronald Conway, APIL, University of Aberdeen School of Law, Tom Marshall, Unite the Union, Digby Brown, Thompsons Solicitors, Drummond Miller, Society of Solicitor Advocates, Kennedys Law, Law Society of Scotland, Action on Asbestos.

[51] Stuart McMillan MSP, Zurich Insurance, Clyde & Co, Stagecoach Group, FOIL, Aviva Insurance, Faculty of Advocates, DAC Beachcroft, Horwich Farrelly Scotland, Association of British Insurers, Forum of Scottish Claim Managers, Direct Line Group, NFU Mutual, Medical and Dental Defence Union.

within the family group. The latter loss is therefore reasonably proximate to the wrong which caused the injuries."

2.89 And, on the issue of foreseeability, the Association of British Insurers said that, in their view, the loss of personal services to a non-relative is "not within the reasonable foreseeability of the responsible person, and a reasonably informed member of the public would not have an expectation of an entitlement to damages".

Discussion

2.90 Respondents were almost evenly split on Question 7(a), with twelve in favour of extension and 14 opposed. In favour of reform, we note the recent shift in societal structure and community interdependence, extending beyond the nuclear family, which was brought to our attention by several respondents. As made clear to us, it is not uncommon for members of the public to rely on their neighbours and friends for the type of support that, previously, was expected of family members. It is on this basis that respondents in favour of reform sought to argue that section 9 should be extended to those who are not members of the injured person's family.

2.91 However, other consultees maintained that the type of loss envisaged by this reform is too remote from the responsible person's delictual act to give rise to a claim for damages.

2.92 As set out above, we recommend that section 8 be extended to include services provided by non-relatives. However, we are not convinced of the merits of an equivalent extension of section 9. We maintain that, irrespective of the social shift raised by respondents, it remains the case that, only within the family, a unique division of labour exists which means that personal services rendered by the injured person are "a species of counterpart for the benefits which that member receives as a member of the family group".[52] This is the rationale that underpins section 9 and it does not extend to personal services provided outwith the family.

2.93 For these reasons, we are of the view that section 9 of the 1982 Act should not be extended to allow the injured person to recover damages for personal services that the injured person would have provided to non-relatives**.** However, given the discussion about provision of an affidavit for section 8 services (see paragraph 2.57 above), we suggest that the Personal Injury Committee of the Scottish Civil Justice Council should also give consideration to introducing a requirement for an affidavit in any claim in terms of section 9 of the 1982 Act.

[52] (1978) Scot Law Com No 51, para 38.

Chapter 3 Deductions from awards of damages

Introduction

3.1 In chapter 3 of our Discussion Paper, we considered the deductibility of certain items from an award of damages for personal injury. Following an accident, an injured person may receive (i) social security benefits, (ii) payments of money (by way of payment from the responsible person,[1] an insurance provider, or some other third party) or (iii) benefits in kind (e.g. local authority care and accommodation). Where the injured person would not have been in receipt of these payments or benefits but for the accident, should these be deducted from an award of damages? If so, which ones, and why?

3.2 As we noted in our Discussion Paper, Scots and English law have diverged on the issue of deductibility despite the fact that the same policy principle – that the award of damages should, as far as possible, return the injured person to the position they would have been in had the accident not occurred and no more – underpins the law in both jurisdictions. We therefore consider that this is an area of law in need of review.[2]

3.3 The main statutory framework on deductions from awards of damages is section 10 of the Administration of Justice Act 1982:[3]

> **"10 Assessment of damages for personal injuries**
>
> Subject to any agreement to the contrary, in assessing the amount of damages payable to the injured person in respect of personal injuries there shall not be taken into account so as to reduce that amount—
>
> (a) any contractual pension or benefit (including any payment by a friendly society or trade union);
>
> (b) any pension or retirement benefit payable from public funds other than any pension or benefit to which section 2(1) of the Law Reform (Personal Injuries) Act 1948 applies;
>
> (c) any benefit payable from public funds, in respect of any period after the date of the award of damages, designed to secure to the injured person or any relative of his a minimum level of subsistence;
>
> (d) any redundancy payment under the Employment Rights Act 1996, or any payment made in circumstances corresponding to those in which a right to a redundancy payment would have accrued if section 135 of that Act had applied;

[1] The person who is liable for the delict. This may be the individual who caused the accident or that person's employer or principal.
[2] Scottish Law Commission, *Tenth Programme of Law Reform* (2018) Scot Law Com No 250, para 2.39.
[3] Note that s 10 applies only to Scotland.

(e) any payment made to the injured person or to any relative of his by the injured person's employer following upon the injuries in question where the recipient is under an obligation to reimburse the employer in the event of damages being recovered in respect of those injuries;

(f) subject to paragraph (iv) below, any payment of a benevolent character made to the injured person or to any relative of his by any person following upon the injuries in question;

but there shall be taken into account—

(i) any remuneration or earnings from employment;

(ii) any contribution-based jobseeker's allowance (payable under the Jobseekers Act 1995);

(iii) any benefit referred to in paragraph (c) above payable in respect of any period prior to the date of the award of damages;

(iv) any payment of a benevolent character made to the injured person or to any relative of his by the responsible person following on the injuries in question, where such a payment is made directly and not through a trust or other fund from which the injured person or his relatives have benefited or may benefit."

3.4 In this chapter, we review the current law as it applies to (i) social security benefits, (ii) payments of money and (iii) benefits in kind.

Social security benefits

Background

3.5 Until their repeal in 1997, provisions in section 2 of the Law Reform (Personal Injuries) Act 1948 provided that, for a period of five years, half the amount of certain specified social security benefits would be deducted from an award of damages; after five years had elapsed no deduction would be made. The view was that social security benefits should not be deducted in their entirety because (i) the injured person would usually have made national insurance contributions, thus the benefits were akin to an insurance policy for which the injured person had paid the premiums; and (ii) the state should not reduce the responsible person's duty to compensate the injured person, by providing the injured person with social security benefits.

3.6 This rationale was doubted in the Pearson Report, which noted that (i) some benefits were non-contributory while some were only partly contributory, and, in any case, national insurance contributions were compulsory and should not be compared to the payment of insurance premiums; and (ii) the idea that state-provided social security should not relieve the responsible person of liability mistook the purpose of the law of tort: which was not to punish the offender for wrongdoing, but to compensate the injured person for their loss.[4]

3.7 The recommendation of the Pearson Report, and our 1978 report on *Damages for Personal Injuries*, was that there should be no overlap (i.e. double compensation) between

[4] Pearson Report, vol 1, paras 471–72.

the award of damages and the provision of social security benefits that the injured person received as a result of their injury.[5]

Current law

3.8 The deductibility of social security benefits is now regulated by section 10 of the Administration of Justice Act 1982 and by the Social Security (Recovery of Benefits) Act 1997. However, as we noted in our Discussion Paper, the 1997 Act has, in practice, incorporated and superseded the provisions of section 10 of the 1982 Act.[6]

3.9 Schedule 2 to the 1997 Act lists the social security benefits which are to be deducted from an award of damages, grouped under three heads: loss of earnings, cost of care and loss of mobility:

(1) Loss of earnings: universal credit; disablement pension payable under section 103 of the Social Security Contributions and Benefits Act 1992; employment and support allowance; incapacity benefit; income support; invalidity pension and allowance; jobseeker's allowance; reduced earnings allowance; severe disablement allowance; sickness benefit; statutory sick pay; unemployability supplement; and unemployment benefit.

(2) Cost of care: attendance allowance; daily living component of personal independence payment; care component of disability living allowance; and disablement pension increase payable under section 104 or section 105 of the Social Security Contributions and Benefits Act 1992.

(3) Loss of mobility: mobility allowance; mobility component of personal independence payment; and mobility component of disability living allowance.

3.10 Only like for like deductions may be made. For example, only benefits paid as a result of lost earnings may be deducted from an award of damages for lost earnings; they cannot be deducted from damages for the cost of care or loss of mobility.[7] As a result, there can be no deduction from damages awarded under a head which is not listed in schedule 2 – notably, there can be no deduction from damages awarded for solatium.[8]

3.11 Deductions are to be calculated on the basis of benefits paid before the "relevant period" ends: that is five years from the date of the injury or, if the claim is settled within those five years, the date of settlement.[9] After this period, the injured person will receive their full damages entitlement. The responsible person is liable to reimburse the state for the total amount of the listed social security benefits received by the injured person within the relevant period.[10] Recovery is made by the Compensation Recovery Unit ("CRU"), which sits in the Department for Work and Pensions.

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[5] Ibid, para 482; Scottish Law Commission, *Damages for Personal Injuries: Report on (1) Admissibility of Claims for Services and (2) Admissible Deductions* (1978) Scot Law Com No 51, para 90.
[6] Discussion Paper, paras 3.17–3.19.
[7] Social Security (Recovery of Benefits) Act 1997, s 8(1).
[8] Solatium is the portion of damages awarded to compensate the injured person for injury to feelings or reputation, pain and suffering, or loss of expectation of life, incurred as a result of their injury.
[9] Social Security (Recovery of Benefits) Act 1997, ss 1(1)(b) and 3.
[10] Social Security (Recovery of Benefits) Act 1997, s 6(1).

Responses to the Discussion Paper

3.12 In our Discussion Paper, we set out our provisional view that the law on deductibility of social security benefits from an award of damages for personal injury, as set out in the 1997 Act, is working well and there is no need for reform.[11]

3.13 However, we did note that the introduction of universal credit has caused difficulties in the recovery of deductible benefits. Universal credit certificates issued by the CRU do not specify the components which make up the award; it is therefore not possible for the responsible person (or, more likely, their insurer) to identify deductible and non-deductible benefits, as set out in schedule 2 to the 1997 Act.

3.14 In such circumstances, the insurer is required first to make payment to the CRU in terms of the whole universal credit award, and then, relying on the evidence given to the court, to seek recovery of those aspects of the award that do not fall within the scope of schedule 2 and are non-deductible.

3.15 In our Discussion Paper, we asked consultees:

> "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 solution to suggest?"

3.16 Twenty-five consultees responded to Question 8(a). Eighteen were of the view that there are problems with the deductibility of social security benefits from awards of damages;[12] seven were of the view that there was no such problem.[13]

3.17 Of the 18 consultees who identified problems with the deductibility of benefits, 16 raised the issue of universal credit certificates. Clyde & Co suggest that the introduction of universal credit in 2013 has created a "largely unavoidable risk of double recovery". The Association of British Insurers share this concern and say that the current system places the onus and cost of avoiding double compensation on insurers.

3.18 Digby Brown spoke of their experience negotiating settlements of claims where the client is clear that the universal credit payments listed in the CRU certificate do not relate to benefits received because of the accident about which a claim is made. They note that the majority of their clients would most likely be unable to provide information specifying which benefits are deductible and which are not. Kennedys Law noted that the universal credit system presents a hurdle to parties reaching settlement, as the lack of clarity about which payments are deductible creates uncertainty when agreeing what the net sum payable to an injured party will ultimately be. Even if settlement can be agreed, the consequent process of

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[11] Discussion Paper, para 3.18.

[12] Action on Asbestos, Association of British Insurers, Association of Personal Injury Lawyers (APIL), Aviva Insurance, Clyde & Co, Ronald Conway, DAC Beachcroft, Digby Brown, Direct Line Group, Forum of Insurance Lawyers (FOIL), the Forum of Scottish Claims Managers, Kennedys Law, Law Society of Scotland, Medical and Dental Defence Union of Scotland (MDDUS), NFU Mutual, Society of Solicitor Advocates, Stagecoach Group, and Zurich Insurance.

[13] Drummond Miller, Faculty of Advocates, Senators of the College of Justice, Thompsons Solicitors, Tom Marshall, Unite the Union, and University of Aberdeen School of Law.

appealing to the CRU is lengthy, leaving compensators "without any finality for some time, despite settlement hav[ing] been agreed between the parties."

3.19 Two consultees expressed some other concern with the deductibility of social security benefits. Action on Asbestos suggested that deducting benefits penalises the injured person, and that the responsible persons should be required to reimburse the CRU for benefits paid to the injured person, but that there should be no corresponding reduction in the award of damages. Zurich Insurance noted that in Scotland, following *McManus's Executrix v Babcock Energy Ltd*,[14] benefits are only deducted against care where the services are rendered professionally, and not gratuitously. This, in Zurich Insurance's view, amounts to double recovery.

Discussion

3.20 Of the 25 responses received, 16 raised the issue of universal credit certificates and the associated difficulties of separating out deductible and non-deductible benefits. Consultees suggest that this results in a serious risk of double compensation, as well as increased costs for insurers and a delay in the processing of awards for pursuers.

3.21 Responsibility for the operation of the CRU lies with the Department for Work and Pensions, and we are therefore unable to make any substantial recommendation to Scottish Ministers. Nevertheless, we are of the view that this is an important issue that should be resolved by a change to the universal credit certificates issued by the CRU.

3.22 We therefore recommend that:

6. Scottish Ministers should raise the issue of CRU universal credit certificates with Ministers in the Department for Work and Pensions as a matter of urgency, drawing attention in particular to the fact that these certificates (as currently issued by CRU) fail to give sufficient detail to enable recipients to identify what benefits are (or are not) recoverable in terms of section 1 and Schedule 2 of the Social Security (Recovery of Benefits) Act 1997.

Payments of money

Background

3.23 Following an accident, an injured person may receive payments of money. These payments may either be benevolent in nature – being donated by generous parties who are sympathetic to the injured person and wish to help alleviate their loss – or be the fruits of an insurance policy for which either the injured person or the injured person's employer has paid the premiums.

3.24 In Scotland, the deductibility of such payments is governed by section 10 of the Administration of Justice Act 1982, which implemented some of the recommendations we made in our 1978 report on *Damages for Personal Injuries*.[15] Those recommendations sought

[14] 1999 SC 569.
[15] (1978) Scot Law Com No 51.

to introduce certain principles of English common law – the benevolence exception and the insurance exception – into Scots law. These principles are discussed below.

Benevolent payments

Current law

3.25 As a general rule, benevolent payments made to the injured person cannot be deducted from an award of damages (the "benevolence exception"). The classic explanation for this is found in the Northern Irish case of *Redpath v Belfast and County Down Railway*. Commenting on the defendant railway company's argument that sums contributed by the public to a distress fund from which the injured person had received payments ought to be deducted from the award of damages, Sir Andrew James LCJ said:

> "… it would be startling to the subscribers to that fund if they were to be told that their contributions were really made in ease and for the benefit of the negligent Railway Company. To this last submission I would only add that if the proposition contended for by the defendants is sound the inevitable consequence in the case of future disasters of a similar character would be that the springs of private charity would be found to be largely, if not entirely, dried up."[16]

3.26 This position was adopted in the English case of *Parry v Cleaver*, in which Lord Reid, after quoting Sir Andrew James LCJ, added:

> "It would be revolting to the ordinary man's sense of justice, and therefore contrary to public policy, that the sufferer should have his damages reduced so that he would gain nothing from the benevolence of his friends or relations or of the public at large …."[17]

3.27 In the consultation that preceded our 1978 report, respondents were unanimously in favour of the benevolence exception applying to Scots law.[18] Section 10 of the Administration of Justice Act 1982 enacted the benevolence exception, providing that:

> "Subject to any agreement to the contrary, in assessing the amount of damages payable to the injured person in respect of personal injuries there shall not be taken into account so as to reduce that amount—
>
> …
>
> (f) subject to paragraph (iv) below, any payment of a benevolent character made to the injured person or to any relative of his by any person following upon the injuries in question."

3.28 Note, however, the caveat to the benevolence exception in paragraph (iv) of section 10, for there must be deducted:

> "(iv) any payment of a benevolent character made to the injured person or to any relative of his by the responsible person following on the injuries in question,

[16] [1947] NI 167, p 170.
[17] [1970] AC 1, p 14.
[18] (1978) Scot Law Com No 51, para 59. There was already some authority for the benevolence exception at sheriff court level: see *Dougan v Rangers Football Club Ltd* 1974 SLT (Sh Ct) 34, p 37 per Sheriff Irvine Smith.

where such a payment is made directly and not through a trust or other fund from which the injured person or his relatives have benefited or may benefit."

3.29 This caveat ensures that where the responsible person makes a direct benevolent payment to the injured person as a result of the injury, this payment is to be deducted from an award of damages. The reason for the stipulation that the payment is made directly, and not through a trust or other fund, is to ensure that a fund set up from public subscriptions does not become deductible just because the responsible person has contributed to that fund.

3.30 The rationale for this caveat, which also applies in English law, was well expressed by Lloyd LJ in *Hussain v New Taplow Paper Mills*:

> "If an employee is injured in the course of his employment, and his employers make him an immediate ex gratia payment, as any good employer might, I see no reason why such a payment should not be taken into account in reduction of any damages for which the employer may ultimately be held liable. Employers should be encouraged to make ex gratia payments in such circumstances. If so, then public policy would seem to require that such payments be brought into account."[19]

Insurance policies arranged by the injured person

Current law

3.31 There is longstanding precedent in English law, first propounded in *Bradburn v Great Western Railway Co*,[20] that where an injured person receives payment from an insurance policy which they have arranged and wholly contributed to, this should not be deducted from any award of damages (the "insurance exception"). In *Bradburn*, the rationale for this position was that the injured person:

> "… does not receive that sum of money because of the accident, but because he has made a contract providing for the contingency; an accident must occur to entitle him to it, but it is not the accident, but his contract, which is the cause of his receiving it."[21]

3.32 The insurance exception was also considered by the House of Lords in *Parry v Cleaver*. Lord Reid said:

> "As regards moneys coming to the plaintiff under a contract of insurance, I think that the real and substantial reason for disregarding them is that the plaintiff has bought them and that it would be unjust and unreasonable to hold that the money which he prudently spent on premiums and the benefit from it should enure to the benefit of the tortfeasor."[22]

3.33 At the time of the publication of our 1978 report, there was no direct Scottish authority on the insurance exception.[23] In that report, we endorsed the reasoning of the English courts

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[19] [1987] 1 WLR 336, p 350.
[20] (1874–75) LR 10 Ex 1.
[21] Ibid, p 3 per Pigott B.
[22] [1970] AC 1, p 14.
[23] Although Lord Reid in *Parry v Cleaver*, at p 14, referred to an old Scottish case, *Forgie v Henderson* (1818) 1 Murray 410, where the Lord Chief Commissioner (Adam) directed the jury that payments the pursuer received from a friendly society in consequence of the pursuer's injuries should not be deducted.

and recommended that the insurance exception be enacted in Scots law.[24] Our draft Damages (Scotland) Bill contained the following provision:

> "4. Subject to any agreement to the contrary, in assessing the amount of damages payable to the injured person in respect of personal injuries there shall not be taken into account so as to reduce that amount—
>
> (a) any contractual pension or benefit (including any payment under an insurance policy and any payment by a friendly society or trade union)…."[25]

3.34 A version of this provision was enacted in section 10(a) of the Administration of Justice Act 1982, with the words "any payment under an insurance policy and" excluded.[26] The operation of section 10(a) is given further consideration in the section on **Other insurance policies** below.

Responses to the Discussion Paper

3.35 In connection with the benevolence exception and the insurance exception, we asked consultees:

> "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?"

3.36 Twenty-six consultees responded to this question,[27] all of whom said that yes, such payments should not be deductible from an award of damages. Three consultees added that, in the case of insurance, the cost of premiums should be deductible from the net wage loss contribution.[28]

Discussion

3.37 While few respondents elaborated on their support for the proposition in Question 9, Direct Line Group provided a rationale for their position, namely that "a prudent decision to arrange and contribute towards benefits of this nature should not be penalised by a mechanism that is able to deduct those benefits from damages". We agree and, while we recognise that there may be concerns regarding double recovery, we consider that an injured person who has contributed to such a scheme should remain the beneficiary under the policy.

3.38 Three consultees did qualify their answer, arguing that the insurance premiums for the policy arranged and paid for by the injured person should be deductible. However, as this particular question (Question 9) concerns only insurance wholly arranged by the injured

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[24] (1978) Scot Law Com No 51, paras 69 and 72.
[25] Ibid, p 54.
[26] See para 3.3 above for the provisions as enacted.
[27] Action on Asbestos, the Association of British Insurers, the Association of Personal Injury Lawyers (APIL), Aviva Insurance, Clyde & Co, Ronald Conway, DAC Beachcroft, Digby Brown, Direct Line Group, Drummond Miller, the Faculty of Advocates, the Forum of Insurance Lawyers (FOIL), the Forum of Scottish Claims Managers, Horwich Farrelly Scotland, Kennedys Law, the Law Society of Scotland, Tom Marshall, Stuart McMillan MSP, NFU Mutual, the Senators of the College of Justice, the Society of Solicitor Advocates, Stagecoach Group, Thompsons Solicitors, Unite the Union, the University of Aberdeen School of Law, and Zurich Insurance.
[28] The Association of British Insurers, Aviva Insurance, and the Forum of Scottish Claims Managers.

person using their own money, the dicta in *Parry v Cleaver* (see paragraph 3.32) apply and the injured person's insurance should be left out of account all together.

3.39 We therefore do not recommend any changes to the non-deductibility, from an award of damages, of benevolent payments or payments from insurance policies which the injured person has wholly arranged and contributed to.

Other insurance policies

Background

3.40 We now turn to the deductibility of payments under an insurance policy to which the injured person has not contributed, or not wholly contributed. This is most common where the injured person's employer has taken out a permanent health insurance (PHI) scheme. PHI schemes[29] typically provide income to employees who are unavoidably absent from work for prolonged periods. Usually, the premiums are paid by the employer, but in some cases the employee may (i) pay the entirety of the premium, (ii) pay part of the premium, (iii) pay tax or national insurance contributions on the PHI scheme as a taxable benefit, or (iv) receive a lower salary because the PHI is taken into account in their total employee benefit package.

3.41 If an employee is absent for a prolonged period,[30] the employer makes a claim against the insurance company. Where the relevant conditions are satisfied, the insurance company generally makes payments to the employer, who then makes payments to the employee on a regular basis.

3.42 As noted above, this Commission, in our 1978 report, recommended that the insurance exception apply to Scots law. That recommendation went beyond the position at English common law – which only applied the insurance exception where the injured person had contributed to the cost of the insurance policy[31] – by extending the insurance exception to cover money paid under an insurance policy even where the injured person did not contribute to that policy. Our recommendation was that:

> "No account should be taken, in the assessment of damages, of contractual benefits payable in consequence of the accident occasioning the injuries, notably money paid under insurance policies …."[32]

3.43 As we said in our Discussion Paper,[33] the rationale for this conclusion is unclear. While the reasoning that an injured person who prudently insures themselves against risk should be entitled to the fruits of that insurance policy is compelling, it is not clear why an injured person should benefit from payments under an insurance policy to which they have not contributed.

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[29] PHI is used here as a shorthand, but there are many different schemes; for example, permanent health insurance, group personal accident insurance, long term disability income, group disability insurance, and group income protection.
[30] Often fixed at 28 weeks.
[31] See e.g. *Parry v Cleaver*, p 14; *Hussain v New Taplow Paper Mills* [1988] AC 514, p 527; *Hodgson v Trapp* [1989] AC 807, p 819; *Gaca v Pirelli General plc* [2004] EWCA Civ 373, [2004] 1 WLR 2683, paras 41–59.
[32] (1978) Scot Law Com No 51, para 72. This recommendation was enacted as section 10(a) of the Administration of Justice Act 1982.
[33] At para 3.37.

This is even less clear where the person who paid the premiums on the insurance is also the responsible person.[34] As such, we are of the opinion that this policy is in need of review.

Current law: The Lewicki/Gaca debate

3.44 In our Discussion Paper, we drew attention to two cases, the Scottish case of *Lewicki v Brown & Root Wimpey Highland Fabricators Ltd*[35] and the English case of *Gaca v Pirelli General plc*,[36] that reached different conclusions on the deductibility of payments from a PHI scheme from an award of damages. In *Lewicki*, the Inner House, applying section 10 of the Administration of Justice Act 1982, held that payments the pursuer had received under a PHI scheme were not deductible from his award of damages. In *Gaca*, the Court of Appeal, applying English common law, held that the payments received under the PHI scheme should be deducted from the claimant's award of damages.[37]

3.45 In *Gaca*, the court held that payments the claimant had received under a group personal accident insurance policy should be deducted from the award of damages. The insurance exception did not apply because it was not the claimant, but his employer, who arranged the insurance policy and paid the premiums. Counsel for the claimant argued that the claimant had in fact contributed to the cost of the premiums "since the money which enabled the defenders to pay the premium was the fruit of the labour of their employees, including the claimant".[38] But this argument was rejected by Dyson LJ:

> "… The insurance moneys must be deducted unless it is shown that the claimant paid or contributed to the insurance premium directly or indirectly. Payment or contribution will not be inferred simply from the fact that the claimant is an employee for whose benefit the insurance has been arranged.
>
> …
>
> "… [counsel] cannot identify any evidence which shows that the claimant paid or contributed to the cost of the insurance policy. All he can point to is the fact that the fruits of the claimant's labour enabled the defendants to pay for the insurance. But for the reasons that I have given, that is not enough to avoid the deduction of the benefits from his damages."[39]

3.46 In *Lewicki*, the court was asked to decide whether payments the pursuer had received under a long term disability plan should be considered a "contractual benefit" under section 10(a) of the Administration of Justice Act 1982, or "remuneration or earnings from employment" under section 10(i) of the Act.[40] If the former, the payments would not be deductible from the pursuer's award of damages; if the latter, the payments would be deductible. The court held that the payments should be construed as a contractual benefit and were not deductible.

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[34] e.g. where the injured person's employer is liable for the injury, and the injured person's employer paid the premiums on a PHI scheme of which the injured person is a member.
[35] 1996 SC 200.
[36] [2004] 1 WLR 2683.
[37] For a fuller consideration of these cases, see paras 3.39–3.56 of the Discussion Paper.
[38] [2004] 1 WLR 2683, para 49.
[39] Ibid, paras 56–59.
[40] See the provisions at para 3.3 above.

3.47 The court concluded that whether payments should fall under section 10(a) or section 10(i) will depend on the nature of the payments, to be ascertained from the contractual documents which gave rise to the pursuer's right to the payments. As the Lord Justice Clerk (Ross) said:

> "… A careful consideration of the documents relating to the Long Term Disability Plan does not reveal any provisions which would suggest that benefits payable thereunder should be regarded as remuneration or earnings of employment ….
>
> "I also regard it as significant that the correspondence shows that, when the question of payment under the Long Term Disability Plan first arose, the pursuer was informed that his employers would 'commence making a claim under the Plan on your behalf' (No. 17/3 of process). Subsequently, he was informed that his claim for benefit under the Long Term Disability Plan had been approved by the insurers (No. 17/4 of process.) The fact that a claim had to be made was something different to remuneration or earnings of his employment to which he would otherwise be entitled."[41]

3.48 Although the case turned on the construction of these documents, the Lord Justice Clerk and Lord McCluskey also commented on the fact that the pursuer had, in their view, contributed indirectly to the insurance policy:

> "… In any event he [the pursuer] can be regarded as contributing indirectly in that if he had not been given the benefit of the Long Term Disability Plan as part of his contract of employment the defenders in theory could have paid him a higher salary."[42]
>
> "… By offering the pursuer a package containing … a contingent right to Long Term Disability payments in association with the Insurance Scheme, the defenders secured the pursuer's agreement to accept their offer of employment …. If the defenders had offered less in terms of non-salary benefits they might have had to offer a greater salary."[43]

3.49 While the most important distinguishing fact between *Lewicki* and *Gaca* is that one was an application of section 10 of the 1982 Act and the other of English common law, it is worth noting that *obiter dicta* in *Lewicki* suggests that the Inner House would have, in the absence of section 10, found that the pursuer had contributed to the insurance policy indirectly by receiving the benefit of the policy in lieu of commanding a higher wage. Of particular note is this passage, from the opinion of Lord McCluskey: "I derive some comfort in arriving at this conclusion from the fact that the same result would, in my view, have been reached at common law."[44]

3.50 In contrast, the English Court of Appeal in *Gaca*, applying the common law of that jurisdiction, was not prepared to accept that the claimant had contributed to the insurance policy, even indirectly, without evidence of such a contribution. While the argument of counsel

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[41] 1996 SC 200, p 206.
[42] Ibid, p 205 per the Lord Justice Clerk (Ross).
[43] Ibid, p 208 per Lord McCluskey. It should be borne in mind that these remarks are *obiter dicta* and do not mean that the court would have found an indirect contribution in any case where a PHI scheme was present. "*Obiter dictum*" is a Latin phrase meaning "that which is said in passing" and is used in a legal context to describe a remark in a judgment that is not legally binding.
[44] 1996 SC 200, p 210.

in *Gaca* was not quite the same as the one envisaged by the Lord Justice Clerk and Lord McCluskey in *Lewicki*, there does appear to be a tension between these two cases that goes beyond the difference in applicable law.

3.51 In our Discussion Paper, we recognised that there is debate about whether *Lewicki* and *Gaca* may be reconcilable. We suggested that it was significant that, in *Lewicki*, the pursuer's membership of the long term disability plan had been taxed as a benefit;[45] whereas there is no such suggestion in the case report of *Gaca*. In the Discussion Paper, we said that:

> "… In the context of the deductibility (or otherwise) of payments received under a PHI-type scheme, we suggest that the key issue is whether the injured employee had, prior to the accident, given some sort of 'consideration' for their participation in the scheme and its benefits.
>
> …
>
> "Having had the benefit of discussion with our Advisory Group, it seems to us that where the evidence shows that an employee actively 'opted in' to a scheme, chose to be a member of it and paid a consideration either directly (for example, by having a contribution taken from their wages) or indirectly (for example, where the employee is, under his contract of employment, subjected to tax and NIC on the notional element of wages representing the 'benefit' of being a member of the scheme), then the insurance exception as enacted in section 10 of the 1982 Act would entitle them to payments of the scheme benefits without any deduction or set-off from damages for wage loss."[46]

3.52 This position is similar to the approach taken by the Employment Appeal Tribunal in *Colt Technology Services Limited v Brown*[47] (chaired by Scottish judge Lady Wise). The claimant was a member of a PHI scheme that entitled him to 75% of his earnings should he become unable to work. The claimant could have instead opted for a membership entitling him to 50% of his earnings and, if the claimant had chosen this membership, he would have received a higher salary from his employer. The employment tribunal concluded that the claimant had contributed to the PHI scheme by virtue of taking a lower salary, a position upheld on appeal:

> "It is accepted in this case that the Respondent employer paid all the premiums for the relevant insurance. It is also accepted that there is no contract between the Claimant and the insurance company. The sole question for the Tribunal was whether, on the evidence before it, the Claimant should be characterised as someone who had made an indirect contribution to the cost of the insurance policy premiums by electing to have more than the minimum 50% salary protection and opting for the full 75% cover ….
>
> …
>
> "It seems to me that the rationale used by the Tribunal for its conclusions is both rational and consistent with the leading authority in *Gaca*. On the available evidence, had the Claimant elected to take either 50% salary protection or 60% salary protection he would have received additional salary. Although the Respondent's flexible benefit

[45] See the judgment of Lord Prosser in the Outer House: *Lewicki v Brown & Root Wimpey Highland Fabricators Ltd* 1996 SLT 145, pp 146–47.
[46] Discussion Paper, paras 3.49–3.51.
[47] UKEAT/0023/17/BA (2018).

scheme involved a choice on a range of other matters such as annual leave and type of pension provision and so on, there was no dispute that, in order to receive 75% cover rather than 50% cover, the Claimant was paid less than he would otherwise have received … The undisputed facts illustrated that the Claimant chose to receive lower salary in return for increased protection."[48]

3.53 In both *Colt* and *Lewicki*, the injured person had given, albeit indirectly, consideration for their membership of the PHI scheme: in *Colt*, the claimant elected to take a lower wage than he otherwise might have done; in *Lewicki*, the pursuer paid tax and national insurance on his membership of the scheme.

Responses to the Discussion Paper

3.54 In connection with the deductibility of payments from a PHI scheme from an award of damages, we asked consultees:

> "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?"

3.55 Twenty-four consultees responded to Question 10(a). Nineteen thought that clarification or reform was needed,[49] four thought there was no such need,[50] and one consultee did not express a clear view.[51]

3.56 The Senators of the College of Justice said that clarification was necessary owing to the uncertainty generated by the conflicting authorities, *Lewicki* and *Gaca*. All remaining consultees (who expanded on their affirmative response to Question 10(a)) said that reform was necessary to ensure that an injured person who contributes to a PHI scheme does not have the payments of that scheme deducted from their award of damages.

3.57 Responding in the negative, both Thompsons Solicitors and Unite the Union told us that *Lewicki* "stands as good law" and there is therefore no need for clarification or reform. Tom Marshall was of the opinion that the current position "benefits both employee and employer – the employee continues to receive money while incapacitated and the employer can use the money which otherwise it would have paid the injured employee to engage a

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[48] Ibid, paras 34–35 per Lady Wise.
[49] The Association of British Insurers, the Association of Personal Injury Lawyers (APIL), Aviva Insurance, Clyde & Co, DAC Beachcroft, Digby Brown, Direct Line Group, the Faculty of Advocates, the Forum of Insurance Lawyers (FOIL), the Forum of Scottish Claims Managers, Horwich Farrelly Scotland, Kennedys Law, the Law Society of Scotland, Stuart McMillan MSP, NFU Mutual, the Senators of the College of Justice, Stagecoach Group, the University of Aberdeen School of Law, and Zurich Insurance.
[50] Drummond Miller, Tom Marshall, Thompsons Solicitors, and Unite the Union.
[51] The Society of Solicitor Advocates.

replacement". Drummond Miller did not expand on their reasoning for responding in the negative to Question 10(a).

3.58 The Society of Solicitor Advocates, while offering no clear view on whether reform or clarification is necessary, said that payments under a PHI scheme should not be deductible from an award of damages.

3.59 Thirteen consultees responded to Question 10(b).[52] Consultees were unanimously of the view that where an employee contributes financially to a PHI scheme – whether directly or indirectly – the proceeds of that scheme should not be deductible from an award of damages. Three consultees[53] agreed that where an employee has made no contribution to the scheme, any benefit arising from the scheme should be deductible.[54]

3.60 Thirteen consultees responded to Question 10(c).[55] Consultees were unanimously in favour of the approach recommended in the Discussion Paper: that the law be clarified to make clear that where an employee contributes financially to a PHI scheme – as a minimum by paying tax and national insurance on membership of the scheme – then any payments made under the scheme should not be deducted from an award of damages.

Discussion

3.61 We note that the majority of consultees thought that reform was necessary, and that those consultees were unanimously in favour of the reform that we recommended in the Discussion Paper.

3.62 It is clear from the responses we received that reform of section 10 is widely sought. All consultees who responded to Questions 10(b) and 10(c) were in favour of the approach set out in Question 10(c): that the law make it clear that where an employee contributes financially to a PHI scheme, for example through paying tax and national insurance on membership of the scheme as a benefit, then any payments made under the scheme should not be deducted from an award of damages.

3.63 After consideration of the case law in *Lewicki*, *Gaca* and *Colt*, it seems to us that an injured person should be deemed to have contributed financially to a PHI scheme where they have either (i) made a direct payment to the scheme; (ii) paid tax or national insurance on membership of that scheme as a benefit; or (iii) forfeited the offer of a greater salary with their employer in order to gain access to that scheme, or to increased benefits under that scheme.

3.64 We therefore recommend that:

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[52] The Association of British Insurers, the Association of Personal Injury Lawyers (APIL), Aviva Insurance, Direct Line Group, the Forum of Scottish Claims Managers, Horwich Farrelly Scotland, Kennedys Law, the Law Society of Scotland, NFU Mutual, the Senators of the College of Justice, Stagecoach Group, the University of Aberdeen School of Law, and Zurich Insurance.

[53] The Association of British Insurers, the Forum of Scottish Claims Managers, and NFU Mutual.

[54] Cf the English Court of Appeal in *Gaca*.

[55] Aviva Insurance, Clyde & Co, DAC Beachcroft, Digby Brown, Direct Line Group, Drummond Miller, the Faculty of Advocates, the Forum of Insurance Lawyers (FOIL), the Forum of Scottish Claims Managers, Kennedys Law, NFU Mutual, the Senators of the College of Justice, and Stagecoach Group. Drummond Miller, while opposed to any reform, expressed the view that if reform was to happen then "there could be benefit from clarification as suggested".

7. Section 10 of the Administration of Justice Act 1982 should be amended to clarify that where an employee contributes financially to a Permanent Health Insurance scheme, whether by (i) making a direct payment; (ii) paying tax or NIC on membership of the scheme as a benefit; or (iii) forfeiting the offer of additional remuneration or earnings with their employer in order to gain access to the scheme, or to increased benefits under that scheme, then any payments made to the employee under that scheme should not be deducted from an award of damages. Where no such contribution is made, payments made under the scheme should be deductible from an award of damages.

(Draft Bill, section 3)

Benefits in kind

Background

3.65 Aside from monetary payments, an injured person may receive access to certain benefits, the aim of which is to return the injured person to the condition they would have been in had the accident not occurred. The most substantial benefits are (i) medical treatment and (ii) care and accommodation.

3.66 Medical treatment may be provided by the NHS or arranged privately; likewise, care and accommodation may be provided by a local authority, under a statutory duty, or arranged privately. This gives rise to two questions. First, where the injured person pays for medical treatment or care and accommodation privately, when they could have taken advantage of NHS or local authority services free of charge, should they be entitled to recover their expenses from the responsible person? And, where the injured person receives treatment from the NHS, or a local authority provides care and accommodation, should the responsible person be liable to the state for the cost of these services?

Private medical treatment

Current law

3.67 Generally in the law of delict, there is a duty upon the injured person to take reasonable steps to mitigate their loss; where the injured person fails to do so, they cannot make a claim against the responsible person for any expenses incurred.

3.68 However, section 2(4) of the Law Reform (Personal Injuries) Act 1948 directs the court that, where the injured person has opted for private medical treatment, the court should disregard the possibility of taking advantage of NHS treatment in assessing whether the injured person has taken reasonable steps to mitigate their loss.

> **"2 Measure of damages**
>
> (4) In an action for damages for personal injuries (including any such action arising out of a contract), there shall be disregarded, in determining the reasonableness of any expenses, the possibility of avoiding those expenses or part of them by taking advantage of facilities available under the National Health Service Act 2006 or the

National Health Service (Wales) Act 2006 or the National Health Service (Scotland) Act 1978, or of any corresponding facilities in Northern Ireland."

3.69 Section 2(4) has generated a great deal of discussion in previous law reform projects. The Pearson Report recommended its repeal and replacement with a provision that "private medical expenses should be recoverable in damages if and only if it was reasonable on medical grounds that the plaintiff should incur them".[56] Our 1978 report recommended a similar, but slightly wider, replacement: with the reasonableness of the pursuer opting for private medical treatment to be assessed generally, rather than solely on medical grounds.[57]

3.70 In contrast, the Law Commission of England and Wales, in its 1999 report, recommended that section 2(4) be retained.[58] The Commission concluded that private treatment offered advantages, such as shorter waiting times and greater choice in the provision of their treatment, that should not be denied to injured persons.[59] The Commission took the view that "these advantages are very closely connected with ensuring the claimant is returned to a position as near as possible to his or her pre-accident state".[60]

Responses to the Discussion Paper

3.71 Our initial position, as set out in our Discussion Paper, was that section 2(4) should remain in force.[61] We therefore asked consultees:

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

3.72 Twenty-seven consultees responded to Question 11, of which 26 responded that section 2(4) should remain in force.[62] One consultee, the Medical and Dental Defence Union of Scotland ("MDDUS") suggested repeal.

3.73 In their response, MDDUS suggest that section 2(4) should be repealed due to the "substantial cost of care packages factored into damages awards" via the provision. They argue that section 2(4) perpetuates a false assumption that the majority of care will be provided by the private sector, and that repeal would allow the NHS to recover more funds from responsible persons.

3.74 In favour of retaining section 2(4), a number of consultees mentioned the waiting times associated with NHS treatment. Unite the Union noted the increase in NHS waiting times since the COVID-19 pandemic, especially in relation to physiotherapy, orthopaedic and mental health services. Thompsons Solicitors said that "rehabilitation treatments … [are] essential at

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[56] Pearson Report, vol 1, para 342.
[57] Scottish Law Commission, *Damages for Personal Injuries: Report on (1) Admissibility of Claims for Services; (2) Admissible Deductions* (1978) Scot Law Com No 51, paras 81–83.
[58] Law Commission of England and Wales, *Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits* (1999) Law Com No 262, para 3.18.
[59] Ibid, para 3.12.
[60] Ibid, para 3.13.
[61] Discussion Paper, para 3.66.
[62] Action on Asbestos, the Association of British Insurers, the Association of Personal Injury Lawyers (APIL), Aviva Insurance, Clyde & Co, Ronald Conway, DAC Beachcroft, Digby Brown, Direct Line Group, Drummond Miller, the Faculty of Advocates, the Forum of Insurance Lawyers (FOIL), the Forum of Scottish Claims Managers, Horwich Farrelly, Kennedys Law, the Law Society of Scotland, Tom Marshall, Stuart McMillan MSP, NFU Mutual, the Senators of the College of Justice, the Society of Solicitor Advocates, Stagecoach Group, Thompsons Solicitors, Unite the Union, the University of Aberdeen School of Law, and Zurich Insurance.

an early stage to maximise the chance of optimal recovery from trauma related injury. In our view it remains an issue of what is reasonable and we consider it is entirely reasonable for injury victims to seek to maximise their recovery".

3.75 Several consultees also noted that section 2(4) ensures that injured persons are not required to justify decisions regarding their own healthcare. The University of Aberdeen School of Law noted that "there may be significant differences between NHS healthcare services and private healthcare services … including differences in waiting times, convenience of facilities and patient autonomy over treatment options" and that section 2(4) "prevent[s] the responsible person from arguing that the injured person's choice not to use the NHS is a failure to mitigate their losses". Action on Asbestos emphasised that "the injured person must have access to those services that offer the best chance of rehabilitation or recovery and should not be restricted only to those services provided by the NHS".

Discussion

3.76 We recognise concerns, expressed in the Pearson Report, our own 1978 report and in the response from MDDUS, that section 2(4) risks overcompensating the injured person where the court makes an award to cover the costs of private medical treatment that the injured person does not in fact make use of. However, we are persuaded by the majority of consultees that to repeal section 2(4) would unreasonably curtail the freedom of the injured person to make decisions regarding their own healthcare.

3.77 MDDUS told us that section 2(4) perpetuates the assumption that the majority of injured persons utilise private medical treatment. We are not convinced that this is the case. The case law is clear that the courts will not award damages for expenses that they are not convinced the pursuer will actually incur.[63] While we recognise that there may be distinct instances where injured persons seek damages for services to which they will make no recourse, this is a matter to be determined by the courts on the evidence. If, for any reason, a defender prefers an extra-judicial settlement, then it is for the parties to negotiate what is reasonable.

3.78 Supporting this proposition, Thompsons Solicitors told us that "in practice, no significant problems are encountered. Reasonableness is a well-worn test in the assessment of damages and a concept with which practitioners, Counsel and the judiciary are very familiar. It provides for flexibility and proportionality".

3.79 As many consultees told us, the earlier treatment begins, the more likely it is to lead to optimal recovery. Without the option of private treatment, injured persons may face long waiting lists prior to receiving the treatment they require and, in turn, have their chances of a full recovery reduced.

3.80 For these reasons, we are not convinced that a failure to opt for NHS treatment is unreasonable, excessive, or overtly prone to overcompensation. We recognise the utility of

[63] See e.g. *Harris v Brights Asphalt Contractors Ltd* [1953] 1 QB 617, p 635; *Lim Poh Choo v Camden and Islington Area Health Authority* [1980] AC 174, pp 187–88; *Woodrup v Nicol* [1993] PIQR Q104, Q114–15; *Fletcher v Lunan* [2008] CSOH 55, 2008 Rep LR 72, para 9; *Hill's Guardians v Highland Health Board* [2016] CSOH 146, paras 24–25.

section 2(4) and its effect in ensuring injured persons have recourse to private medical treatment.

3.81 We therefore recommend that the provisions of section 2(4) remain in force. However, we note that the 1948 Act is now outdated and many of its original provisions have been repealed. Therefore, in order to modernise the law and ensure accessibility, we recommend that:

> **8. Section 2(4) of the Law Reform (Personal Injuries) Act 1948 should be repealed and the provisions re-enacted in a new section 10A of the Administration of Justice Act 1982.**
>
> (Draft Bill, section 4)

Recovery of NHS costs

Current law

3.82 While injured persons are entitled to opt for private medical treatment, many instead use the NHS.[64] This results in costs for the NHS, which arguably should be borne by the responsible person. To address this, section 150 of the Health and Social Care (Community Health and Standards) Act 2003 imposes liability upon the responsible person to pay charges incurred for NHS ambulance services or for treatment at an NHS hospital provided to the injured person.

Responses to the Discussion Paper

3.83 We asked consultees:

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

3.84 Twenty-six consultees answered this question: six were in favour of reform and 20 thought that no reform was necessary.

3.85 Of the six consultees in favour of reform, four raised the issue of personal injuries arising from disease.[65] Under subsection (5) of section 150, responsible persons are not liable to the NHS for treatment for injuries arising because of a disease. Thompsons Solicitors and Unite the Union told us that this is unsustainable "given the thousands of industrial related diseases diagnosed in Scotland every year caused by negligent working practices and the resultant strain on the NHS".

3.86 Two consultees expressed concern that the damages paid to account for future treatment of the injured person are not always spent on that treatment.[66] Both consultees were concerned that this leads to overcompensation. To avoid this, Clyde & Co recommended

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[64] And some medical treatments, such as emergency or complex surgery, are unavailable privately; in these cases, the injured person has no choice but to use the NHS.
[65] Action on Asbestos, Stuart McMillan MSP, Thompsons Solicitors, and Unite the Union.
[66] Clyde & Co and the Forum of Insurance Lawyers (FOIL).

implementing a "system whereby insurers arrange and pay directly for treatment issued and completed prior to ultimate settlement".

Discussion

3.87 On the issue of industrial disease, we note that, in 2020, Stuart McMillan MSP (who responded to our consultation) introduced the Liability for NHS Charges (Treatment of Industrial Diseases) (Scotland) Bill, which sought to amend section 150 to include industrial disease. The result would be that any person making a payment of damages to or in respect of an injured person whose injury is a result of an industrial disease, would become liable for the cost of any NHS ambulance or hospital charges in relation to that injury. The bill was considered at Stage 1 by the Health and Sport Committee but was withdrawn due to an insufficiently robust financial memorandum.

3.88 There is a clear rationale for expanding section 150 to include industrial disease: it would comply with the principle that the financial burden for treating injuries should fall on the responsible person, it would allow the reallocation of NHS resources away from the (often long-term) treatment of industrial disease to other departments in need of additional funding, and it would provide an incentive to employers to ensure that health and safety standards are adhered to in industrial workplaces.

3.89 However, we note that such a reform would have significant implications for the NHS and for the insurance industry. It is not clear to us that the NHS is equipped to assess its expenditure on treating injured persons with industrial diseases, or equipped to pursue claims against responsible persons. There is also concern that the cost of this additional liability on insurance providers may be passed on to businesses and individuals via an increase in insurance premiums.

3.90 We consider that the issue of whether to legislate so as to include "industrial disease" within the definition of disease in the 2003 Act is a question of policy with far-reaching practical and financial consequences for health services and the insurance industry alike. There is currently a lack of sufficient research and evidence in this area, making it difficult to reach a firm conclusion. We make no formal recommendation for reform to the existing regime in relation to the costs of an injured person's medical treatment. However, we recommend that:

9. Scottish Ministers should give consideration to amending the definition of "injury" in section 150 of the Health and Social Care (Community Health and Standards) Act 2003 to include "industrial disease".

Private care and accommodation

Current law

3.91 Often, a local authority will be under a statutory duty to provide care and accommodation to an injured person. Where there is such a duty on the local authority, but the injured person decides instead to arrange private care and accommodation, should the responsible person be liable for the associated costs? As there is no equivalent to section 2(4)

for expenses of this kind,[67] the argument that the injured person failed to mitigate their loss is, in principle, open to the responsible person.

3.92 Scots law in this area is neither clear nor well-understood, and there are few cases that consider the matters in detail. This is a serious concern, considering the sums in such cases can be substantial. In our Discussion Paper, we set out four cases from the English Court of Appeal which may shed light on the legal principles in this area.[68]

3.93 In *Rialas v Mitchell*,[69] the court held that, while there might be cases in which it was unreasonable for an injured person to receive care at home, once it was concluded that it was reasonable for the injured person to remain at home, there was no ground for saying that the responsible person should not meet the reasonable cost of this care.

3.94 In *Sowden v Lodge*,[70] the Court of Appeal dealt with two appeals in which the injured person, while being in receipt of local authority care, argued that their needs went beyond what the local authority could provide. The court held that the appropriate test for assessing the injured person's needs was not what was in the best interests of the injured person, but what was reasonable to meet those needs.[71] Therefore, a comparison must be made between what the injured person reasonably required and what the local authority was likely to provide; if the statutory provision met the injured person's reasonable requirements, then the responsible person need not pay for some different care regime.[72] In other words, the responsible person's obligation (if any) was to "top up" the level of care provided by the local authority to the level of the injured person's reasonable requirements, if necessary.

3.95 While the logic of the reasoning is easy to follow, from a policy perspective the decision raises a fundamental question: why should the state rather than the responsible person be primarily responsible for meeting the injured person's needs?

3.96 In *Crofton v NHS Litigation Authority*,[73] the court identified two issues regarding the provision of local authority care where there is a substantial award of damages. The first issue is whether the local authority, where substantial damages have been awarded, can be satisfied that it should make welfare payments to the injured person at all (the threshold stage). The second issue is whether, at means testing, the local authority should have regard to the award of damages in quantifying any welfare payment.[74]

3.97 The court held that the local authority could not take account of the injured person's award of damages at the threshold stage,[75] but that it did not have sufficient evidence before it to determine whether the local authority would take this into account at means testing.[76] Consequently, the court held that, given the local authority was going to make at least some

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[67] Section 2(4) of the Law Reform (Personal Injuries) Act 1948 directs the court that, where the injured person has opted for private medical treatment, the court should disregard the possibility of taking advantage of NHS treatment in assessing whether the injured person has taken reasonable steps to mitigate their loss. For discussion, see paras 3.67–3.82 above.
[68] See paras 3.80–3.92 of the Discussion Paper for a full consideration of these cases.
[69] (1984) 128 SJ 704.
[70] [2004] EWCA Civ 1370, [2005] 1 WLR 2129.
[71] Ibid, para 94 per Longmore LJ.
[72] Ibid, para 41 per Pill LJ.
[73] [2007] EWCA Civ 71, [2007] 1 WLR 923.
[74] Ibid, para 28 per Dyson LJ.
[75] Ibid, paras 64–72.
[76] Ibid, para 96.

form of direct payments to meet the cost of the injured person's care, the court should take these payments into account in quantifying damages:

> "Once the judge decided that the council would make such direct payments, it seems to us that he was bound to hold that they should be taken into account in the assessment of damages.
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> "… If the court is satisfied that a claimant will seek and obtain payments which will enable him to pay for some or all of the services for which he needs care, there can be no doubt that those payments must be taken into account in the assessment of his loss. Otherwise, the claimant will enjoy a double recovery."[77]

3.98 In *Peters v East Midlands Strategic Health Authority*,[78] the Court of Protection, which in England and Wales is responsible for making decisions on financial and welfare matters for people who lack mental capacity, had appointed a deputy to manage the injured person's property and affairs. The court considered whether, when an injured person has both a right of action against a responsible person and a statutory right to services provided by a local authority, the injured person is entitled to recover damages as a matter of right, or only if it was unreasonable to expect the injured person to rely on their statutory right. The court said:

> "… We can see no reason in policy or principle which requires us to hold that a claimant who wishes to opt for self-funding and damages in preference to reliance on the statutory obligations of a public authority should not be entitled to do so as a matter of right. The claimant has suffered loss which has been caused by the wrongdoing of the defendants. She is entitled to have that loss made good, so far as this is possible, by the provision of accommodation and care …"[79]

3.99 This decision therefore departs from the "top up" approach of *Sowden* and places responsibility for provision of care squarely on the responsible person and his insurers. Indications so far are that it has been well received.[80]

3.100 Having reached this conclusion, the court in *Peters* was concerned about the possibility of double recovery. However, the court was satisfied that an effective way of policing the matter and controlling any future application for local authority care or accommodation was for an undertaking to be given by the injured person's deputy on the injured person's behalf. The undertaking was to the effect that the senior judge of the Court of Protection would be notified of the proceedings, and the authority of the injured person's deputy would be limited such that no application for public funding of care could be made without further direction of the Court of Protection, and the responsible persons would be notified of any such application. The court regarded this as an effective means of addressing the risk of double recovery.[81]

3.101 This brief review of the recent appellate case law in England and Wales supports the general principles that an injured person is entitled to the reasonable costs of care and accommodation; that the responsible person rather than the state should meet those costs;

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[77] Ibid, paras 87 and 91.
[78] [2009] EWCA Civ 145, [2010] QB 48.
[79] Ibid, para 53 per Dyson LJ.
[80] See e.g. *Coombs v North Dorset NHS Primary Care Trust* [2013] EWCA Civ 471, [2014] 1 WLR 111, para 11. See also *McGregor on Damages*, paras 41-196–41-197.
[81] See [2010] QB 48, paras 56–66.

that the injured person is entitled to opt for private or for public provision of care and accommodation; and that in making an award of damages the court should seek to guard against the risk of double recovery. Various possible approaches to realising these principles are set out in *McGregor on Damages*:

> "How then should the matter be dealt with so as to ensure that it is the tortfeasor, rather than the wider community, who bears the cost of the injured person's accommodation and care? It was suggested in earlier editions that an attractive way of achieving this was to require across the board injured claimants to pay for accommodation and care provided by local authorities and [those claimants] would accordingly be awarded the damages with which to do so. This solution, which also removes the injured person's dependence on the resources and policies of the local authorities, had earlier been achieved in *Avon CC v Hooper*, being a decision under different legislation which permitted this. An alternative, and probably better, solution would be to entitle injured persons to care and accommodation from the local authority in all cases without payment and to award damages for the cost of that care and accommodation to the local authority itself. Longmore LJ in *Sowden v Lodge* made it clear that he thought that this is what the legislation should provide and this thought was strongly endorsed by the Court of Appeal in *Crofton*. Yet a far better route has opened for allowing the full damages to be paid by the tortfeasor. This is by virtue of its being held, in case after case, that it is reasonable for claimants to opt for private care and the Court of Appeal has since given this approach a great boost by holding in *Peters v East Midlands Strategic Health Authority* that claimants are entitled as of right to opt for private care, so that the whole question of reasonableness is by-passed."[82]

Responses to the Discussion Paper

3.102 In our Discussion Paper, we set out three policies that the law should give effect to:

(1) There should be recognition that different injured persons will have different care and accommodation needs, and what is needed will be a matter of evidence to be assessed by the courts. An injured person is entitled to have their loss made good and, for seriously injured persons, that may include the cost of private care and accommodation.

(2) While local authority provision should remain available in accordance with the various statutory schemes, the default position should be that the responsible person, rather than the state, should pay care and accommodation costs.

(3) However, the corollary of the second policy is that there requires to be some mechanism for avoiding double recovery.[83]

3.103 Accordingly, we asked consultees:

> "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?

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[82] *McGregor on Damages*, para 41-261 (footnote references omitted).
[83] Discussion Paper, paras 3.75–3.78.

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?

15. Do you have any other comments?"

3.104 Twenty-eight consultees responded to Question 13; 23 agreed that the default position should be that the responsible person, rather than the state, should pay for the cost of care and accommodation,[84] four disagreed with this default position,[85] and one consultee, Zurich Insurance, offered a different view.

3.105 Of the 23 consultees who agreed with the default position, many cited the variation in quality and extent of local authority provision as their reasoning. The Association of Personal Injury Lawyers ("APIL") noted that "there is not a 'state' fund for the injured person to draw on if the responsible person does not pay". They refer to a "postcode lottery", noting that standards of care availability vary widely across Scotland and that "it is not right that an injured person should have to rely on inconsistent state provision, instead of the responsible person paying for the cost of care that is required due to their negligence".

3.106 Some consultees, while supporting the default position, did express concern regarding the issue of contributory negligence.[86] Stagecoach Group said that where there is contributory negligence, it may be the case that an award of damages would not cover the full cost of the injured person's needs. Similar points were made by NFU Mutual and the Association of British Insurers.

3.107 Clyde & Co were of the view that the responsible person should not have to pay for the cost of care and accommodation if the injured person chooses to receive that care or accommodation from the state. While an injured person's ability to choose the source of such care and accommodation should be preserved, unless the state levies charges to an injured person for care or accommodation, compensators should not be required to cover state-sponsored charges, as the loss is not borne by the injured person but by the state.

3.108 Finally, Zurich Insurance provide a qualified view in favour of the default position. They said that the responsible person should be liable for care and accommodation costs that arise as a direct result of the injuries sustained by the injured person, but the responsible person should not be liable for costs that are linked to a pre-existing condition which has been exacerbated by the injury.

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[84] Action on Asbestos, the Association of British Insurers, the Association of Personal Injury Lawyers (APIL), Aviva Insurance, Ronald Conway, Digby Brown, Drummond Miller, the Faculty of Advocates, the Forum of Complex Injury Solicitors (FOCIS), the Forum of Insurance Lawyers (FOIL), the Forum of Scottish Claims Managers, Horwich Farrelly Scotland, Kennedys Law, the Law Society of Scotland, Tom Marshall, Stuart McMillan MSP, NFU Mutual, the Senators of the College of Justice, the Society of Solicitor Advocates, Stagecoach Group, Thompsons Solicitors, Unite the Union, and the University of Aberdeen School of Law.

[85] Clyde & Co, DAC Beachcroft, Direct Line Group, and the Medical and Dental Defence Union of Scotland (MDDUS).

[86] Under s 1 of the Law Reform (Contributory Negligence) Act 1945, where the judge or jury find that the injured person's negligence contributed to their loss, the award of damages will be reduced commensurately. For example, if the injured person is found to have contributed to their loss by 40%, the award of damages will be reduced by 40%. The effect of such a deduction is that where damages had been calculated in order to cover the cost of private care and accommodation, the actual award made by the court may be insufficient to meet that cost. For fuller discussion, see para 3.79 of the Discussion Paper.

3.109 Twenty-eight consultees responded to Question 14; 20 agreed that an injured person should be entitled to opt for private care and accommodation even where local authority provision is available,[87] six disagreed,[88] and two offered an alternative view.[89]

3.110 Just as in response to Question 13, a number of consultees referred to the difference in quality between local authority and private care, and the variation in quality as between local authorities, in their answer. Digby Brown told us:

> "Local authority care and accommodation is not set up to offer the degree of flexibility that is often needed to meet the needs of the injured person. An injured person should not have to compromise in relation to care and accommodation simply to reduce the damages payable by the wrongdoer … In almost every case in which the pursuer has suffered catastrophic injury, privately funded care and accommodation is better able to meet the needs of the pursuer than local authority provision."

3.111 Three consultees[90] referred to the case of *Peters v East Midlands Strategic Health Authority*[91] in support of their conclusion that there is no reason to differentiate between private medical treatment and private care and accommodation.[92]

3.112 Six consultees[93] opposed the view that the injured person should be entitled to opt for private care and accommodation. They argued that to require the responsible person to pay for private care, where local authority provision is available, would be excessive and would go beyond restitution. They also noted that it can reasonably be assumed that the injured person will be able to access local authority care indefinitely, whereas private care will only continue for as long as the injured person can meet the associated costs. Utilising local authority provision, then, reduces the risk of the injured person receiving inadequate compensation for their care requirements.

3.113 Kennedys Law and MDDUS recommended an alternative approach. Kennedys Law said that there should not be an automatic entitlement to private care, but neither should it be automatically excluded. Instead, each case should be assessed on its own merits to determine what is reasonable, having regard to the availability and quality of local authority care and the cost of private care. Similarly, MDDUS suggest that the default position should be to consider the availability of local authority provision. Only if it is then found that the injured person's needs cannot be fully met through that provision should there be consideration of supplementing this with private care and accommodation.

3.114 Question 15 asked consultees if they had any additional comments. Only two consultees responded to this question. The University of Aberdeen School of Law were of the

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[87] Action on Asbestos, the Association of Personal Injury Lawyers (APIL), Clyde & Co, Ronald Conway, DAC Beachcroft, Digby Brown, Direct Line Group, Drummond Miller, the Faculty of Advocates, the Forum of Complex Injury Solicitors (FOCIS), Horwich Farrelly Scotland, the Law Society of Scotland, Tom Marshall, Stuart McMillan MSP, the Senators of the College of Justice, the Society of Solicitor Advocates, Thompsons Solicitors, Unite the Union, the University of Aberdeen School of Law, and Zurich Insurance.

[88] The Association of British Insurers, Aviva Insurance, the Forum of Insurance Lawyers (FOIL), the Forum of Scottish Claims Managers, NFU Mutual, and Stagecoach Group.

[89] Kennedys Law and the Medical and Dental Defence Union of Scotland (MDDUS).

[90] DAC Beachcroft, the Faculty of Advocates, and the Senators of the College of Justice.

[91] [2009] EWCA Civ 145, [2010] QB 48. For discussion, see paras 3.100–3.102 above.

[92] See paras 3.67–3.82 above on private medical treatment.

[93] The Association of British Insurers, Aviva Insurance, the Forum of Insurance Lawyers (FOIL), the Forum of Scottish Claims Managers, NFU Mutual, and Stagecoach Group.

opinion that, in the interests of consistency and clarity, the law on the recovery of costs for medical treatment and the law on the recovery of costs for care and accommodation should, as far as possible, be harmonised.[94] The Senators of the College of Justice, on the issue of double recovery, expressed their agreement with the opinion of the Law Commission of England and Wales that there is not a high risk that injured person will claim damages for private services they will not actually utilise,[95] and, in any case, the Senators were of the opinion that this is a matter than can be regulated effectively by the courts.

Discussion

3.115 Question 13 asked consultees if they agreed with the general principle that it is the responsible person, and not the state, who should bear the cost of the injured person's care and accommodation needs. Question 14 asked consultees if the injured person should be entitled to opt for private care rather than rely on local authority provision. Question 15 asked consultees if they had any further comments to add.

3.116 We note the considerable support among consultees in favour of (i) the proposition that it is the responsible person who should pay for the injured person's care and accommodation costs (with only four of 28 respondents expressing disagreement), and (ii) the proposition that the injured person should have the option of private care and accommodation (with eight of 28 respondents expressing disagreement).

3.117 As some consultees noted, a basic principle of the law of delict is that it is the responsible person who should bear the burden of compensating the injured person for their loss. An approach to the provision of care and accommodation which places the burden on the state, rather than the responsible person, absolves the responsible person of their obligation to account to the injured person for their loss.

3.118 Another issue raised by consultees is the disparity in the kind and quality of care and accommodation (i) as between local authorities and the private sector and (ii) as between individual local authorities. A number of consultees said that an injured person should not be disadvantaged by virtue of living in an area where the local authority has fewer resources and therefore an inferior ability to provide adequate care and accommodation. We also note the view, expressed by Digby Brown and by APIL, that even well-funded local authority care and accommodation is often unable to cater to the needs of individuals with personal injuries.

3.119 However, six consultees disagreed with the proposition that an injured person should be entitled to opt for private care and accommodation. Consultees said that allowing an injured person to opt for private care and accommodation in all instances would mean that some claimants are overcompensated, as the damages they receive would go beyond what is reasonable and necessary to achieve restitution. Consultees also referred us to the fact that it can reasonably be assumed that the injured person will be able to access local authority care indefinitely, whereas private care will only continue for as long as the injured person can meet the associated costs.

3.120 We note the merit of these two arguments, and we find particularly persuasive the suggestion that funds for private care and accommodation may deplete. Private care and

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[94] See paras 3.83–3.92 above on the recovery of costs for medical treatment.
[95] (1999) Law Com No 262, paras 3.5–3.10.

accommodation can be costly, and we recognise that an award of damages may not suffice for private care if the period of care lasts for longer than expected, or if there is an unforeseen increase in the cost of care, or if the injured person's damages are reduced due to contributory negligence. However, we place more emphasis on the view of the majority of consultees that to deny injured persons the freedom to opt for private care and accommodation is unreasonably restrictive, when considering the disparity in the availability and quality of local authority provision. For these reasons, we recommend that the injured person has a statutory right to opt for private care and accommodation where it is available, similar to the current position on private medical treatment.[96]

3.121 Two consultees, the University of Aberdeen School of Law and the Senators of the College of Justice, offered further comments in response to Question 15.[97] These responses were very helpful when we were considering the issues around Questions 13 and 14 and have been taken into account in our recommendations.

3.122 In respect of Question 13, we are of the view that the default position that the responsible person should pay for the cost of the injured person's care and accommodation should be retained and enforced.

3.123 In respect of Question 14, we recommend that:

10. There should be a statutory provision, similar in effect to section 2(4) of the Law Reform (Personal Injuries) Act 1948, that an injured person is entitled to opt for private care and accommodation, rather than rely on local authority provision, where it is available.

(Draft Bill, section 4)

Recovery of care and accommodation costs: Possible models for reform

3.124 In our Discussion Paper,[98] we discussed three possible models of reform to give effect to the policies we set out at paragraph 3.102 above,[99] allowing for the fact that some injured persons will receive local authority care and accommodation and others will make use of the private sector.

3.125 The first two models are applicable where the injured person receives care or accommodation from a local authority; the final model is concerned with avoiding double recovery where the injured person receives private care or accommodation.

Model one

3.126 The first model is that the injured person pays for local authority care and accommodation, and the award of damages covers the cost of making those payments.

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[96] See paras 3.67-3.68 above.
[97] See para 3.116 above.
[98] See paras 3.94–3.101 of the Discussion Paper.
[99] First, that an injured person is entitled to have their loss made good and that may include the cost of private care and accommodation; second, that while local authority provision should remain available under the various statutory schemes, the default position should be that the responsible person pay the costs of care and accommodation; and third, that the corollary of the second policy is that there requires to be some mechanism for avoiding double recovery.

3.127 In terms of quantification of damages, this is a straightforward model, provided that the local authority has the necessary statutory entitlement to charge for the care and accommodation it provides.

Model two

3.128 The second model is that the injured person receives but does not pay (or at least does not pay the true cost) for local authority care and accommodation, and an award of damages is made to the local authority to cover the cost of providing it.

3.129 This would bear some similarity to the regime for medical treatment introduced by Part 3 of the Health and Social Care (Community Health and Standards) Act 2003, under which a person who makes a compensation payment to an injured person is also liable to pay the NHS for the cost of treatment provided to that person.[100]

Model three

3.130 Where the injured person opts for private care or accommodation, allowing the injured person to recover the costs of that care or accommodation in an award of damages[101] raises the issue of double recovery,[102] since an injured person receiving private care has not waived any entitlement to seek support from a local authority.

3.131 At present, in each individual case it is a matter for the judge to form a view, based on the available evidence, on whether the injured person is in fact going to make use of private facilities or public ones. Even leaving aside the case of an injured person who embellishes their evidence, or misleads the court about their true intentions, the judge will still face difficulties in calculating the true cost of private care and accommodation: what facilities will be available in years to come, either through local authority or private provision; how should the judge assess what kind of facility is likely to be most appropriate for the injured person many years after the date of the proof; what account should be taken of the possibility that the injured person may have to move from private to public facilities (perhaps because of a shortage of funds) or from public to private (perhaps because of a shortage of available services)?

3.132 We note that section 3 of the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019 (which is not yet in force) may be useful in combatting some of these issues. Section 3 will, if brought into force, (i) require the court to consider making an order that damages be paid by periodical payments, rather than by a lump sum, where those damages are for future pecuniary loss[103] in respect of personal injury and regardless of any agreement between the parties concerning periodical payments;[104] and (ii) allow the court to

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[100] For discussion of the 2003 Act, see para 3.82 above.
[101] As we recommend in Recommendation 14, at para 3.125 above.
[102] Because of the need for private care and accommodation to continue over a prolonged period – perhaps over the injured person's entire life – the issue of double recovery is much more pronounced than it is in the case of private medical treatment.
[103] "Pecuniary" loss is the economic loss resulting from the delict. This includes care and accommodation expenses, medical expenses, loss of wages etc.
[104] Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019, s 3(1). Under the current law, the court may only make an order for periodical payments with the agreement of the parties – Damages Act 1996, s 2(1). Such agreement is rarely forthcoming – see *Wells v Wells* [1999] 1 AC 345, p 384 per Lord Steyn; *D's Parent and Guardian v Greater Glasgow Health Board* [2011] CSOH 99, 2011 SLT 1137, para 4 per Lord Stewart.

vary the amount of damages payable under periodical payments or to suspend the pursuer's right to the periodical payments.[105]

3.133 If it were to become usual for damages to be paid by periodical payments rather than by a lump sum, the court would have more flexibility to amend the award based on the pursuer's need for, and use of, private care and accommodation over their lifetime. However, periodical payments are not a panacea: it may involve continued court oversight, and give rise to continued litigation, many years after the initial case has been brought.

Responses to the Discussion Paper

3.134 In our Discussion Paper, we asked consultees:

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

3.135 Thirty-four consultees responded to these questions. Some consultees advocated for more than one option, but ten were most in favour of Option A,[106] six most in favour of Option B,[107] and nine most in favour of Option C.[108] Nine consultees expressed an alternative view.[109]

Option A

3.136 Two main rationales were advanced in support of Option A. Clyde & Co suggested that this approach would have the effect of reimbursing direct expenditure by the injured person that would not have been incurred but for the accident which results in their injury.

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[105] Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019, s 4 inserting new ss 2E, 2F, 2G and 2H to the Damages Act 1996.

[106] Clyde & Co, Ronald Conway, Digby Brown, the Forum of Insurance Lawyers (FOIL), Kennedys Law, the Medical and Dental Defence Union of Scotland, Stuart McMillan MSP, the Senators of the College of Justice, Thompsons Solicitors, and Unite the Union.

[107] Horwich Farrelly Scotland, Stuart McMillan MSP, the Senators of the College of Justice, Thompsons Solicitors, Unite the Union, and the University of Aberdeen School of Law.

[108] The Association of British Insurers, Aviva Insurance, Clyde & Co, Direct Line Group, the Forum of Insurance Lawyers (FOIL), the Forum of Scottish Claims Managers, Stuart McMillan MSP, Stagecoach Group, and Zurich Insurance.

[109] The Association of Personal Injury Lawyers (APIL), DAC Beachcroft, Drummond Miller, the Faculty of Advocates, the Forum of Complex Injury Solicitors (FOCIS), the Law Society of Scotland, Tom Marshall, NFU Mutual, and the Society of Solicitor Advocates.

3.137 The Forum of Insurance Lawyers suggested that Option A represents the equitable implementation of the general principle of *restitutio in integrum*.[110] However, they said that charges under Option A should be reasonable, proportionate, and should be subject to assessment by a third party if required. In partial support of Option A, NFU Mutual expressed a similar sentiment: they stated that Option A is an attractive equitable solution, but that it required that schedules of charges be subject to review by an external expert, ensuring that the reasonableness and proportionality of the schedule is properly considered.

3.138 On the other hand, Aviva Insurance and the Forum of Scottish Claims Managers criticised Option A on the ground that it ignores the issue of contributory negligence. Additionally, they expressed concern about a lack of oversight of the reasonableness of the payments levied by the local authority.

Option B

3.139 Only one consultee in support of Option B provided reasoning for that support. The University of Aberdeen School of Law said that Option B would "bring the approach to care and accommodation broadly in line with the regime for medical treatment" found in Part 3 of the Health and Social Care (Community Health and Standards) Act 2003.

3.140 However, a number of consultees expressed their opposition to Option B. Aviva Insurance, the Association of British Insurers, the Forum of Scottish Claims Managers, and NFU Mutual wrote that Option B ignores the policy principle that local authority provision should be accessible and adequate regardless of the cause of the injury, although none of the consultees told us what they mean by this or how Option B, as proposed, undermines the accessibility of local authority care. The Forum of Insurance Lawyers submitted that if an injured person has not sustained a loss, and the local authority is not seeking reimbursement, there is no basis to extend the scope of an award of damages. Clyde & Co said that Option B would have an "undesirable" effect on the affordability of insurance products.

3.141 Kennedys Law raised a number of concerns with Option B: that it would be difficult and costly for the local authority to calculate the cost of the care they provided to the injured person; that, as the local authority would not be charging commercial rates or operating for profit, the appropriate charge to the responsible person would be unclear and open to dispute; and the local authority's assessment of what it is required to provide to the injured person may be different from the court's assessment of what is reasonable.

Option C

3.142 Aviva Insurance and the Forum of Scottish Claims Managers supported Option C but submitted that it was "imperative" to have some procedure, such as the English Court of Procedure, to avoid double recovery. Direct Line Group suggested that this Option is the preferable one, as established case law from the Court of Protection would set out the appropriate test for assessing an injured person's needs and what is reasonable to meet those needs. Stagecoach Group said that Option C is the best method for ensuring that the pursuer receives appropriate and adequate care and accommodation while avoiding double recovery.

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[110] i.e. restoring a person who has been injured as a result of negligence back into the position they would have been in had the injury not occurred.

3.143 A number of consultees were unconvinced that there was a case for the introduction of a mechanism, modelled on the Court of Protection, in Scotland.

3.144 The Association of British Insurers said that, while it is imperative that provision should be made to avoid double recovery, it does not necessarily follow that having a procedure entirely equivalent to the Court of Protection is the most efficient and cost-effective way of achieving this. NFU Mutual noted that the Court of Protection makes decisions on financial and welfare matters for people who lack mental capacity, and that the majority of cases would not require this form of oversight. Horwich Farrelly Scotland raised their concerns that a mechanism similar to the Court of Protection would "erode the comfort of the finality of litigation in order for parties to arrange their affairs and would likely protract disputes at increased cost."

3.145 Thompsons Solicitors and Unite the Union, while noting that the establishment of a body equivalent to the Court of Protection would require further consultation, suggested that there may be potential merit in such a court, as the present uncertainty over whether an injured person will incur the cost of future care and accommodation ultimately, more often than not, leads to under-compensation rather than any potential for double recovery.

3.146 However, the Senators of the College of Justice and the Law Society of Scotland considered this Option to be unnecessary, as they contend that there is no issue of double recovery in Scotland. The Senators said that if the matter ever arose it could be effectively regulated by the courts, but that in any case the problem of abuse and double recovery was more theoretical than real in the Scottish jurisdiction.

Other suggestions

3.147 Several consultees expressed their discontent with all three Options offered as part of this question, a few of whom provided alternatives.

3.148 The Association of Personal Injury Lawyers suggested that the starting position should be that where private provision is required it should be paid for by the responsible person. If local authority provision is required further down the line, then at that point funds should be made available by the defender to make that provision, in line with the particular local authority's processes.

3.149 Drummond Miller said that:

> "Where an injured person receives local authority care then in [the] same way as defenders/insurers must pay certain recoverable benefits (CRU) they ought to pay the local authority back for that care. However, the onus should be on the defenders/insurers and not the injured person to deal with such payments and it should not be relevant to the pursuer's claim (in the same way as CRU is). It should not form part of the award/value of the claim where the care provided for has not been charged."

3.150 The Forum of Insurance Lawyers stated that they would not object to a change in the law which enables local authorities, at the point of conclusion of a damages claim, to recover their past expenditure relating to the injuries that were the subject of the claim.

3.151 No consultees had any further suggestions for reform, in response to Question 17.

Discussion

3.152 We note that despite the number of consultees who responded to this question, no majority arose in favour of any of the Options we put forward in our Discussion Paper. In addition, a considerable number of the consultees who responded to this question did so in opposition to all three of the Options posed, offering their own solutions instead.

3.153 Option A places a significant burden on the injured person by requiring them to pay the local authority directly out of an award of damages. It may be difficult under such an arrangement for the injured person to identify the costs of local authority care. Even where costing exercises were carried out, pursuers would be faced with the challenge of identifying which local authorities, if any, provide care which is affordable based on the award of damages.

3.154 Similar issues arise with Option B. It would require that local authorities be provided with the resources to calculate their expenditure on injured persons' care and the means to pursue responsible persons. In some cases this may require the local authority to intervene in litigation, raising additional costs and likely prolonging what can already be lengthy cases.

3.155 In terms of Option C, our position has evolved since the Discussion Paper. Based on what we heard from consultees, we now place less emphasis on the third policy set out in paragraph 3.102 as we are not convinced that there is any significant risk of double recovery becoming a feature of damages claims in Scotland. We note that neither the Senators of the College of Justice nor the Law Society of Scotland were concerned about double recovery and, while other consultees raised it as an issue, we have not received any evidence of circumstances in which a pursuer was overcompensated because of an award for private care and accommodation, nor have we been made aware of any Scottish case in which double recovery was an issue. We therefore agree with the Senators that, unless there is evidence to the contrary, the issue of double recovery can be effectively regulated by the courts. We are not recommending the creation of some form of Court of Protection.

3.156 It remains our position that the general principles in this area of law are that an injured person is entitled to the reasonable costs of care and accommodation; that the responsible person rather than the state should meet those costs; that the injured person is entitled to opt for private or for public provision of care and accommodation; and that in making an award of damages the court should seek to guard against the risk of double recovery.

3.157 However, it is worth reflecting on the difficulties inherent in devising a regime which deals effectively with policy goals which may pull in different directions: that the responsible person rather than the state should pay and that local authorities should perform their statutory duties. Accordingly, we have concluded that reform in this area – while desirable – is a matter of policy that would have considerable impact on local authorities, on the insurance industry, and on the courts. For these reasons, we are of the view that reform is a matter for Scottish Ministers.

3.158 We therefore recommend that:

11. Scottish Ministers should give consideration to reform of the law concerning recovery of the injured person's care and accommodation costs so far as provided by local authorities.

Chapter 4 Provisional damages and asbestos-related disease

Introduction

4.1 In this Chapter, we consider the law of provisional damages and in particular, how provisional damages operate in the context of asbestos-related disease. We consider the responses to the questions posed in Chapter 4 of the Discussion Paper and give thought to the unique legal position experienced by some of those suffering from an asbestos-related disease. We discuss the time-bar problem faced by some, and set out our policy-driven approach to tackling this issue.

Provisional damages in general

4.2 Section 12 of the Administration of Justice Act 1982 ("the 1982 Act") introduced the concept of provisional damages into Scots law. Before section 12 came into force in 1984, the courts applied the well-established rule that a pursuer must claim the entirety of their loss in one action. Increasing recognition that injured persons could, as a result, be over-compensated, or under-compensated (especially if the pursuer's prognosis was uncertain) resulted in the enactment of section 12, permitting a pursuer in certain circumstances to seek provisional damages on the assumption that there would be no further development or deterioration in their condition, but reserving the right to the pursuer to return to the court for a further award of damages in the event of such further development or deterioration.

4.3 In our Discussion Paper, we asked consultees the following question:

> "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?"

4.4 Of the 25 consultees who responded to Question 18, a clear majority[1] were of the view that there is no general need for reform of the law of provisional damages. We agree, with the exception of asbestos-related disease, to which we now turn.

Provisional damages and asbestos-related disease

Background

[1] 22 out of 25. Of the three consultees who disagreed, one observed that "problems arise because of the current law on limitation, not because of the law of provisional damages"; a second suggested that there should be clarification of the definitions "serious disease" and "serious deterioration"; a third consultee qualified their disagreement with an acknowledgement that "it is not obvious that a change in the law will alter the situation since whether or not there is a risk of serious deterioration or serious disease is very much a medical question".

4.5 An injured person can choose whether to apply for provisional damages, or for full and final settlement of their claim. Prior to the 1982 Act, damages for personal injury had to be assessed "once and for all" at a court hearing or a settlement. Future developments in the injured person's condition had to be assessed on the information then available. That proved unsatisfactory in certain cases, leading to the introduction of provisional damages in the 1982 Act.

4.6 Section 12 of the 1982 Act permits an injured person with a condition which may deteriorate in the future (such as noise-induced hearing loss, silicosis, or certain asbestos-related conditions) to make an application to the court for provisional damages calculated on the basis of their condition at the time of the action, reserving the right to return to the court for further damages should the condition deteriorate. To qualify for an award of provisional damages, the injured person must supply medical evidence to the court. If the court is satisfied that there is a risk that at some future time the injured person will, as a result of the defender's act or omission, develop some serious disease or serious deterioration in their physical or mental condition, provisional damages may be awarded.

4.7 An exception arises in a case where a defender is not a public body or has no insurance. The option of provisional damages is not then available to an injured person, as section 12 of the 1982 Act is not satisfied. In such circumstances, the pursuer has no choice, and cannot opt for a litigation route involving provisional damages which would provide protection against the later emergence of a much more serious condition.

4.8 In general, our understanding is that the law governing provisional damages is working well. However, one area, concerning pleural plaques and some other asbestos-related diseases, for which provisional damages are often sought, requires attention. This is an important area as over 700 pleural plaques cases are identified each year.[2] It is estimated that the number of such cases may not peak until around 2025.[3]

4.9 As explained on Asbestos.com:

> "Pleural plaques are benign areas of thickened tissue that form in the pleura, or lung lining. They are indicative of asbestos exposure. Pleural plaques develop 10 to 30 years after initial asbestos exposure and usually do not require treatment. Most people with pleural plaques do not show obvious symptoms, although some describe pain or an uncomfortable sensation as they breathe."[4]

4.10 A diagnosis of pleural plaques alerts someone to the fact that they have been exposed to asbestos and might later develop a serious and possibly life-threatening disease such as mesothelioma or another asbestos-induced cancer. Other asbestos-related diseases may include, but are not limited to, pleural thickening and asbestosis.

[2] Information from practitioners in our Advisory Group.
[3] Practitioners' further information.
[4] Sourced from Asbestos.com on 01 February 2024.

The current law

4.11 In 2007, the House of Lords decision in *Rothwell v Chemical and Insulating Co. Ltd*[5] ruled that pleural plaques are a symptom-free condition and do not amount to an "actionable harm". As a consequence, defenders ceased making damages payments to injured persons suffering from that condition. That decision was contrary to the Scottish Government's policy on asbestos-related disease and ultimately the Scottish Parliament passed the Damages (Asbestos-related Conditions) (Scotland) Act 2009 ("the 2009 Act").[6] For present purposes the precise terms of the 2009 Act are important and are quoted in full below.

The Damages (Asbestos-related Conditions) (Scotland) Act 2009

4.12 The 2009 Act provides that pleural plaques, asymptomatic pleural thickening and asymptomatic asbestosis constitute actionable harms in Scotland, for which damages are recoverable, even though the conditions are symptom-free.

4.13 The Act provides:

> **"1 Pleural plaques**
>
> (1) Asbestos-related pleural plaques are a personal injury which is not negligible.
>
> (2) Accordingly, they constitute actionable harm for the purposes of an action of damages for personal injuries.
>
> (3) Any rule of law the effect of which is that asbestos-related pleural plaques do not constitute actionable harm ceases to apply to the extent it has that effect.
>
> (4) But nothing in this section otherwise affects any enactment or rule of law which determines whether and in what circumstances a person may be liable in damages in respect of personal injuries.
>
> **2 Pleural thickening and asbestosis**
>
> (1) For the avoidance of doubt, a condition mentioned in subsection (2) which has not caused and is not causing impairment of a person's physical condition is a personal injury which is not negligible.
>
> (2) Those conditions are–
>
> (a) asbestos-related pleural thickening; and
>
> (b) asbestosis.
>
> (3) Accordingly, such a condition constitutes actionable harm for the purposes of an action of damages for personal injuries.
>
> (4) Any rule of law the effect of which is that such a condition does not constitute actionable harm ceases to apply to the extent it has that effect.

[5] [2007] UKHL 39, 2008 1 AC 281: an English law decision.
[6] The 2009 Act was a response to the English ruling, the Cabinet Secretary for Justice in Scotland having stated on 29 November 2007 that the Scottish Government would "overturn a House of Lords ruling preventing workers suing employers over an asbestos-related condition."

(5) But nothing in this section otherwise affects any enactment or rule of law which determines whether and in what circumstances a person may be liable in damages in respect of personal injuries."

4.14 When the Scottish Parliament passed the 2009 Act, the courts had held, in *Shuttleton v Duncan Stewart & Co Ltd*,[7] that pleural plaques, pleural thickening and asbestosis were "sufficiently distinct" to qualify as separate diseases and were therefore subject to different limitation periods.[8] This meant that where an injured person had failed to bring an action for an asbestos-related condition within 3 years, they would not automatically be precluded from bringing a later action for a separate asbestos-related condition that they subsequently developed.[9]

4.15 The decision in *Shuttleton* was overruled by the Inner House in *Aitchison v Glasgow City Council*.[10] The court held that separate conditions caused by the same injury did not give rise to separate limitation periods. Disapproving of *Shuttleton*, the Lord President (Hamilton) said that:

> "There is, in my view, no warrant for identifying for limitation purposes 'two separate diseases or impairments of physical condition' or 'consequentially separate time-bar periods'. These observations are not, in my view, well-founded in law."[11]

Provisional damages and the asbestos-related disease time-bar problem

4.16 Subject to certain exceptions, claims for damages become time-barred 3 years after the development of an asbestos-related disease caused by negligent exposure to asbestos.[12] Unless an action is raised within that 3-year period, the claim cannot proceed. Following the decision in *Aitchison*, an injured person who fails to bring an action for an asbestos-related condition within 3 years will be time-barred from bringing a subsequent claim for any, including a more serious, asbestos-related condition. As outlined in our Discussion Paper on Damages for Personal Injury,[13] a time-bar problem has emerged for some injured persons who have suffered negligent exposure to asbestos.

4.17 The time-bar problem which has arisen presents as follows: a diagnosis of asbestos-related pleural plaques, asymptomatic pleural thickening or asymptomatic asbestosis (the three conditions referred to in the 2009 Act) triggers the 3-year limitation period. The limitation period runs even if the plaques (or the other two conditions) are causing no impairment of the person's physical condition. Years later, the development of a much graver condition such as mesothelioma or another asbestos-induced cancer may be time-barred because of the earlier pleural plaques (or other two conditions).[14] While an earlier action including a claim for

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[7] 1996 SLT 517.
[8] Ibid, p 518 per Lord Prosser.
[9] e.g., a person who had previously been diagnosed with pleural plaques, but had never raised an action for damages, would still be able to raise a separate action for mesothelioma, should they go on to develop that condition.
[10] 2010 CSIH 9, 2010 SC 411.
[11] Ibid, para 42.
[12] Prescription and Limitation (Scotland) Act 1973, s 17.
[13] No 174 published in February 2022, Chapter 4.
[14] Prescription and Limitation (Scotland) Act 1973 s 17 and *Aitchison v Glasgow City Council* 2010 SC 411. The time-bar affects not only the injured person's claim, but also surviving relatives' claims for loss of society, loss of support, loss of services etc: see s 4(2) of the Damages (Scotland) Act 2011. While s 5 of the 2011 Act provides an exception in mesothelioma cases, that exception is limited to allowing claims for loss of society, so that

provisional damages would have protected the injured person from the time-bar of the later graver condition, many people with pleural plaques do not raise actions for various reasons. For example:

- The pleural plaques are causing no impairment to their physical condition.
- Their doctor may be unaware that compensation can be claimed for pleural plaques in Scotland, especially if they have been trained in England or Wales, where the law is different. The doctor may not mention the finding of asymptomatic pleural plaques to the patient.
- Pleural plaques, because they are symptomless, are often only discovered following an investigation into a separate medical condition (for example, a scan of the organs to look for signs of liver cancer may also show calcification on the lungs and lead to a diagnosis of pleural plaques alongside a diagnosis of liver cancer). In such circumstances, the individual's attention is focused on the more serious diagnosis – a co-occurring diagnosis of benign pleural scarring may hardly register.
- As one practitioner advised us, UK-wide literature from professional bodies such as Asthma + Lung UK explains that readers should not be concerned about pleural plaques as they are asymptomatic.

4.18 Thus, in Scotland (but not in England or Wales) someone who develops a graver asbestos-related condition[15] at a later stage may find their action for damages time-barred because of the earlier diagnosis of pleural plaques or asymptomatic pleural thickening or asymptomatic asbestosis.

4.19 This time-bar problem has arisen as a result of the unique legal position created by:

- the Prescription and Limitation (Scotland) Act 1973, which sets the 3-year time limit;
- the Administration of Justice Act 1982, which creates provisional damages;
- the Damages (Asbestos-related Conditions) (Scotland) Act 2009, which, contrary to the ruling in the House of Lords in 2007,[16] deems asbestos-related pleural plaques, asymptomatic pleural thickening, and asymptomatic asbestosis,[17] to be personal injuries which are "not negligible" but on the contrary are "actionable harm[s] for the purposes of an action of damages for personal injuries"; and
- the subsequent Court of Session decision, *Aitchison v Glasgow City Council* 2010 SC 411 (referred to in paragraph 4.15 above), which authoritatively confirms the "one wrong, one action" rule, i.e. in a negligent asbestos exposure context, all consequences of the negligent exposure (such as pleural plaques, pleural

significant claims for loss of support or loss of services may be time-barred. An illustration of the operation of the s 5 exception can be seen in *Veale v Scottish Power UK plc* [2024] CSIH 14, 2024 SLT 607.

[15] Such as mesothelioma or asbestos-related lung cancer.

[16] *Rothwell v Chemical and Insulating Co Ltd* [2007] UKHL 39; [2008] 1 AC 281.

[17] Unlike pleural plaques, pleural thickening and asbestosis usually cause symptoms.

thickening, asbestosis, asbestos-induced lung cancer, mesothelioma, and other conditions) are to be treated as one injury for the purposes of the 3-year time-limit.[18]

4.20 While section 19A of the Prescription and Limitation (Scotland) Act 1973 gives the court discretion to permit a time-barred action to proceed, two recent cases[19] demonstrate that similar facts may result in very different outcomes, such that one claim proceeds, but not the other. Thus, unless an action claiming, amongst other things, provisional damages for the negligent exposure is raised within the standard 3-year period, a claim for a later much graver condition becomes time-barred.[20]

4.21 Concerns have been expressed about this situation, and about the law's apparent unfairness, uncertainty, unpredictability, and inconsistency. One consultee with lived experience offered the following criticism:

> "I find it utterly ridiculous that a law introduced for Pleural Plaques can then be used as a loophole by insurers/former employers to not be held accountable for their negligence when it leads to a terminal illness such as Mesothelioma. To make matters even more frustrating, if [the deceased had] lived in England or Wales, then there would be no issue."[21]

4.22 Another consultee expressed a similar concern:

> "Scotland allows for compensation claims to be made with the presence of pleural plaques alone, whereas in England and Wales, compensation claims for asbestos-related diseases can *only* be made for the more serious diseases such as lung cancer and mesothelioma. But in a sense, this has introduced problems for some Scottish people to make claims for a mesothelioma diagnosis who didn't realise the need to act on their pleural plaques diagnosis in a timely manner (within 3 years of initial diagnosis)."[22]

Our consultation on provisional damages and the asbestos-related disease time-bar problem

Background

4.23 In our Discussion Paper, we asked consultees the following questions:

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[18] One consultee, Midori Courtice, informed us that medical opinion differs from the legal approach. Doctors emphasise that a condition such as pleural plaques is quite distinct from a condition such as mesothelioma. In particular, the mesothelioma is not a development or deterioration of the pleural plaques: all that can be said is that the pleural plaques "flag up" the fact that the patient has been exposed to asbestos, and the asbestos exposure causes the mesothelioma.

[19] *Quinn v Wright's Insulations Ltd* [2020] CSOH 21, 2020 SCLR 731 and *Kelman v Moray Council* [2021] CSOH 131, 2022 Rep LR 64. Both were large claims: about £810,000 in *Quinn* (where liability was admitted), and £200,000 in *Kelman.* Kelman's action was allowed to proceed, but not Quinn's.

[20] As indicated above, the time-bar affects not only the individual's claim, but also surviving relatives' claims for loss of society, loss of support, loss of services etc: see s 4(2) of the Damages (Scotland) Act 2011. While s 5 of the 2011 Act provides an exception in mesothelioma cases, that exception is limited to allowing claims for loss of society, so that significant claims for loss of support or loss of services may be time-barred.

[21] Wendy Kepler.

[22] Midori Courtice.

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

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?

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

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?"

Responses to Discussion Paper

4.24 In response to Question 19, the majority of consultees agreed that there is a problem with the way provisional damages operate in cases involving asbestos-related disease claims, for the reasons outlined above.[23] The law was variously described as uncertain, unpredictable, inconsistent, and unfair. Many consultees agreed that some sort of law reform is necessary. However, there was disagreement about the appropriate way forward.

4.25 Questions 20 and 21 ask, if there is a problem with the way provisional damages operate in cases involving asbestos-related disease claims, what solution should be adopted, and for what reasons. Ten consultees preferred not to comment.

4.26 Of those who answered Questions 20 and 21, some chose more than one option. The most popular option was option (b), followed by (a), then (d), and finally (c).

4.27 From these responses, five possible options for reform can be identified:

1. The Damages (Asbestos-related Conditions) (Scotland) Act 2009 should be repealed.[24]

[23] Of the 32 consultees commenting on Question 19 of the Discussion Paper, 16 agreed that such a problem exists, while a further eight agreed that there is a problem but preferred to classify it as arising from the law of limitation, and particularly the case of *Aitchison*. Four consultees thought that there was no problem, and four further consultees made no comment.

[24] Only one consultee, Clyde & Co LLP, under option (d), suggested repeal.

2. A diagnosis of pleural plaques, asymptomatic pleural thickening, or asymptomatic asbestosis, should never preclude the raising of an action founded on negligent exposure to asbestos.[25]

3. A general reform of the law of limitation should be carried out (for example, amendment of section 17 and/or section 19A of the Prescription and Limitation (Scotland) Act 1973).[26]

4. The law governing provisional damages should be reformed, specifying the sort of diseases or type of deterioration contemplated, particularly in asbestos-related injury "in which future risk is readily and openly opined by expert medical evidence".[27]

5. A policy-driven statutory provision, focusing solely on the 2009 Act conditions, namely asbestos-related pleural plaques, asymptomatic pleural thickening, and asymptomatic asbestosis, should be enacted to resolve the time-bar problem.[28]

Discussion

4.28 1. *Repeal of the 2009 Act:* We accept that repeal of the 2009 Act is a possible solution. Such a repeal would bring Scots law into line with the law of England and Wales. Without the 2009 Act, should a relevant case be brought before the Court of Session, it is possible that the court may follow the decision in *Rothwell v Chemical and Insulating Co Ltd*.[29] This would result in pleural plaques and other symptom-free asbestos-related conditions being deemed not to be an "actionable harm" for the purposes of an action of damages for personal injury, and not to entitle the pursuer to damages. Thus, a diagnosis of symptom-free asbestos-related conditions (in particular, those specified in the 2009 Act, namely pleural plaques, asymptomatic pleural thickening and asymptomatic asbestosis) would no longer trigger the 3-year limitation period.

4.29 However, we are reluctant to recommend repeal. We are mindful of the policy reasons behind the introduction of the 2009 Act and in our view, pleural plaques, asymptomatic pleural thickening and asymptomatic asbestosis are conditions which are indeed "not negligible" and are properly defined by the 2009 Act as "actionable harms". These conditions are evidence of exposure to asbestos which may lead to extremely serious conditions such as mesothelioma or asbestos-induced lung cancer. A patient diagnosed with asymptomatic pleural plaques, asymptomatic pleural thickening, or asymptomatic asbestosis should, in our view (if negligence is established) be entitled to recover damages. For example, the patient may suffer anxiety, depression, and uncertainty about the possible later development of a grave and/or life-threatening condition. For some pursuers, the anxiety and unpredictability about their future is a heavy burden.

4.30 Thus, the 2009 Act should not in our view be repealed. We understand that damages for pleural plaques may currently amount to something in the range of £5,000 to £20,000. We

[25] In effect option (a). Seven consultees favoured this option, namely the Senators of the College of Justice, Horwich Farrelly, Association of British Insurers, Law Society of Scotland, Society of Solicitor Advocates, Zurich Insurance, and Stuart McMillan MSP.
[26] Aviva, Forum of Scottish Claim Managers, Stagecoach, and National Farmers Union suggested amendment of s 19A, while a wider reform of limitation law was suggested by Tom Marshall (all under option (d)).
[27] Zurich Insurance (in addition to option (a)), when answering Question 19.
[28] In effect, option (b).
[29] [2007] UKHL 39, 2008 1 AC 281.

consider that an employee who has suffered negligent exposure to asbestos resulting in pleural plaques, or asymptomatic pleural thickening and/or asymptomatic asbestosis, should be entitled to reparation for a harm which, albeit asymptomatic, is not negligible.

4.31 Accordingly, we do not recommend the repeal of the 2009 Act.

4.32 2. *A diagnosis of pleural plaques, asymptomatic pleural thickening, and asymptomatic asbestosis should never preclude, on the basis of time-bar, the raising of an action founded on negligent exposure to asbestos*: As noted above, seven consultees[30] favoured a solution of this nature, in effect "ring-fencing" those conditions such that they never trigger the time-bar. The solution is attractive to injured persons. However, there are obstacles to such an approach. The law of limitation seeks to strike a balance between the rights of the injured person and the rights of the responsible person. It encourages injured persons to bring claims timeously, which allows parties to provide the best evidence available. In the context of civil claims for personal injury, it is generally accepted that a responsible person should not have to face claims in perpetuity, without any time-limit. Yet that would be the result if pleural plaques and the other two conditions were wholly exempt from limitation law.[31]

4.33 We acknowledge that one exception to the law of limitation does exist in the form of the Limitation (Childhood Abuse) (Scotland) Act 2017, which exempted from limitation any action in respect of personal injuries arising from childhood abuse. However, this carve out from the law of limitation is due to the exceptional circumstances surrounding childhood abuse in Scotland and was a policy decision taken by the Scottish Ministers. It is not our intention to propose that a similar approach is taken for asbestos-related diseases. The issue with which we are concerned relates purely to the challenges faced by those suffering from an asbestos-related disease due to the precise terms of the 2009 Act. We are of the view that a more proportionate approach to address the issues created by the 2009 Act is to develop specific legislation focusing on the time-bar problem associated with the 2009 Act conditions. This is discussed below in paragraph 4.40 in more detail.

4.34 For these reasons, we do not recommend a total exemption from the law of limitation for the three conditions in the 2009 Act.

4.35 3. *A general reform of the law of limitation:* Some consultees suggested that section 19A of the Prescription and Limitation (Scotland) Act 1973[32] provides an adequate remedy for the pleural plaques time-bar problem. In practice, it does not, for several reasons:

- The exercise of judicial discretion can result in very different outcomes in the context of very similar facts.[33] The law thus appears unpredictable and unfair.
- Litigation is an expensive and often protracted process. Few people would contemplate raising and conducting an action for damages at a time when they are suffering no symptoms. Similarly, few people would take the trouble to raise or conduct such an action with a claim for provisional damages simply to preserve

[30] Namely the Senators of the College of Justice, Horwich Farrelly, Association of British Insurers, Law Society of Scotland, Society of Solicitor Advocates, Zurich Insurance, and Stuart McMillan MSP.
[31] The problem addressed in the Limitation (Childhood Abuse) (Scotland) Act 2017 was a very special one.
[32] Which gives the court discretionary power to override time limits.
[33] See *Quinn v Wright's Insulations Ltd* [2020] CSOH 21, 2020 SCLR 731 and *Kelman v Moray Council* [2021] CSOH 131, 2022 Rep LR 64.

their position in the event that a more serious asbestos-related condition might develop years later.

- From a social policy point of view, it would be unfortunate to encourage people to raise 'safeguard' actions, using up court time and resources.
- Section 19A was enacted to assist an excusably late claim in particular circumstances, but not to excuse a whole class of persons with a particular condition.

4.36 One consultee[34] suggested a general reform of the law of limitation, while four consultees[35] advocated the specific reform of section 19A of the Prescription and Limitation (Scotland) Act 1973. One of the four[36] explained:

> "We would prefer to amend s 19A [so as to provide] the court [with] the power to disregard a claim for pleural plaques and … proceed as if no prior claim for pleural plaques had been made."

4.37 There will be an opportunity to consider a general reform of the law of limitation during our Eleventh Programme,[37] which runs from 2023 to 2027. However, the problem raised by pleural plaques, asymptomatic pleural thickening and asymptomatic asbestosis is in our view a special and urgent one, arising from the unique combination of the "warning flag" of pleural plaques (or asymptomatic pleural thickening or asymptomatic asbestosis) and the very lengthy period which often elapses between that warning flag and the development of an extremely serious condition such as mesothelioma or another asbestos-induced lung cancer.[38] We have not identified any comparable personal injury which, despite being symptomless, constitutes an actionable harm in law and therefore triggers the limitation period, with the consequence of "catching out" a pursuer who fails to raise an action for damages within 3 years following diagnosis of the plaques (or asymptomatic pleural thickening or asymptomatic asbestosis). In our view, this effect of the 2009 Act should be addressed as soon as possible. The number of asbestos-related claims in Scotland is increasing, not decreasing. We consider that the unintended consequence of the combination of the Prescription and Limitation (Scotland) Act 1973, the Administration of Justice Act 1982, the Damages (Asbestos-related Conditions) (Scotland) Act 2009, and the court's decision in *Aitchison v Glasgow City Council*[39] requires immediate attention, rather than being allowed to remain pending a general and possibly protracted review of limitation law.

4.38 Accordingly, in the context of the three conditions defined in the 2009 Act, the option of awaiting the outcome of a general review of the law of limitation is not recommended.

4.39 4. *Reform of provisional damages law*: A general and far-reaching reform of the whole of provisional damages, as suggested by Zurich Insurance, would also take some time. In addition, the law governing provisional damages is in general working well and it is unclear to

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[34] Tom Marshall.
[35] Aviva Insurance, Forum of Scottish Claims Managers, Stagecoach Group, and National Farmers Union.
[36] Aviva Insurance.
[37] See Scot Law Com No 264; 2023, paras 2.29–2.30.
[38] "Unique" in that we have been unable to identify any other latent-type condition which has (i) a "warning flag" comprising a symptomless initial condition, followed by (ii) a period of many years during which no other condition develops, and finally (iii) in some cases, after many years, the development of an extremely serious and life-threatening condition such as mesothelioma or asbestos-induced lung cancer.
[39] 2010 SC 411.

us how reforming provisional damages alone would solve the issues identified with the 2009 Act. Accordingly, we do not make such a recommendation.

4.40 5. *Specific legislation focusing on the time-bar problem associated with the 2009 Act conditions*: The majority of consultees who responded to Question 20 were in favour of legislation providing that a claim for asbestos-related pleural plaques (or asymptomatic pleural thickening or asymptomatic asbestosis) itself would become time-barred in the standard 3-year limitation period, but claims for any subsequent asbestos-related disease, such as mesothelioma, would not be so time-barred. It was agreed that this was an appropriate solution, which would avoid unfairness and bring Scotland into line with other jurisdictions. One consultee commented:

> "This option would afford certainty for defenders with regard to claims for pleural plaques or mild/asymptomatic conditions, but not mesothelioma. It would allow a pursuer not to embark on litigation in that regard, but to take a different decision if and when a more serious condition developed."[40]

Two other consultees observed:

> "Individuals should not be disproportionately penalised for failure to raise court proceedings for a relatively minor injury when they later go on to develop a serious and potentially life-threatening illness as a result of the same negligent act."[41]

4.41 We have ultimately concluded that this option presents the best solution to the time-bar problem. Claims for asbestos-related pleural plaques, asymptomatic pleural thickening and asymptomatic asbestosis would remain time-barred after the expiry of the standard 3-year limitation period, but claims for later-developing symptomatic asbestos-related diseases would be unaffected by that expiry. Thus, we recommend a statutory provision which inserts new section 17ZA into the Prescription and Limitation (Scotland) Act 1973. The new section will only apply if the action consists solely of a claim for damages for an injury which is (i) wholly or partly attributable to exposure to asbestos and (ii) has caused or is now causing impairment of the injured person's physical condition (i.e. a symptomatic asbestos-related condition).

4.42 New section 17ZA provides a bespoke exception to the standard 3-year limitation period contained in section 17 of the 1973 Act. The exception only applies in cases where a symptomatic asbestos-related condition is time-barred by one of the following (unlitigated) asbestos-related conditions, as defined in the 2009 Act[42]:

- pleural plaques
- pleural thickening
- asbestosis.

The reasons for providing the exception in these particular cases are set out in paragraphs 4.16 to 4.41 above.

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[40] Kennedys Scotland LLP.
[41] Thompsons and Unite the Union.
[42] The full terms of the Act are set out in para 4.13 above.

4.43 The bespoke exception in section 17ZA is intended to have the following effect:

- Someone suffering from asymptomatic asbestos-related **pleural plaques** would not be time-barred when seeking to raise an action of damages for mesothelioma (or any symptomatic condition) which develops many years later. (The standard 3-year limitation period would nevertheless apply to the asymptomatic pleural plaques condition).

- Someone suffering from asbestos-related asymptomatic **pleural thickening** or asbestos-related asymptomatic **asbestosis** would not be time-barred when seeking to raise an action of damages years later when the condition becomes symptomatic. The 3-year limitation period for the *symptomatic condition* would only begin to run once a registered medical practitioner informs the person that the asbestos-related pleural thickening or asbestos-related asbestosis has become symptomatic and is causing (or has caused) impairment of their physical condition.[43] (The standard 3-year limitation period would nevertheless apply to the *asymptomatic* pleural thickening or asbestosis).

4.44 Appendix D to the Report provides a list of worked examples illustrating the effect of sections 17ZA and 18ZZA in more detail.

4.45 In cases of developing pleural thickening or developing asbestosis, we consider that the time-bar should not be able to begin running until all relevant information has been provided to the injured person by a registered medical practitioner (see s17ZA(5)), because the symptoms and circumstances of someone who has suffered exposure to asbestos and who may have other conditions in addition to the developing asbestos-related condition can present an unclear and confusing picture, not easily understood by a lay person. Section 17ZA prevents the court from forming the opinion that it would have been reasonably practicable for the person to have been aware of the fact mentioned in section 17(2)(b)(i) at some time prior to the medical practitioner's advice.

4.46 New section 17ZA is not intended to revive previously time-barred claims, such as those mentioned in brackets in the two bullet points in paragraph 4.43. The intention is to provide a solution for injured persons who have been "caught out" by being unaware of, or untroubled by, an asymptomatic asbestos-related condition defined in the 2009 Act, but years later go on to develop a symptomatic asbestos-related condition (often serious) only to find that their proposed action for damages has become time-barred.

4.47 A related bespoke exception is necessary for the linked claim by relatives. As a result of new section 18ZZA, an action of damages brought by the relatives of a now deceased asbestos-exposed person who would, if alive, have qualified in terms of section 17ZA would not be time-barred if damages are sought for the deceased's death within the 3-year period from the death.

4.48 We consider that these focused statutory provisions would resolve the pleural plaques time-bar problem discussed above, and would result in "individuals [not being]

[43] This ensures that the limitation period cannot start running any earlier than this point, but it could theoretically start later, where for example it was not clear whether the liability requirements in section 17(2)(b)(ii) and (iii) were satisfied.

disproportionately penalised for failure to raise court proceedings for relatively minor injury when they later go on to develop a serious and potentially life-threatening illness as a result of the same negligent act."[44] We are of the view that this policy-driven approach addresses the main issue we have identified as arising from the unique legal position referred to in paragraph 4.19.

4.49 We therefore recommend the enactment of a statutory provision which would have the effect that:

> **12. For the purposes of section 17 of the Prescription and Limitation (Scotland) Act 1973, asymptomatic asbestos-related conditions should be distinguished from symptomatic asbestos-related conditions, such that failure on the part of an injured person to raise an action within the limitation period for (i) asymptomatic asbestos-related pleural plaques, or (ii) asymptomatic asbestos-related pleural thickening or asymptomatic asbestosis, would not preclude that injured person from subsequently raising an action for a symptomatic asbestos-related condition, including asbestos-related pleural thickening or asbestosis which has become, but was not previously, symptomatic.**
>
> **The 3-year time-bar for the symptomatic asbestos-related condition will begin no earlier than the date on which the injured person became aware of the fact mentioned in section 17(2)(b)(i) with respect to the symptomatic condition.**
>
> **Where an asbestos-related disease which was recognised while asymptomatic becomes symptomatic, the 3-year time-bar will begin no earlier than the date on which the injured person is informed by a registered medical practitioner that the condition had caused, or had begun causing, impairment of that person's physical condition.**
>
> **In the event of that injured person's death, the relatives' claim would no longer be time-barred. For that purpose, section 18 of the 1973 Act would also be amended.**
>
> (Draft Bill, section 1)

Transitional arrangements

4.50 As discussed in paragraph 1.12, commencement of the Bill provisions is a matter for the Scottish Government. However, due to the nature of the cases in question, the transitional arrangements for section 1 of the draft Bill are of particular importance. The date on which new section 17ZA comes into force will dictate which cases will, or will not, benefit from the new provision.

4.51 We explored a number of options for such transitional arrangements, most notably, excluding for the purposes of time-bar the period from the date of *Aitchison* (2010) to the date

[44] Thompsons and Unite the Union.

section 17ZA comes into force. Although we were attracted to this option, we encountered numerous difficulties in developing satisfactory retrospective arrangements.

4.52 Instead, we have concluded that the most pragmatic approach to transitional arrangements is that new section 17ZA should apply to all actions commenced on or after the date on which section 17ZA comes into force, or which are in court at that date (i.e. not finally disposed of). We recognise that no transitional arrangement in this context will produce a desirable result for all parties. However, in our view, this approach is the most practicable and workable.

Possible deferment of the establishment of liability

4.53 As noted above, Question 22 in the Discussion Paper asked consultees:

> "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?"

4.54 This question was asked on the basis that a pursuer would raise an action within the 3-year period, but would be able to claim and receive provisional damages without establishing liability at that stage. In other words, the pursuer would not have to go to the trouble and expense of a protracted proof, in order to establish liability at that stage.

4.55 Of the 25 consultees who answered Question 22, fifteen[45] were opposed to the suggestion that the establishment of liability should be capable of being deferred by agreement between the parties to a later date, should a more serious condition emerge. We agree. While an artificial deferment of the establishment of liability might enable an injured person to recover provisional damages at an early stage without having to embark on a full-blown proof about liability, there would be serious disadvantages, including loss of evidence through the passage of time before the establishment of liability was sought, and prejudice to defenders in having to face an unknown and unquantifiable burden of future litigation. We consider that the focused statutory provision outlined in paragraphs 4.40–4.49 above would be a preferable solution.

4.56 We therefore do not recommend 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.

[45] Horwich Farrelly, Association of British Insurers, APIL, Clyde & Co, DAC Beachcroft, Digby Brown, Direct Line Group, Faculty of Advocates, Law Society of Scotland, Ronald Conway, Society of Solicitor Advocates, Thompsons, Unite the Union, Tom Marshall, Action on Asbestos.

Chapter 5 Management of damages awarded to children

Introduction

5.1 In Chapter 5 of the Discussion Paper,[1] we considered awards of damages made to children. We investigated the operation of section 13 of the Children (Scotland) Act 1995, the low usage of remits to the Accountant of Court, the court's discretion in deciding the method of payment of an award, and the use of trusts to manage awards.

5.2 In this Chapter, we discuss the above issues, examine the responses to the questions posed in Chapter 5 of the Discussion Paper and outline our conclusions. We are conscious that awards of damages to children may be vulnerable to ill-advised investment or misappropriation. We therefore approach this Chapter with the safeguarding and protection of a child's award of damages in mind.

5.3 For clarity, when we refer to a 'child', we are referring to a person under the age of 16. The definition of a child varies in different legal contexts in Scotland. The Children (Scotland) Act 1995 and the Children and Young People (Scotland) Act 2014 define a child as a person under 18 years of age. Similarly, the United Nations Convention on the Rights of the Child ("UNCRC") defines a child as a person who has not attained the age of 18. However, the Age of Legal Capacity (Scotland) Act 1991 provides that the age of legal capacity in Scotland is 16. Likewise, the Adults with Incapacity (Scotland) Act 2000 defines an adult as someone aged 16 or over, and in the context of safeguarding and managing children's property (the subject matter of this Chapter), the involvement of the Accountant of Court can continue until the child's 16th birthday. The safeguards and protections for awards of damages made to children identified below are, therefore, aimed at ensuring a child is protected up until their 16th birthday. Should a child lack capacity to take ownership of their award at this stage, the Adults with Incapacity (Scotland) Act 2000 protections would then apply.

5.4 Our research in this area has led us to conclude that it would be beneficial for children and families if there was increased oversight of an award of damages made to a child. We consider that it would be advantageous to place a new duty on the court to inquire into the future administration of an award of damages made to a child, and for the pursuer's agents to be required to explain to the court (by way of a form) how the award will be safeguarded. Taking into account this information and other relevant factors, such as the level of damages awarded and the future care and accommodation needs of the child, the judge will have to decide whether to remit the case to the Accountant of Court for oversight, or, if the judge decides this is not necessary, the judge must explain in a written report why that is the case.

5.5 It is our hope that by legislating for this type of supervision in all cases, the risk of misappropriation or ill-advised investment of a child's award of damages is mitigated. The court's inquiry into the future administration of the award will encourage parties to plan appropriately in regard to how the award will be used in the best interests of the child and

[1] See Discussion Paper pages 55–73.

explain this to the court. Thereafter, the court will have the discretion to refer the case to the Accountant of Court for advice on how the award should be managed. This approach will also provide clear guidance to the judge or sheriff, and ensure that there is some element of consistency of practice for parents and their advisers. This policy forms Recommendation 14 of the Report and is the headline recommendation (from which all other recommendations flow) in this Chapter.

5.6 In relation to trusts, ultimately, we recommend in Recommendation 15 that there should be a standalone Commission project, with trust specialist input, entitled "Personal Injuries, Children, and Trusts", focusing amongst other things on (i) whether section 13 of the Children (Scotland) Act 1995 empowers the court to order payment of a child's damages into a trust; (ii) if so, whether the trust could be a bare trust, or a substantive trust, or a Personal Injury Trust; (iii) to what extent the court is able to define the purpose(s) of such a trust; (iv) what happens where a court or the Accountant of Court has some continuing supervision in respect of funds held in a trust, and a difference of view arises between the trustees and the court/Accountant of Court; and finally (v) whether there should be independent oversight of an award of damages for a child which is to be placed into a trust, and if so, what form that oversight should take and whether such oversight should be necessary in all cases or only in certain specific circumstances. Nevertheless, we consider that the research, the consultees' responses to our questions, and the outline recommendations made in this Report may provide a suitable basis for a standalone project in a trust context. We are grateful for all of the contributions we have received from consultees which have helped inform these recommendations.

Section 13 of the 1995 Act

Background

5.7 Section 13 of the Children (Scotland) Act 1995 is the key provision which deals with managing and safeguarding awards of damages to children. Section 13 enables the court to make such orders relating to the payment and management of the award for the benefit of the child as it thinks fit, including ordering the money to be paid to the Accountant of Court, or to a parent or guardian of the child, subject to conditions of the court's choosing. For the avoidance of doubt, section 13 also encompasses an extra-judicial settlement made in the course of an action.[2]

5.8 Section 13 provides:

> **"Awards of damages to children**
>
> (1) Where in any court proceedings a sum of money becomes payable to, or for the benefit of, a child under the age of sixteen years, the court may make such order relating to the payment and management of the sum for the benefit of the child as it thinks fit.
>
> (2) Without prejudice to the generality of subsection (1) above, the court may in an order under this section—

[2] *McEwan and Paton on Damages*, para 8-18, fn 2.

(a) appoint a judicial factor to invest, apply or otherwise deal with the money for the benefit of the child concerned;

(b) order the money to be paid—

(i) to the sheriff clerk or the Accountant of Court; or

(ii) to a parent or guardian of that child,

to be invested, applied or otherwise dealt with, under the directions of the court, for the benefit of that child; or

(c) order the money to be paid directly to that child.

(3) Where payment is made to a person in accordance with an order under this section, a receipt given by him shall be a sufficient discharge of the obligation to make the payment."

Responses to the Discussion Paper

5.9 In our Discussion Paper we asked:

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

5.10 The majority of consultees, including a mixture of practitioners specialising in personal injury cases, insurers and trade unions, considered that there are no serious operational issues with section 13. The overall view was that on the face of things, section 13 operates satisfactorily and is generally fit for purpose.

5.11 However, a number of consultees did raise valid concerns. Criticisms and observations included (i) the lack of use of section 13, (ii) the difficulties faced by solicitors when making an application under section 13, as the application may be seen as challenging the instructing parent's or guardian's trustworthiness or capabilities, and (iii) the general lack of oversight of awards of damages made to children, which may leave the award open to ill-advised investment or misappropriation.

Discussion

(i) Lack of use

5.12 Despite section 13 being the key provision aimed at managing and safeguarding awards of damages to children, it is used infrequently.

5.13 The Accountant of Court plays an important role in the context of section 13. Section 13(2)(b)(i) provides that the court may make an order that an award of damages made to a child be paid to the Accountant of Court (or sheriff clerk). She will then take professional financial advice as to its management. On the basis of available records, the Accountant of Court has confirmed that during the 14 years from 2009 to 2023, there appear to have been few remits of damages awards to her. In practice, section 13 is used only where a case goes to proof, and that is rare as the vast majority of personal injury cases settle. If there has been no court involvement in the case, section 13 does not apply. Generally, courts do not refer to

the Accountant of Court unless requested to do so by a party (a judge's *ex proprio motu*[3] referral is rare). The statistics are indicative of a lack of use of a key provision aimed at managing and safeguarding awards of damages to children.

5.14 The Law Society of Scotland advised that the reason for the low usage of section 13 is simply that its engagement is not compulsory, and it is rarely ever raised in a child's damages claim by a party to the action. Kennedys Law suggested that the reason parties do not use section 13 more often is that a defender may not feel sufficiently informed about the circumstances of the parent or child to propose an order in the specific terms which section 13 requires. This sentiment was echoed by Clyde & Co and may go some way to explaining the low usage of the provisions. A further theory offered by Kennedys Law is that a parent or guardian may feel confident about managing the sum, and therefore they may consider it unnecessary to seek an order under section 13.

(ii) Challenges facing solicitors

5.15 Consultees explained the difficult position solicitors may find themselves in when making an application under section 13, as the application may be seen as challenging the instructing parent's or guardian's trustworthiness or capabilities. Making an application could be interpreted as implying either (a) the client's inability to properly manage the child's funds and/or (b) the client's lack of integrity and potential misapplication of the funds. One consultee explained that:

> "the critical issue with the system in Scotland at present is that it puts the pursuer's solicitor in a position of conflict – the solicitor is required to go to court and say that they do not trust the person who is instructing them (the child's parent) to look after the compensation."[4]

5.16 We recognise how challenging it may be for a solicitor to make an application under section 13 in such circumstances. In order to address this issue, we consider that it would be beneficial to place a new responsibility on the judge to inquire into the future administration of an award, rather than rely on parties to raise section 13 in an action. We discuss this further in paragraphs 5.32-5.38 below.

(iii) General oversight of awards

5.17 Of most concern in relation to section 13 is the lack of oversight of awards of damages made to children, which leaves the award open to possible ill-advised investment or misappropriation. Naturally, we proceed on the hypothesis that parents and guardians do not deliberately set out to exhaust or misappropriate an award of damages made to a child. However, one ill-advised purchase or investment decision could dissipate the award unintentionally. Similarly, one decision to spend the award, or part of the award, in a way which is not entirely compatible with the best interests of the child could amount to misappropriation. We are aware that the majority of such cases will involve the innocent mismanagement of funds rather than purposeful misappropriation. Nevertheless, it is prudent to explore ways in

[3] *Ex proprio motu* is a Latin term to describe something a judge does on their own initiative, without an application from the parties.
[4] The Association of Personal Injury Lawyers.

which such an award may be more robustly safeguarded. We consider this in more detail in paragraphs 5.32-5.38 below.

5.18 We are aware that to some extent, the potential for ill-advised investment and/or misappropriation is mitigated by the use of Parental Indemnity forms which are sometimes imposed in extra-judicial settlements by an insurer, and set out that the payment is being made in full and final settlement of the claim, on the basis that an undertaking is given by the parent that they will apply the funds for the sole benefit of the child. However, the purpose of a Parental Indemnity form is to protect insurers' liability, rather than ensure the child's funds are spent appropriately. Consultees indicated that they are uncomfortable with this approach and would prefer increased court involvement in cases involving awards of damages made to children, or alternatively that the award should be paid into a trust to ensure it is safeguarded. It would appear that there is an appetite for general independent oversight of any award made to a child. We address reform of this nature in Recommendation 14.

Possible solutions

Responses to Discussion Paper

5.19 In our Discussion Paper, we asked:

> "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?"

5.20 Proposals from consultees to improve the law in this area focused on increased involvement from (i) the court and (ii) the Accountant of Court. There was no consensus amongst consultees in relation to what form the increased involvement might take; consultees who commented on how oversight of an award may be provided had mixed views. General observations included the proposal that there should be a court/judicial approval process where the damages are paid into the court, a trust, or a protected account to ensure that the award is used for the benefit of the child. There was also discussion about whether the court should only become involved where the applicant is unrepresented. Similar thinking was offered in relation to the Accountant of Court, who consultees suggested could provide an additional safeguard for awards made to children.

Discussion

5.21 Against this background, we are persuaded that reform in this area would be of benefit to children and families. We are attracted to the proposition of an enhanced role for the court and the Accountant of Court in order to improve the safeguards which surround awards of damages made to children. We consider the exact nature of this enhanced role below in paragraphs 5.32 - 5.38.

Three fundamental principles

5.22 The second part of Question 24 asked what matters the court should have regard to in cases involving section 13 and whether these should be the same as the matters considered in cases invoking section 11(1) of the Children (Scotland) Act 1995, namely (i) the welfare of

the child, (ii) the "no order" principle[5] and (iii) the views of the child (as set out in section 11(7)). The principles are commonly referred to as the three fundamental principles which inform many other decisions affecting children.

5.23 For background, section 11(1) of the Children (Scotland) Act 1995 allows for court orders to be made in relation to parental rights and responsibilities, guardianships or the administration of a child's property. The court is given a general discretion to make "such orders relating to the payment and management of the sum for the benefit of the child as it thinks fit". However, rules of court provide that where an order under section 13 has already been made, an application may be made for an order under section 11(1)(d) for administration of the child's property, and the court must take into account the welfare of the child, the "no order principle" and the views of the child. The interaction between section 13 and section 11(1)(d) is discussed in a different context in paragraphs 5.66-5.73 below but, for present purposes, it is important to note that currently orders made under section 13 do not have to take into account the three fundamental principles, but orders made under section 11, do (due to section 11(7)).

Responses to Discussion Paper

5.24 Of the 13 consultees who provided a view, the majority supported or did not oppose this proposal. Clyde & Co summed up the position in their response, "it seems sensible to provide that the court has regard to the three fundamental principles which inform many other decisions affecting children." The Senators of the College of Justice favoured the three principles being considered but were of the view that this should be left to the discretion of the court.

Discussion

5.25 In our view, there should be no difference in what the court considers in cases utilising section 13 or section 11. A change to this effect would make section 13 more inclusive of the modern way of managing cases involving children and ensure that the fundamental principles relating to children are enshrined in legislation. It is not the intention of this recommendation to encroach upon the discretion of the court. It is simply aimed at modernising the relevant legislation and bringing the pertinent matters to the forefront of the court's mind.

5.26 Section 11(7) of the 1995 Act will in due course be repealed and replaced by new sections 11ZA and 11ZB of the 1995 Act inserted by section 1 of the Children (Scotland) Act 2020 which further expand on the matters the court must have regard to under these three principles when deciding whether or not to make an order under section 11. At the time of writing, sections 11ZA and 11ZB are not yet in force. We have based our draft Bill provision on section 11 of the 1995 Act which is currently in force. However, should section 1 of the 2020 Act[6] be commenced, alternative wording for section 8 of the Bill might be: "Sections 11ZA and 11ZB apply in relation to subsection (1) as they apply in relation to section 11(1)".

5.27 We therefore make the following recommendation:

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[5] "The no order principle" being, as its name suggests, that the court should not make an order or orders unless it considers that doing so would be better for the child than making no order at all.
[6] Inserting new sections 11ZA and 11ZB.

13. The court should be required, when applying section 13 of the Children (Scotland) Act 1995, to have regard to the same matters that it has to consider when determining an application under section 11(1) of the 1995 Act, namely (i) the welfare of the child, (ii) the "no order" principle and (iii) the views of the child.

(Draft Bill, section 7)

Wide discretionary power

Background

5.28 Our Discussion Paper[7] considered the wide discretionary power section 13 provides to the court. It asked:

> "25. Do you consider that it should be mandatory for the parents and 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?"

Responses to Discussion Paper

5.29 Of the 21 consultees who responded to this question, ten consultees[8] from a variety of backgrounds thought that the decision on reporting should be left to the discretion of the court. Clyde & Co were of the view that a mandatory report would be "too prescriptive, costly and unnecessary in the vast majority of cases." Similarly, Digby Brown said that to impose a requirement would "involve unnecessary intervention in private family life." Three consultees[9] took the view that there should be an automatic report made to the Accountant of Court or the Court of Protection regardless of circumstances. Eight consultees[10] had more nuanced views on this question in the sense that they were supportive of the proposition that a mandatory report should be made to the Accountant of Court, but only under certain circumstances. These circumstances include the value of the award, whether the child is represented or not, and to whom the responsibility for providing a report to the Accountant of Court falls.

5.30 No consultee made a suggestion as to the level of award at which mandatory reporting to the Accountant of Court should be set. Generally, it was believed that for lower value awards a mandatory reporting requirement would be unnecessary. The Forum of Scottish Claims Managers explained that, although they agree that it should be mandatory in cases where a child will be largely dependent upon an award for the rest of their life, for lower value claims this would be disproportionate. This opinion was shared by NFU Mutual who took the view that a mandatory requirement would be "wholly disproportionate and unnecessary in lower value claims."

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[7] See paragraphs 5.12–5.22 of the Discussion Paper.
[8] Clyde & Co, University of Aberdeen, Senators of the College of Justice, Digby Brown, Drummond Miller, DAC Beachcroft, Society of Solicitor Advocates, Association of British Insurers, Direct Line Group, Law Society of Scotland.
[9] Zurich Insurance, Unite the Union, Thompsons.
[10] Association of Personal Injury Lawyers, Ronald Conway, Stagecoach, Forum of Insurance Lawyers, Aviva, Forum of Scottish Claims Managers, NFU Mutual, Kennedys Law.

Discussion

5.31 We are not convinced that a mandatory reporting requirement for parents and guardians is the correct way forward. In some cases, it would be considered intrusive and disproportionate. We are also mindful of the resource implications for the Accountant of Court should each case in which an award of damages was made to a child be presented to the Accountant of Court. An alternative to a mandatory reporting requirement for parents and guardians is to place an additional duty on the court as we recommend below in paragraphs 5.32-5.38. We consider that the advantage in taking this approach is that in cases where a judge thinks it is necessary, having been informed of how the pursuer's agents (and by association, parents or guardians) intend to safeguard the award and considering the relevant factors outlined above, those cases will receive the oversight they require. For other cases, in which the judge is satisfied that suitable arrangements are in place to safeguard the award, no further involvement from the court or Accountant of Court will be necessary. The key point is that there is a much improved and enhanced check and balance on the safeguarding of the award firstly by the court, and secondly, with the potential for the involvement of the Accountant of Court in cases where the court deems it necessary (see recommendation 14 below).

The court's duty to inquire

Background

5.32 In our Discussion Paper we asked:

> "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?"

Responses to Discussion Paper

5.33 Responses to this question were generally mixed, with a small majority tipping the scales in favour of an affirmative response. Of note was the response from the Senators of the College of Justice who responded to this question as follows:

> "yes, we agree that there is nothing controversial, and indeed merit, in the court being obliged, prior to granting decree to inquire into the future administration of the child's damages and, if it is considered necessary, to remit the case to the Accountant of Court for a report, in terms of s.13, for advice."

5.34 The Senators were of the view that there should be no mandatory requirement to remit to the Accountant of Court, but they did support the proposal that the court should be obliged to inquire into the administration of the award and have the option of remitting to the Accountant of Court. Of course, the option to remit to the Accountant of Court already exists; however, the obligation to inquire into the administration of the award will bring this to the forefront of the court's and practitioners' minds.

5.35 Six consultees[11] took the opposing view that there should be no such obligation placed on the court. A variety of reasons were offered as justification for this viewpoint, such as proportionality; the delay in payment of the damages which may result from having to take the additional step; the fact that some cases are settled extra-judicially and therefore such a step may be pointless and result in extra costs for parties; as well as the additional resourcing burden it would place on both the Accountant of Court and the Scottish Courts and Tribunals Service. We are grateful to the consultees who provided this perspective.

Discussion

5.36 We consider that it would be beneficial to place a new responsibility on the judge to inquire into the future administration of an award, and for pursuers' agents to be required to explain to the court (by way of a form) how the award will be safeguarded. Taking into account this information and other relevant factors, such as the level of damages awarded, the future care and accommodation needs of the child, and any proposed trust deed, the court will have to decide whether to remit the case to the Accountant of Court for advice on how the award should be managed, or, if the court decides this is not necessary, the court must explain in a written report why that is the case.

5.37 By providing this type of supervision in all cases, the court will act as a safeguard when an award of damages is made to a child. The court's inquiry into the future administration of the award will encourage parties to plan appropriately in regard to how the award will be used in the best interests of the child and explain this to the court. Section 3 of the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019 (which is not yet in force and is discussed above in paragraphs 3.132–3.133) may provide the court with an alternative to awarding a lump sum and this is something which pursuers' agents may wish to provide views on. Thereafter, the court will have the discretion to refer the case to the Accountant of Court for advice on how the award should be managed. It is our hope that this approach will provide clear guidance to the court and ensure that there is some element of consistency of practice for parents and their advisers.

5.38 We therefore make the following recommendation:

14. Section 13 of the Children (Scotland) Act 1995 should be amended to impose a duty on the court, prior to granting decree for damages for a child, to inquire into the future administration of the award and, if the court considers it necessary, to remit the case to the Accountant of Court. The pursuer's agent should be required to submit a form to the court,[12] outlining how the funds are to be invested and protected until the child reaches the age of 16. A non-exhaustive list of factors which the court should take into consideration should be contained in the form including (i) the level of damages awarded, (ii) the future care and accommodation needs of the child and (iii) whether the sum is to be placed in a trust and if so, the identity and qualifications of the trustees, together with a copy of the proposed trust deed. If the court does not remit the case to the

[11] Clyde & Co, Forum of Insurance Lawyers, Digby Brown, DAC Beachcroft, Association of British Insurers, Law Society of Scotland.

[12] The Scottish Civil Justice Council ('SCJC') is responsible for preparing draft rules of procedure for the civil courts. It is anticipated that the form which pursuers' agents will be required to submit will be developed by the Personal Injury Committee of the SCJC.

> **Accountant of Court, the judge or sheriff should have a duty to explain, in a written report, why this is not necessary. The duty would apply whether damages are assessed and awarded by the court, or whether damages are to be paid as a result of settlement arrangements where a court is invited to interpone authority to a joint minute and grant decree in terms thereof.[13] The duty would not apply to interim awards of damages.**
>
> (Draft Bill, section 6)

The extent of the court's powers

Background

5.39 As discussed in paragraphs 5.28 – 5.31, section 13 of the Children (Scotland) Act 1995 provides the court with a wide discretionary power which includes the power to order an award of damages to be paid directly to a child. It strikes us that this scenario will rarely occur in practice and will only be appropriate in relation to smaller damages awards.

Responses to Discussion Paper

5.40 In our Discussion Paper we asked the following questions:

> "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?
>
> 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?"

5.41 Of the 15 consultees who responded to Question 27, ten[14] generally considered that the court's wide discretion remains appropriate. The Forum of Insurance Lawyers stated, "we anticipate that the court takes into consideration the factors mentioned above." Likewise, the Society of Solicitor Advocates said, "we consider that the court would likely have cognisance to the factors described before making such an award."

5.42 Three consultees[15] considered that in certain circumstances, the court should be required to consider specific factors. Such factors may include the age and needs of the child; the size of the award; the best interests, welfare and views of the child; the likely reliance on the award into adulthood; whether the child will have capacity at age 16; and whether the child's parents or guardians have the ability to assist the child to manage the award effectively.

5.43 Two consultees took a different view. Zurich Insurance felt strongly that the court's wide discretion is no longer appropriate and should be curtailed unless the payment is going

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[13] Interpone authority to a joint minute means that the court has seen and approved of the parties' agreement as contained in the joint minute.
[14] Senators of the College of Justice, Digby Brown, University of Aberdeen, Society of Solicitor Advocates, Direct Line Group, NFU Mutual, Law Society of Scotland, Ronald Conway, Clyde & Co, Forum of Insurance Lawyers,.
[15] Thompsons, Kennedys, Drummond Miller.

into a trust. The Association of Personal Injury Lawyers believe that all awards, regardless of circumstances, should be held by the Accountant of Court until the child reaches 16.

5.44 In relation to Question 28, eight consultees offered suggestions as to additional factors the court ought to be required to take account of. These included the future costs of caring for the child, the best interests of the child, the welfare of the child, the views of the child, the legal capacity of the child on reaching the age of 16, the ability of a parent or guardian to assist the child in managing sums effectively, the extent to which the child is likely to remain dependent on the award upon reaching adulthood, and any specific immediate needs of the child.

Discussion

5.45 We are of the view that it is unlikely, in the vast majority of cases, that the court would order that an award of damages be paid directly to a child. Should the court choose to do so, we trust that there are valid and well considered reasons for such an approach. We note that only a small number of consultees suggested curtailing the court's discretion in this context.

5.46 Although we recognise the merit of each of the suggestions in response to Question 28, we do not believe that there is any requirement to specify additional factors which the court must take into account when making an award directly to a child. We therefore make no additional recommendation beyond that made in Recommendation 13: that the court must take into account the three fundamental principles when making an order under section 13, including an order that directs that damages be paid directly to a child.[16]

Trusts for an injured child

Background

5.47 As stated in paragraph 5.6 above we recommend that a standalone project on damages awarded to children and trusts is undertaken. Nevertheless, the research, consultee responses and outline recommendations in this Report may form a useful basis for such a project.

5.48 One method of safeguarding an award of damages made to a child is to set up a trust. Generally, this might be a personal injury trust, although this is not always the case, and it may be possible to use other types of trust.[17] Our Discussion Paper considers the benefits of attempting to safeguard an award of damages made to a child using a trust. It also considers some of the challenges, such as who has the authority to place a child's award into a trust on the child's behalf.[18] Question 29 of the Discussion Paper asks:

> "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?

[16] See para 5.27 above.
[17] See Question 38 at paragraph 5.99.
[18] See paragraphs 5.47–5.52 of the Discussion Paper.

(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?"

Responses to Discussion Paper

5.49 Ten consultees[19] responded to this question. Some consultees responded to each part of the question (a)–(f), whilst some consultees only provided an answer to certain parts. We are grateful to consultees for their in-depth and thoughtful responses to this question. It is undoubtedly a complex area of law which requires thorough examination and clarification.

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

5.50 Ten consultees[20] responded to part (a) of Question 29. There was little consensus as to whether the court has power to direct payment into a trust and if so, which type of trust. The majority believed that section 13 gives the court the power to direct money into a trust.[21] A minority took an alternative view or chose to make a general comment about awards of damages for children being placed into a trust.[22] Four consultees[23] took the opportunity to ask for clarity to be provided in this area of law. The Senators of the College of Justice said:

> "… that the paper identifies doubts on the matter of whether the general discretion afforded by section 13 is such as to confer on the court the power to direct payment of damages into a trust – whether a bare trust or a substantive trust – is sufficient to indicate that clarification is necessary, and that any such clarification, which should specify the extent of any power to direct payment of damages into a trust arrangement, should be effected by statute. The extent to which the Court should have power to direct payment of damages into a trust will necessarily be informed by the terms and effect of Article 1 of the First Protocol to the ECHR.[24]
>
> For our part, we share the concern that a substantive trust, involving a direction as to the identification of the person or persons who are to be beneficiaries of the residue of the trust, or which otherwise might benefit different beneficiaries, other than the child awarded damages, may not be appropriate in A1P1 terms."

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[19] Zurich, Unite the Union, Digby Brown, Thompsons, Drummond Miller, Kennedys Law, Senators of the College of Justice, Association of Personal Injury Lawyers, Law Society of Scotland, Association of British Insurers.
[20] Zurich, Unite the Union, Digby Brown, Thompsons, Drummond Miller, Kennedys Law, Senators of the College of Justice, Association of Personal Injury Lawyers, Law Society of Scotland, University of Aberdeen.
[21] Zurich, Unite the Union, Digby Brown, Thompsons, Drummond Miller, Kennedys Law.
[22] Senators of the College of Justice, Association of Personal Injury Lawyers, Law Society of Scotland.
[23] Association of Personal Injury Lawyers, Drummond Miller, Association of British Insurers, Kennedys Law.
[24] Article 1 of Protocol 1 of the European Convention of Human Rights precludes the state from interfering with a person's property except in limited circumstances.

5.51 It is clear that there is a need for clarity relating to the court's powers under section 13 to direct an award 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?

5.52 Consultees had mixed views. Ten consultees responded: three consultees[25] advised caution against using the power to place an award into a substantive trust for Article 1 Protocol 1 European Convention on Human Rights reasons, three consultees[26] explained that there is no clear answer to this question or that they are unsure of the answer, and four consultees[27] said that the power related to both types of trust.

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

5.53 Only two consultees[28] shared an example of the use of a trust in practice. It is difficult to say whether this is because it is a rare occurrence or because consultees did not want to share their experiences in this way. Unite the Union and Thompsons Solicitors provided identical examples:

> "we represented a child injured in an RTA who even though she was under 16 she would not be deemed to have capacity when she reached the age of 16 due to her injuries. Her damages were placed into a Personal Injury Trust with a professional trustee. She was in receipt of means tested benefits that we were keen to ensure would continue beyond settlement hence the use of the PI trust."

(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?

5.54 In terms of the transfer of the award to persons other than those listed in section 13(2)(a) and (b),[29] three consultees[30] were of the view that "professional trustees" or "trustees" should be included in the list. Four consultees[31] thought that the scope of the list was appropriate and required no changes. One of the four consultees[32] made the case for removal of the option of the judicial factor due to costs and bureaucracy.

(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?

5.55 Five consultees[33] responded to Question 29(e) which relates to whether the court is able to define the purposes of the trust and the trustees' powers. Responses ranged from yes, the court already has this power,[34] to responses focused more on the duties of professional trustees. Two consultees[35] said that in cases involving professional trustees, a trustee's

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[25] Kennedys Law, Senators of the College of Justice, University of Aberdeen.
[26] Zurich Insurance, Law Society of Scotland, Association of British Insurers.
[27] Unite the Union, Thompsons, Drummond Miller, Digby Brown.
[28] Unite the Union and Thompsons.
[29] i.e. a judicial factor, a sheriff clerk, the Accountant of Court, or a parent or guardian of the child.
[30] Drummond Miller, Unite the Union, Thompsons.
[31] Senators of the College of Justice, Law Society of Scotland, Digby Brown, Zurich Insurance.
[32] Law Society of Scotland.
[33] Drummond Miller, Digby Brown, Law Society of Scotland, Unite the Union, Thompsons.
[34] Drummond Miller.
[35] Unite the Union, Thompsons.

professional duty to the beneficiary ought to supersede judicial control. One consultee[36] was of the view that it was up to the court to define the purpose of the trust, but "the remaining matters go beyond the scope of the court's role and would be more appropriately dealt with by the professional advisor." One consultee[37] offered an alternative solution and suggested that "the trustees' powers should be similar to those which apply when a Financial Guardianship is appointed."

(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?

5.56 Six consultees[38] offered suggestions for reform. The majority of suggestions (four out of the six responses)[39] centred upon clarity relating to the court's discretion to direct payment of damages into trusts – specifically substantive trusts. Other suggestions included (i) that the court should not be given the power to impose a requirement to set up a substantive or personal injury trust,[40] and (ii) that in cases where the child will never have capacity, the funds should be looked after by an independent trustee who will only pay out for the benefit of the child and not, for example, to meet the parents' needs.[41] Finally, Digby Brown suggested that it would be helpful if the monetary limits set by section 9(2) of the 1995 Act were removed, thus giving greater flexibility to applications concerning a child's property held in a trust. This suggestion is considered in more detail in paragraphs 5.109-5.116.

Discussion

5.57 As there appear to be significantly different views about the power of the court to direct payment of damages into a trust, the type of trust which may be appropriate, the choice of trust purposes, and whether there should be any independent supervision of a trust, we recommend that there should be a standalone Commission project, with trust specialist input, entitled "Personal Injuries, Children, and Trusts". We acknowledge that taking this approach will not provide immediate clarification for practitioners on this area of law. However, given the variety of evidence provided in response to the Discussion Paper, and in particular, the uncertainty in regard to the current law, we are of the opinion that this is the most sensible way forward. Undertaking a standalone project will allow for more detailed and specialist evidence to be gathered on the aforementioned issues, and ultimately ensure that the Commission is able to make an informed decision when clarifying or recommending possible reform in this area.

5.58 We therefore recommend that:

15. There should be a standalone Commission project, with trust specialist input, entitled "Personal Injuries, Children, and Trusts", focusing amongst other things on (i) whether section 13 of the Children (Scotland) Act 1995 empowers the court to order payment of a child's damages into a trust; (ii) if so, whether the trust could be a bare trust,

[36] Digby Brown.
[37] Law Society of Scotland.
[38] Zurich Insurance, Drummond Miller, Law Society of Scotland, Senators of the College of Justice, Kennedys Law, Association of British Insurers.
[39] Kennedys Law, Senators of the College of Justice, Association of British Insurers, Drummond Miller.
[40] Law Society of Scotland.
[41] Zurich Insurance.

or a substantive trust, or a Personal Injury Trust; (iii) to what extent the court is able to define the purpose(s) of such a trust; (iv) what happens where a court or the Accountant of Court has some continuing supervision in respect of funds held in a trust, and a difference of view arises between the trustees and the court/Accountant of Court; and finally (v) whether there should be independent oversight of an award of damages for a child which is to be placed into trust, and if so, what form that oversight should take and whether such oversight should be necessary in all cases or only in certain specific circumstances.

Sheriff clerk

Background

5.59 Section 13(2)(b)(i) of the Children (Scotland) Act 1995 provides the power for the court to make an order that money (including an award of damages made to a child) be consigned to the sheriff clerk. According to data provided by the Scottish Courts and Tribunal Service for the calendar years 2014 to 2020, no funds were consigned with any sheriff clerk under an order of the court in terms of section 13(2)(b)(i).

Responses to Discussion Paper

5.60 In our Discussion Paper we asked:

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

5.61 Sixteen consultees responded to this question, 14[42] of whom were supportive of retaining the power. The justification for this view, provided by six consultees[43], was the possibility that the formation of the All-Scotland Personal Injury Court ("ASPIC") in 2015 may result in the option of money being paid to the sheriff clerk being utilised more often. All six consultees who mentioned ASPIC agreed that the court has not existed for long enough to allow for accurate assessment of how ASPIC cases may impact the power in due course. Unite the Union summarised matters as follows:

> "we agree that the recent formation of ASPIC is reason enough to retain the power to make an order that money be paid to the Sheriff Clerk. There has not been enough time for proper consideration to be given to the use of this function given the relatively short time this Court has been in existence."

5.62 Discussion

[42] Zurich Insurance, Forum of Insurance Lawyers, University of Aberdeen, Unite the Union, Senators of the College of Justice, Digby Brown, Thompsons, Drummond Miller, Association of British Insurers, Society of Solicitor Advocates, Direct Line Group, NFU Mutual, Kennedys, Law Society of Scotland.
[43] University of Aberdeen, Unite the Union, Senators of the College of Justice, Digby Brown, Thompsons, NFU Mutual.

5.63 We agree with this view and conclude that there should be no change to section 13(2)(b)(i) of the Children (Scotland) Act 1995 at this time. This matter should be revisited once the full impact of ASPIC can be assessed.

Other reform

Background

5.64 In our Discussion Paper we asked:

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

5.65 Thirteen consultees[44] responded to this question. Twelve[45] of the thirteen stated that they had no comment or other proposals for reform in this area. One consultee[46] proposed an additional reform and referred us to their detailed response to the opening question of the chapter, which asked consultees if there were any problems in practice with the operation of section 13. To summarise his response, he is of the view that the value of the award should dictate the course the case follows. He splits cases into three types. For cases under £10,000, he suggests limited input from the court. Payment can be made to the parent or guardian relatively safely, with a reminder of relevant duties. For cases between £10,000–£50,000, the sums should be consigned to the sheriff clerk. For cases above £50,000, it is assumed that most agents will make arrangements for financial advice, or a Case Manager may be appointed. His concern focuses on the potential that a parent or guardian may still dissipate or misappropriate funds in some way. The general solution proposed is that the Office of the Public Guardian or the Accountant of Court may play a role in this case. The suggestion is that a register is created in addition to a supervision and reporting requirement. Moreover, there would be an opportunity for concerned individuals to report concerns for investigation even if they had no title and interest to sue.

Discussion

5.66 As it is our recommendation to legislate to provide enhanced oversight of an award by both the court and the Accountant of Court, we believe that the individual's concerns are addressed by our previous recommendations. We are not minded to adopt the suggested categorisation of cases by value, as we consider that flexibility, together with the judgement of the court or the Accountant of Court, is more effective for the protection of children. The reform which we are recommending, which is set out in paragraphs 5.32–5.38 above, will result in greater oversight by the court and the Accountant of Court. We do not recommend categorisation of awards by size nor the creation of a register. Provided that there is greater oversight by the court/Accountant of Court, we consider that there is likely to be an obvious "port of call" for a concerned individual.

Section 13: where "a sum becomes payable to"

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[44] Clyde & Co, Forum of Insurance Lawyers, Senators of the College of Justice, University of Aberdeen, Digby Brown, Drummond Miller, DAC Beachcroft, Association of British Insurers, Direct Line Group, NFU Mutual, Kennedys Law, Law Society of Scotland, Ronald E Conway.

[45] Clyde & Co, Forum of Insurance Lawyers, Senators of the College of Justice, University of Aberdeen, Digby Brown, Drummond Miller, DAC Beachcroft, Association of British Insurers, Direct Line Group, NFU Mutual, Kennedys Law, Law Society of Scotland.

46 Ronald E Conway.

Background

5.67 As noted in our Discussion Paper,[47] some concern has been expressed regarding the fact that the wide discretionary power of the court in section 13(1) is only triggered where, in any court proceedings, a sum "becomes payable to, or for the benefit of" a child. This means that once damages have been paid, section 13 no longer applies and cannot be utilised by parties.[48] The alternative then is to use section 11, which effectively fills the gap left by section 13 in relation to damages which have already been paid.

5.68 Where there are existing proceedings, an application under section 11(1)(d) of the Children (Scotland) 1995 Act may be made by minute. Upon receiving an application, the court may make such order as it sees fit, including appointing a judicial factor to manage a child's property, or remitting the matter to the Accountant of Court to report on suitable arrangements for the future management of the property.[49]

5.69 Section 11 also allows an application under section 11(1)(d) in relation to the administration of a child's property in "relevant circumstances", whether or not those proceedings are independent of any other action. The "relevant circumstances" are listed in section 11(3) and include where an application is made by a person who has parental rights and responsibilities, or by a person who does not have parental rights and responsibilities but otherwise claims an interest in the child.[50]

Responses to Discussion Paper

5.70 In our Discussion Paper we asked:

> "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."

5.71 We took the preliminary view that there is adequate provision in section 11 to enable an application to be made in court proceedings for an appropriate order relating to the management of sums already paid (as opposed to payable) in respect of damages awarded to a child.

5.72 The majority of consultees – 14 out of 17[51] – said that there is adequate provision to enable applications to be made for an appropriate order for the management of damages that have already been paid to a child or their parent or guardian. Of those who provided reasoning for their views, section 11 was identified as the key provision which supports section 13 in such cases. Thompsons Solicitors said, "we consider that section 11 provides adequate opportunity to allow an application to be made during court proceedings for an appropriate order relating to the management of sums." Similarly, Digby Brown stated, "yes, we do

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[47] See paragraphs 5.30–5.33 of the Discussion Paper.
[48] See Lord Brodie's comments in *S v Argyll and Clyde & Co Acute Hospitals NHS Trust* 2009 SLT 1016 at para 6: "it seemed to me that counsel was correct when he accepted that 'the horse had bolted'".
[49] 1995 Act, s.11(2)(g).
[50] Ibid, s 11(3)(a)(i) and (ii).
[51] Clyde & Co, Forum of Insurance Lawyers, University of Aberdeen, Unite the Union, Digby Brown, Thompsons, Drummond Miller, DAC Beachcroft, Association of British Insurers, Society of Solicitor Advocates, Direct Line Group, NFU Mutual, Kennedys Law, Law Society of Scotland.

consider that there is adequate provision on the basis of the powers provided in s.11 of the 1995 Act."

5.73 A minority – three[52] out of 17 – suggested that section 11 might be inadequate. One consultee[53] discussed issues arising from the fact that, at present, the process relies on solicitors expressing concerns about the ability of parents or guardians to manage funds. This issue is discussed in paragraphs 5.15–5.16 above but may be less relevant in the context of section 11, where an application can only be made in certain circumstances. The two other consultees advocated increased involvement from the Accountant of Court in all cases.[54]

Discussion

5.74 It appears that section 11 adequately fills any gap left by section 13 once damages have been paid. Parties can still access the court using section 11(1)(d). We are therefore not concerned that there is any scenario (apart from in cases which settle out of court) in which parties cannot access the court when an order is made for damages awarded to a child. We also consider that Recommendation 14 (suggesting the insertion of certain subsections into section 13) provides additional protection for the child, as agents will have to be proactive in safeguarding the award and a judge must inquire into the management of the award in a way which is not currently the case. It is hoped that this approach will encourage sensible forward planning for an award of damages made to a child so fewer cases will have to come to court once damages have already been paid.

Low usage of Accountant of Court provisions

Background

5.75 As discussed above in paragraph 5.32–5.38, we envisage an enhanced role for the Accountant of Court in order to provide a safeguard for awards of damages made to children. Our Discussion Paper[55] explains that, currently, provisions which involve the Accountant of Court are used less frequently than might be expected.

Responses to Discussion Paper

5.76 In our Discussion Paper we asked the following questions:

> "33. What do you think might explain the low usage of the provisions that involve the Accountant of Court?
>
> 34. What might increase use of these provisions?"

5.77 Thirteen consultees[56] responded to Question 33. Several consultees suggested that the low usage may be explained by a lack of awareness of the provisions and, by extension, uncertainty as to how the provisions work, which ultimately exacerbate their low take-up. Three

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[52] Zurich Insurance, Association of Personal Injury Lawyers, Ronald E Conway.
[53] Association of Personal Injury Lawyers.
[54] Zurich Insurance, Ronald E Conway.
[55] See paragraphs 5.43–5.46 of the Discussion Paper.
[56] Digby Brown, Drummond Miller, Zurich Insurance, Ronald E Conway, Clyde & Co, University of Aberdeen, Association of Personal Injury Lawyers, Unite the Union, Thompsons, DAC Beachcroft, Society of Solicitor Advocates, Kennedys Law, Law Society of Scotland.

consultees[57] noted that parental involvement may reduce the use of the provisions as the parent or guardian to whom payment is being made may consider that it is preferable to retain the freedom to seek professional advice on investment and administration outwith the court setting. One consultee[58] thought that parents and practitioners may consider the option to be unattractive due to the low interest rates associated with the usage of the Accountant of Court. Three legal practitioners[59] explained that firms generally obtain independent advice for clients, and that they rarely find it necessary to seek orders under section 11 or section 13, given that they are generally satisfied that the child's damages will be safeguarded. Finally, one consultee[60] noted that the courts generally prefer alternative orders which, when considered alongside the court's lack of obligation to consider an order under section 13 unless moved to do so, may explain the low use of the provisions.

5.78 To address the low usage of the provisions, one consultee[61] suggested the creation of a clear and established set of rules around when to refer a case to the Accountant of Court. Four consultees[62] suggested that usage may increase if awareness of the provisions is raised, particularly within the legal profession and any other area in which advice is given to those who hold property owned by or due to a child. Five consultees[63] said that making the involvement of the Accountant of Court mandatory or, alternatively, making the involvement of the courts mandatory, so as to determine the best interests of the child, would increase use of the provisions. Finally, one consultee[64] recommended that all damages for children, regardless of the value of the damages and whether the settlement occurs pre-litigation or following proof, should be subject to approval and protections through the holding of the funds for the child until the age of 16.

Discussion

5.79 Two issues arose consistently throughout the responses – namely, a lack of clarity and awareness of the provisions, and low use of the provisions by the court.

5.80 As suggested by four consultees, the introduction of guidance may improve general awareness and understanding of the provisions. Guidance on the benefits of the provisions and their availability, as well as guidance on how and when to use the provisions, may encourage legal practitioners, as well as parents and guardians, to seek the assistance of the Accountant of Court where necessary. One consultee[65] suggested that the Law Society of Scotland should produce guidance for practitioners. We agree that this is a sensible solution which will increase awareness of the provisions. We trust that appropriate guidance will be issued by the Law Society of Scotland and the Faculty of Advocates for practitioners on the use of sections 9 to 13 of the Children (Scotland) Act 1995 and the work of the Accountant of Court.

5.81 Low use of the provisions by the court was also highlighted as an issue. Linked to this was speculation amongst some consultees that the court may prefer alternative orders, such

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[57] Zurich Insurance, Kennedys Law, Drummond Miller.
[58] Ronald E Conway.
[59] Thompsons, Drummond Miller, Digby Brown.
[60] University of Aberdeen.
[61] Zurich Insurance.
[62] Clyde & Co, University of Aberdeen, Digby Brown, Kennedys Law.
[63] Thompsons, Unite the Union, Drummond Miller, Kennedys Law, Law Society of Scotland.
[64] Association of Personal Injury Lawyers.
[65] Ronald E Conway.

as payment to a parent or guardian under section 13(2)(b)(ii), and that a lack of direction surrounding the court's discretion in utilising the provisions could also be contributing to the low usage rate. In addition to practitioners, judges and sheriffs may also benefit from increased awareness and understanding of the provisions. We trust that appropriate guidance will be issued by the Judicial Institute for Scotland for judges and sheriffs on the use of sections 9 to 13 of the Children (Scotland) 1995 Act and the work of the Accountant of Court.

5.82 We also considered whether remitting a case to the Accountant of Court should be mandatory; however, we do not wish to curtail the court's discretion in this matter and are mindful of the cost implications of such an approach.

5.83 Instead, our approach is (i) to impose a duty of inquiry (with a possible option of remitting to the Accountant of Court after consideration of a number of factors) upon the court hearing the case;[66] and (ii) to raise awareness of the provisions amongst practitioners and the judiciary. We are of the view that any further reforms are not merited at this time.

Personal injury trusts for a child: lack of independent oversight

Background

5.84 Currently, where a child's damages are paid directly into a trust, there is no independent oversight either of the terms of the trust, or of those who wish to be appointed as trustee or trustees. Our Discussion Paper[67] recognises that this position contrasts with the situation in relation to adults with incapacity, where a guardian who has been granted power to set up a trust on behalf of an incapable adult must send a draft of the proposed trust deed to the Public Guardian for consideration, along with a statement explaining the rationale behind setting up the trust.[68]

5.85 In order to gain an understanding of current practice, we liaised with an Advisory Group who suggested that where awards of damages made to a child are to be paid directly into a trust, independent oversight of the terms of the trust, and of the choice of persons to be appointed as trustees, would be beneficial in reducing the risk of misappropriation or improper investment of funds. Independent oversight could also be triggered by a significant change in circumstances such as, for example, where there is a substantial increase in the assets held in a trust following a final settlement, or where there is a change of trustees.

Responses to Discussion Paper

5.86 In light of the general lack of oversight and the Advisory Group's comments, in our Discussion Paper we asked:

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

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[66] See Recommendation 14 above, at para 5.40 above.
[67] See paragraphs 5.56–5.57 of the Discussion Paper.
[68] See the Office of the Public Guardian (Scotland) website: FAQs (publicguardian-scotland.gov.uk).

5.87 Consultees' responses to the question of whether independent oversight is necessary were mixed. Thirteen consultees responded to this question.[69] Six consultees[70] considered that there is such a need, whilst others considered that independent oversight may be beneficial in some, but not all, cases,[71] or that there is no such need at all.[72] The justification for the latter view was that the extent of misappropriation or improper investment of funds is unclear, and that families who take the step of setting up a trust for their child are also families who are protective of the funds involved and follow the advice of the professionals advising them.

5.88 Of the six consultees who said that independent oversight is necessary in all cases, four considered that arguably the appointed trustees could provide such oversight.[73] The Association of Personal Injury Lawyers felt that it would be beneficial to ensure that the majority of trustees are not family members. Rather, as three consultees[74] suggested, it would be wise to institute a requirement that the trustees appointed are professionally regulated persons, who are able to appropriately manage and invest funds with controlling interest, especially where larger sums are involved.

5.89 A minority of consultees[75] who did not consider such oversight to be necessary were largely of the view that in most cases involving a trust, the child's parents or relatives are appointed as trustees alongside a professional. It was suggested that by setting up a trust, the family are attempting to safeguard the award and are following the advice given to them by professionals. There is therefore less requirement to provide independent oversight.

5.90 The response from the Senators of the College of Justice queried whether the true extent of misappropriation or improper investment of funds is clear and if not, whether providing for independent oversight may be an unnecessary imposition.

5.91 In response to Question 36, whether oversight is necessary in all cases or only in certain circumstances, a clear majority considered independent oversight only to be necessary in some cases. There was less agreement about which cases. While one consultee[76] gave a precise sum as a suggested minimum for independent oversight – £50,000 – others provided suggestions that were less focused on figures, and more on case-specific characteristics. One consultee[77] suggested that oversight would not be necessary in "modest" cases, as these pose a lower level of risk of misappropriation of the funds. Five consultees[78] suggested that oversight be employed in any case where there are concerns regarding the funds being misappropriated or not properly invested. One consultee[79] said oversight would be necessary in cases where no independent professionally regulated trustee is appointed. Lastly, one

[69] Zurich, Clyde & Co, Association of Personal Injury Lawyers, University of Aberdeen, Kennedys Law, Law Society of Scotland, Forum of Insurance Lawyers, Senators of the College of Justice, Digby Brown, Drummond Miller, Unite the Union, Thompsons, Association of British Insurers.
[70] Zurich, Clyde & Co, Association of Personal Injury Lawyers, University of Aberdeen, Kennedys Law, Law Society of Scotland.
[71] Unite the Union, Thompsons, Association of British Insurers.
[72] Forum of Insurance Lawyers, Senators of the College of Justice, Digby Brown, Drummond Miller.
[73] Clyde & Co, Association of Personal Injury, Kennedys Law, Law Society of Scotland.
[74] Clyde & Co, Forum of Insurance Lawyers, Law Society of Scotland.
[75] Forum of Insurance Lawyers, Senators of the College of Justice, Digby Brown, Drummond Miller.
[76] Ronald E Conway.
[77] Zurich Insurance.
[78] Clyde & Co, Unite the Union, Thompsons, Drummond Miller, Association of British Insurers.
[79] Law Society of Scotland.

consultee[80] emphasised that any reform should be proportionate so as to mitigate the increase in the Accountant of Court's workload and the associated cost implications.

Discussion

5.92 Responses to these questions ranged from oversight is needed in all contexts, to oversight is not needed at all. We are grateful to consultees for expressing their views on this challenging area.

5.93 As in the position reached in paragraphs 5.57-5.58 above, there appear to be significantly different views on whether there is a need for independent oversight of a trust and what form that oversight may take. We therefore recommend that the question of whether there should be independent oversight of a trust and if so, in what form, should be part of the standalone trust project referred to in paragraph 5.58.

Achieving independent oversight

Background

5.94 In our Discussion Paper we asked:

> "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 a trust following a final settlement, or where there is a change of trustees; or
>
> (c) another process? If so, what?"

5.95 The method of achieving independent oversight which we suggested was 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 that such oversight by the Accountant of Court would also be triggered by any significant change in circumstances such as where there is a substantial increase in the assets held in a trust following a final settlement, or where there is a change of trustees (options (a)–(b) in Question 37). If consultees were not in favour of this method, they were asked for another process which they would consider suitable.

Responses to Discussion Paper

[80] Association of British Insurers.

5.96 Of the 14[81] consultees who responded to this question, nine[82] favoured the method described above in options (a)–(b). The Association of Personal Injury Lawyers emphasised that the choice of trustees must be scrutinised, and that there must not be a majority of family members amongst trustees. They explained that initial scrutiny about the choice of trustees would be pointless if the trustees were "then free to remove certain trustees and select others without oversight once the trust was set up." The Law Society of Scotland stated that if oversight is considered necessary, it should only arise "where there is no independent professionally regulated person appointed as a trustee with a controlling interest." It is in this situation that they consider options (a)–(b) should apply.

5.97 The five remaining consultees[83] did not consider that options (a)–(b) were appropriate. Digby Brown and the Forum of Insurance Lawyers reiterated their belief that oversight is unnecessary but, if implemented, the latter emphasised that it must be proportionate. Two other consultees suggested alternative procedures such as extending the powers of the Accountant of Court[84], and including oversight as part of the court process on the conclusion of an action when the settlement is over a certain financial threshold[85].

Discussion

5.98 We do not wish to speculate on how independent oversight of an award of damages for personal injury to a child may be achieved in the context of a trust. As demonstrated by the options listed in our Discussion Paper, and the variety of views expressed by consultees, this is a complex area which requires focused and specialist work. We consider that the issue of independent oversight should form part of the standalone trust project referred to in paragraph 5.58.

Personal Injury Trusts – which type of trust

Background

5.99 We mentioned Personal Injury Trusts for children above and suggested that a standalone project with specialist trust input is undertaken to consider matters such as who has the power to direct an award into trust, and what type of trust. In the meantime, without delving into these issues, we can examine the use of Personal Injury Trusts with the evidence we have.

Responses to Discussion Paper

5.100 In our Discussion Paper we asked:

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[81] Zurich Insurance, Clyde & Co, Association of Personal Injury Lawyers, University of Aberdeen, Unite the Union, Thompsons, Association of British Insurers, Kennedys Law, Law Society of Scotland, Drummond Miller, Ronald E Conway, Forum of Insurance Lawyers, Senators of the College of Justice, Digby Brown.
[82] Zurich Insurance, Clyde & Co, Association of Personal Injury Lawyers, University of Aberdeen, Unite the Union, Thompsons, Association of British Insurers, Kennedys Law, Law Society of Scotland.
[83] Drummond Miller, Ronald E Conway, Forum of Insurance Lawyers, Senators of the College of Justice, Digby Brown.
[84] Ronald Conway.
[85] Drummond Miller.

"38. Are Personal Injury Trusts 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?"

5.101 Eight[86] out of the 13[87] consultees who responded to this question were of the view that Personal Injury Trusts are the only type of trust used for managing awards of damages to children.

5.102 The minority of consultees who were not of this view provided a variety of reasons for their answer. The Law Society of Scotland stated that where the higher costs associated with a Personal Injury Trust are to be avoided, bare trusts may be used. In addition, where the value of the case is lower, a bare trust may be the preferred option. Drummond Miller explained that if damages are paid to a child as a consequence of their injury, then it would be unlikely that any trust other than a Personal Injury Trust would be appropriate. However, they state that if the award was being paid to a child as a result of a fatal claim, then another form of trust may be appropriate. Unite the Union and Thompsons Solicitors also considered that other types of trusts may be used, but the benefits provided by Personal Injury Trusts mean that others are not considered as frequently.

Discussion

5.103 It appears that Personal Injury Trusts are working effectively at the moment. Even consultees who referred to other types of trusts considered that Personal Injury Trusts often fit the needs of a child best. The only issue raised by consultees is that of the high costs associated with Personal Injury Trusts, which may at times result in bare trusts being used instead.

5.104 There appear to be significantly different views about what type of trust is appropriate for awards of damages made to children. We consider this to be a complex area which requires further consultation and research in a stand-alone project, as outlined in Recommendation 15.

Other issues

Background

5.105 In our Discussion Paper we asked:

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

5.106 Three consultees[88] provided a substantive response to this question. Digby Brown suggested that consideration should be given to expanding the role of the Office of the Public Guardian and explained the benefits of having a single body responsible for oversight of financial affairs for both incapable adults and children. Clyde & Co were of the view that the

[86] Ronald E Conway, Clyde & Co, Association of Personal Injury Lawyers, Forum of Insurance Lawyers, University of Aberdeen, Digby Brown, Association of British Insurers, Society of Solicitor Advocates.
[87] Ronald E Conway, Clyde & Co, Association of Personal Injury Lawyers, Forum of Insurance Lawyers, University of Aberdeen, Digby Brown, Association of British Insurers, Society of Solicitor Advocates, Zurich Insurance, Unite the Union, Thompsons, Drummond Miller, Law Society of Scotland.
[88] Clyde & Co, Digby Brown, Direct Line Group.

current measures are largely appropriate, and that the introduction of a Court of Protection equivalent would be extreme and costly. Nevertheless, Clyde & Co stated that there is scope to improve the current system. Direct Line Group emphasised that the current system is working well as evidenced by the lack of reported issues. They conclude that there is little need for reform other than providing the court with a discretionary duty to intervene as and when it is appropriate to protect the child's interests.

Discussion

5.107 We refer to Recommendation 14, where we recommend that both the court and the Accountant of Court have an enhanced role when an award of damages is made to a child. The court will have a duty to inquire into the administration of the award and intervene if appropriate. The Accountant of Court also holds office as the Public Guardian and is best placed to provide oversight for awards of damages for a child when the court deems this necessary. We consider that this recommendation is an appropriate reform that would enhance the protection of a child's damages.

Section 9 of the 1995 Act – monetary limits

Background

5.108 Section 9 of the Children (Scotland) Act 1995 deals with safeguarding a child's property. It does not specifically refer to awards of damages. It applies where property held by a person, other than a parent or guardian of the child, is owned by or due to the child and would, but for a direction under section 9, require to be handed over to a parent or guardian to be administered on behalf of the child.

5.109 Originally, it was not anticipated that section 9 would form part of this project as it deals with a broad range of property. However, our attention was drawn to the section by a consultee advocating the removal of the monetary limits contained in section 9(2). Section 9(2) requires an executor or trustee holding property to apply to the Accountant of Court for a direction as to the administration of the property where the value of the property exceeds £20,000. Where the value of the property is not less than £5,000 and does not exceed £20,000, the executor or trustee has discretion to apply to the Accountant of Court. The consultee[89] suggested that it would be helpful if those monetary limits were removed, thus giving greater flexibility to applications concerning a child's property.

Accountant of Court consultation

5.110 Our Discussion Paper did not ask a question in relation to section 9. Therefore, to ensure we have the appropriate understanding of this area of law, we have liaised closely with the Accountant of Court on this point.

Discussion

5.111 Although alteration of the monetary limits was suggested by only one consultee, we believe that there is merit in the suggestion. The value of money changes over time. Using the Bank of England's inflation calculator,[90] £20,000 in June 1995 has an equivalent value of

[89] Digby Brown.
[90] Inflation calculator | Bank of England as of September 2024.

£39,951 in September 2024. This raises the question of whether the monetary limits as they are currently set are correct, and if they are not, should they be amended to take account of the modern-day value of money.

5.112 In terms of a change to the monetary limits, we considered whether it would be desirable to tie the figure to inflation (rather than have a fixed value which will change over time). However, we are conscious that this may complicate matters for executors and trustees, as it would not be clear on the face of section 9 when the mandatory referral to the Accountant of Court is triggered.

5.113 One solution would be to remove the minimum threshold (£5000) which currently exists (as Digby Brown suggested), thus allowing greater flexibility. By removing the minimum threshold, a direction could be sought from the Accountant of Court if it was considered appropriate, regardless of monetary value. In order to ensure that oversight is still provided in high value cases, where the value of property exceeds £40,000 the executor or trustee should be required to apply to the Accountant of Court for a direction as to the administration of the property. This would mean that assistance from the Accountant of Court is an option in all cases, regardless of monetary value, and an obligation in cases where the value of the property exceeds £40,000.

5.114 We have liaised with the Accountant of Court about the possible impact of removing the minimum threshold and increasing the upper threshold. Consequences might be (a) a possible increase in queries relating to lower value property; and (b) the non-referral of some cases falling between the current upper threshold (£20,000) and the new threshold (£40,000), as referral for property valued below £40,000 would no longer be compulsory. We consider that these concerns are outweighed by the benefits of the suggested reform, in particular by the flexibility offered by removing the lower threshold (thus permitting access to the Accountant of Court in difficult albeit low value property cases) and also by the updating of the upper threshold for compulsory referrals to a more realistic level in light of the current value of money. The Accountant of Court has advised that she would be satisfied with such a change to section 9.

5.115 Between 2007–2023, the Accountant of Court provided over 1,750 Directions under section 9. It is realistic to assume that this number might increase should the minimum threshold be removed; however, as long as adequate resource is provided to assist with any increase in the number of Directions sought, the Accountant of Court is supportive of this change.

5.116 We note that section 9(8) gives Scottish Ministers the power to vary the sums referred to above in section 9(2), although it is not clear that that power can be exercised to entirely remove the £5,000 lower limit. We suggest that, following consultation, Scottish Ministers consider exercising their power to modify the monetary limits by subordinate legislation.

5.117 We therefore recommend that:

16. Scottish Ministers should consider exercising their power under section 9(8) of the Children (Scotland) Act 1995 to modify the monetary limits in section 9(2) of that Act by subordinate legislation.

Chapter 6 Summary of recommendations

1. The definition of relative in section 13(1) of the Administration of Justice Act 1982 should be amended to include persons accepted into family as a parent, grandparent, sibling, or grandchild of the injured person.

(Draft Bill, section 5)

2. The definition of relative in section 13(1) of the Administration of Justice Act 1982 should be amended to include ex-cohabitants of the injured person.

(Draft Bill, section 5)

3. Section 8 of the Administration of Justice Act 1982 should be extended to claims in respect of necessary services provided to the injured person by an individual who is not a relative of the injured person.

(Draft Bill, section 2)

4. Section 8 of the Administration of Justice Act 1982 should be amended to provide that services rendered by any person are recoverable so long as the services are provided (a) without a contractual right to payment or (b) otherwise than in the course of a business, profession or vocation.

(Draft Bill, section 2)

5. The Personal Injury Committee of the Scottish Civil Justice Council should consider introducing a Rule of Court, applying to the sheriff court and the Court of Session, to the effect that a pursuer bringing a claim in terms of section 8 of the Administration of Justice Act 1982 is required to produce an affidavit declaring:

(a) the identity of any person who has provided or is providing necessary services that are the subject of the claim;

(b) the relationship between the pursuer and that service provider or those service providers;

(c) the nature of the services provided;

(d) that the pursuer has informed the service provider that the pursuer is making a claim under section 8; and

(e) that the pursuer undertakes to account to the service provider for any damages obtained under section 8.

(Paragraph 2.60)

6. Scottish Ministers should raise the issue of CRU universal credit certificates with Ministers in the Department for Work and Pensions as a matter of urgency, drawing attention in particular to the fact that these certificates (as currently issued by CRU) fail to give sufficient detail to enable recipients to identify what benefits are (or are not) recoverable in terms of section 1 and Schedule 2 of the Social Security (Recovery of Benefits) Act 1997.

(Paragraph 3.22)

7. Section 10 of the Administration of Justice Act 1982 should be amended to clarify that where an employee contributes financially to a Permanent Health Insurance scheme, whether by (i) making a direct payment; (ii) paying tax or NIC on membership of the scheme as a benefit; or (iii) forfeiting the offer of additional remuneration or earnings with their employer in order to gain access to the scheme, or to increased benefits under that scheme, then any payments made to the employee under that scheme should not be deducted from an award of damages. Where no such contribution is made, payments made under the scheme should be deductible from an award of damages.

(Draft Bill, section 3)

8. Section 2(4) of the Law Reform (Personal Injuries) Act 1948 should be repealed and the provisions re-enacted in a new section 10A of the Administration of Justice Act 1982.

(Draft Bill, section 4)

9. Scottish Ministers should give consideration to amending the definition of “injury” in section 150 of the Health and Social Care (Community Standards) Act 2003 to include “industrial disease”.

(Paragraph 3.90)

10. There should be a statutory provision, similar in effect to section 2(4) of the Law Reform (Personal Injuries) Act 1948, that an injured person is entitled to opt for private care and accommodation rather than rely on local authority provision where it is available.

(Draft Bill, section 4)

11. Scottish Ministers should give consideration to reform of the law concerning recovery of the injured person’s care and accommodation costs so far as provided by local authorities.

(Paragraph 3.158)

12. For the purposes of section 17 of the Prescription and Limitation (Scotland) Act 1973, asymptomatic asbestos-related conditions should be distinguished from symptomatic asbestos-related conditions, such that failure on the part of an injured person to raise an action within the limitation period for (i) asymptomatic asbestos-related pleural

plaques, or (ii) asymptomatic asbestos-related pleural thickening or asymptomatic asbestosis, would not preclude that injured person from subsequently raising an action for a symptomatic asbestos-related condition, including asbestos-related pleural thickening or asbestosis which has become, but was not previously, symptomatic.

The 3-year time-bar for the symptomatic asbestos-related condition will begin no earlier than the date on which the injured person became aware of the fact mentioned in section 17(2)(b)(i) of the 1973 Act with respect to the symptomatic condition.

Where an asbestos-related disease which was recognised while asymptomatic becomes symptomatic, the 3-year time-bar will begin no earlier than the date on which the injured person is informed by a registered medical practitioner that the condition had caused, or had begun causing, impairment of that person's physical condition.

In the event of that injured person's death, the relatives' claim would no longer be time-barred. For that purpose, section 18 of the 1973 Act would also be amended.

(Draft Bill, section 1)

13. The court should be required, when applying section 13 of the Children (Scotland) Act 1995, to have regard to the same matters that it has to consider when determining an application under section 11(1) of the 1995 Act, namely (i) the welfare of the child, (ii) the "no order" principle and (iii) the views of the child.

(Draft Bill, section 6)

14. Section 13 of the Children (Scotland) Act 1995 should be amended to impose a duty on the court, prior to granting decree for damages for a child, to inquire into the future administration of the award and, if the court considers it necessary, to remit the case to the Accountant of Court. The pursuer's agent should be required to submit a form to the court, outlining how the funds are to be invested and protected until the child reaches the age of 16. A non-exhaustive list of factors which the court should take into consideration should be contained in the form including (i) the level of damages awarded, (ii) the future care and accommodation needs of the child and (iii) whether the sum is to be placed in a trust and if so, the identity and qualifications of the trustees, together with a copy of the proposed trust deed. If the court does not remit the case to the Accountant of Court, the judge or sheriff should have a duty to explain, in a written report, why this is not necessary. The duty would apply whether damages are assessed and awarded by the court, or whether damages are to be paid as a result of settlement arrangements where a court is invited to interpone authority to a joint minute and grant decree in terms thereof. The duty should not apply to interim awards of damages.

(Draft Bill, section 7)

15. There should be a standalone Commission project, with trust specialist input, entitled "Personal Injuries, Children, and Trusts", focusing amongst other things on (i) whether section 13 of the Children (Scotland) Act 1995 empowers the court to order payment of a child's damages into a trust; (ii) if so, whether the trust could be a bare trust, or a

substantive trust, or a Personal Injury Trust; (iii) to what extent the court is able to define the purpose(s) of such a trust; (iv) what happens where a court or the Accountant of Court has some continuing supervision in respect of funds held in a trust, and a difference of view arises between the trustees and the court/Accountant of Court; and finally (v) whether there should be independent oversight of an award of damages for a child which is to be placed into trust, and if so, what form that oversight should take and whether such oversight should be necessary in all cases or only in certain specific circumstances.

(Paragraph 5.8)

16. Scottish Ministers should consider exercising their power under section 9(8) of the Children (Scotland) Act 1995 to modify the monetary limits in section 9(2) of that Act, by subordinate legislation.

(Paragraph 5.116)

APPENDIX A: Damages (Scotland) Bill

[PRE-INTRODUCTION]

CONTENTS

Damages (Scotland) Bill

[PRE-INTRODUCTION]

An Act of the Scottish Parliament to amend the law in relation to damages for personal injuries and damages awarded to children; and for connected purposes.

Amendment of Prescription and Limitation (Scotland) Act 1973

1 Actions where damages claimed include damages for certain injuries attributable to asbestos exposure

(1) The Prescription and Limitation (Scotland) Act 1973 is amended as follows.

(2) After section 17, insert—

"17ZA Actions where damages claimed are for certain injuries attributable to asbestos exposure

(1) This section makes further provision about the application of section 17 in relation to an action of damages where the damages claimed consist solely of damages in respect of an injury that—

(a) is wholly or partly attributable to exposure to asbestos, and

(b) has caused or is causing impairment of the injured person's physical condition.

(2) The reference in section 17(2)(b)(i) to the injuries in question is to be read as referring only to injuries which have caused or are causing impairment of the injured person's physical condition.

(3) Accordingly, that reference does not include reference to—

(a) asbestos-related pleural plaques,

(b) the following injuries, provided the injury has not caused and is not causing impairment of the injured person's physical condition—

(i) asbestos-related pleural thickening,

(ii) asbestosis.

(4) Subsection (5) applies where—

(a) the reference in section 17(2)(b)(i) to the injuries in question includes reference to one of the following injuries—

(i) asbestos-related pleural thickening,

(i) asbestosis, and

(b) the fact that the injured person has the injury was recognised at a time when it had not yet caused and was not causing impairment of the person's physical condition.

(5) It is to be taken to have been impossible to be aware of the fact mentioned in section 17(2)(b)(i) in relation to the injury until the point at which a registered medical practitioner informed the injured person that the injury had caused, or had begun causing, impairment of the person's physical condition.

(6) It does not matter for the purposes of subsection (4)(b) whether or not the injured person was informed that the person had the injury.

(7) This section applies in relation to an action—

(a) commenced on or after the day on which this section comes into force regardless of whether the right of action accrued before, on or after that day,

(b) commenced before the day on which this section comes into force if the action has not been finally disposed of before that day.

(8) For the purposes of this section, an action is finally disposed of—

(a) when a decision disposing of the action is made, if there is no right of appeal against the decision,

(b) if there is a right of appeal with leave or permission against such a decision—

(i) when the time period for seeking leave or permission to appeal has expired without an application for leave or permission having been made, or

(ii) when leave or permission to appeal is refused,

(c) if leave or permission to appeal against such a decision has been granted or is not required, when the time period for making an appeal has expired without an appeal having been made, or

(d) when the action is withdrawn or abandoned.

(9) In subsection (8), the reference to a decision disposing of the action includes a reference to a decision made in an appeal against an earlier decision.".

(3) After section 18, insert—

"18ZZA Actions where damages claimed are for certain injuries or death attributable to asbestos exposure

(1) This section makes further provision about the application of section 18 in relation to an action of damages where—

(a) the deceased person died, before the day on which this section comes into force, from a personal injury that is wholly or partly attributable to exposure to asbestos, and

(b) leaving aside the possibility of the bringing of an action of damages in respect of the injury or death being allowed by virtue of section 19A, the bringing of such an action is (ignoring this section) prevented by section 18(4).

(2) Section 18(4) does not prevent the action being brought if it would have been possible, by virtue of section 17ZA, for an action—

(a) to which section 17 applied, and

(b) in which the damages claimed consisted solely of damages in respect of the injury from which the person died,

to be brought by or on behalf of the person, if alive, on the day on which section 17ZA came into force.

(3) This section applies in relation to an action commenced before the day on which this section comes into force if the action has not been finally disposed of before that day (as well as in relation to actions commenced on or after that day).

(4) An action is finally disposed of for the purposes of this section if it would be finally disposed of for the purposes of section 17ZA.".

NOTE

Section 1 implements recommendation 12 of the Scottish Law Commission Report on Damages for Personal Injury (Scot Law Com No. 266, 2024) ("the Report") by making further provision about the application of section 17 and section 18 of the Prescription and Limitation (Scotland) Act 1973 to symptomatic asbestos-related conditions. Paragraphs 4.40-4.52 of the Report explain the rationale for this recommendation.

Subsection (2) and (3) insert new sections 17ZA and 18ZZA, respectively, into the 1973 Act. These sections provide an exception to the three-year limitation periods contained in sections 17 and 18 of the 1973 Act, but only in the context of the asbestos-related conditions of pleural plaques, pleural thickening, and asbestosis (conditions specified as actionable harms in the Damages (Asbestos-related Conditions) (Scotland) Act 2009).

New section 17ZA applies to actions identified in subsection (1), that is, actions where the damages claimed consist solely of damages in respect of an injury that (a) is wholly or partly attributable to asbestos exposure and (b) has caused or is causing impairment of the person's physical condition (i.e. a symptomatic condition). In actions of this type, the overall effect of new section 17ZA is that the action is not time-barred by a preceding asymptomatic condition; instead, a new three-year limitation period applies only to the symptomatic condition.

This is achieved by subsection (2), which provides that the asymptomatic conditions listed in subsection (3) are to be disregarded from the reference to "injuries in question" in section 17(2)(b)(i) of the 1973 Act. The effect is that for symptomatic conditions, the time-bar will not begin running until the person became (or it was reasonably practicable for the person to have become) aware of the fact mentioned in section 17(2)(b)(i) of the 1973 Act in relation to the symptomatic condition.

Subsections (4) and (5) of new section 17ZA make additional provision for cases where an injury has progressed from being in asymptomatic form to symptomatic form. The three-year time-bar will not start running until a registered medical practitioner has informed the injured person that the injury has progressed to a symptomatic condition. It does not matter whether the injured person was aware that they had the asymptomatic condition in the first place (subsection (6)).

Subsection (7) makes transitional arrangements. It provides that section 17ZA applies to any action (a) commenced on or after the date on which the new section comes into force, or (b) commenced before the date on which the new section comes into force provided the action has not been finally disposed of. The meaning of "finally disposed of" is set out in subsections (8) and (9), and includes an action that has been decided with no further avenue for appeal.

New section 18ZZA applies to actions for damages in cases of fatal asbestos exposure. Subsection (2) provides that in cases where the deceased would have been entitled to raise an action to which section 17 applies by virtue of new section 17ZA had they not died before it came into force, section 18(4) does not prevent the action being brought. Subsections (3) and (4) make further provisions about what actions new section 18ZZA applies to.

Appendix D of the Report provides worked case examples.

Amendments of Administration of Justice Act 1982

2 Liability to pay damages for services rendered by persons other than relatives

(1) Section 8 of the Administration of Justice Act 1982 is amended as follows.

(2) In subsection (1)—

(a) for "a relative" substitute "another individual",

(b) for second "relative" substitute "individual".

(3) In subsection (2), for "relative" substitute "individual".

(4) In subsection (3)—

(a) for "a relative" substitute "another individual",

(b) for second "relative" substitute "individual".

(5) After subsection (3), insert—

"(3A) The responsible person is not liable as mentioned in subsection (1) or (3) in respect of services rendered if the services are rendered (either or both)—

(a) by a person who has a contractual right to payment in respect of the rendering of the services, or

(b) in the course of an individual's business, profession or vocation.".

(6) In subsection (4), for "relative" substitute "other individual mentioned in subsection (1) or, as the case may be, (3)".

NOTE

Section 2 implements recommendations 3 and 4, by extending the class of persons who are entitled to damages under section 8 of the Administration of Justice Act 1982. Section 8 allows damages to be recoverable for necessary services provided to the injured person.

Subsections (2) to (4) and (6) amend section 8 of the 1982 Act to remove references to a "relative" and replace with an "individual". This allows non-relatives to be compensated for (i) necessary services provided to the injured person as a consequence of their injury and (ii) necessary services that will be required to be provided in the future to the injured person as a consequence of their injury. The new reference to an "individual" captures modern support structures, where, alongside family members, friends and neighbours may also assist with the provision of services (see paragraph 2.56 of the Report).

Subsection (5) inserts new subsection (3A) to the 1982 Act and creates an exception whereby the defender will not be liable to compensate an individual for certain necessary services (i.e. in circumstances involving a contractual right to payment, or a business, profession, or vocation).

3 Payments made under insurance arranged by injured person's employer

(1) Section 10 of the Administration of Justice Act 1982 is amended as follows.

(2) The existing text becomes subsection (1).

(3) After that subsection, insert—

"(2) The following are to be regarded as a contractual benefit for the purposes of subsection (1)(a) only if a condition set out in subsection (4) is satisfied—

(a) any sum paid or payable to the injured person under a qualifying insurance arrangement,

(b) any sum paid to the injured person by the injured person's employer the cost of which has been recovered or is recoverable by the employer under a qualifying insurance arrangement.

(3) Otherwise, such sums are to be regarded as remuneration or earnings for the purposes of subsection (1)(i).

(4) The conditions are that—

(a) the injured person required to make any payment in order for the qualifying insurance arrangement to apply in relation to the injured person,

(b) the injured person chose to forgo additional remuneration or earnings in respect of the injured person's employment with the employer in order for the qualifying insurance arrangement to apply (or apply in a particular way) in relation to the injured person, or

(c) the qualifying insurance arrangement applying in relation to the injured person caused an increase in the amount of a payment of a type which would anyway require to be paid by the injured person (whether directly or by the amount due being deducted by the injured person's employer from the injured person's remuneration or earnings for onward transmission to the person to whom the payment is due).

(5) It does not matter for the purposes of subsection (4)(a) or (c) whether or not the injured person had a choice as to whether the qualifying insurance arrangement applied in relation to the injured person.

(6) An arrangement is a "qualifying insurance arrangement" for the purposes of subsections (2) to (4) if—

(a) it is a contractual arrangement between an injured person's employer and another person, and

(b) the arrangement provides for that other person to make any payment to the employer or the injured person in consequence of the injured person (in circumstances covered by the arrangement) being absent from, or ceasing, the injured person's employment with the employer."

NOTE

Section 3 implements recommendation 7, clarifying when payment under a Permanent Health Insurance (PHI) scheme will be deductible from an award of damages (paragraphs 3.44 to 3.53 of the Report cover the current law). Recommendation 7 identifies those financial contributions that qualify as consideration for participation in a PHI scheme, so that any sums paid out under the scheme are a non-deductible contractual benefit for the purposes of section 10 of the Administration of Justice Act 1982.

Subsection (3) inserts new subsections (2) to (6) into section 10 of the 1982 Act, setting out when sums paid out under a PHI scheme will not be deducted from an award of damages. The following references are to section 10 of the 1982 Act as amended by the new subsections (2) to (6) introduced in the present Bill.

Subsection (2) provides that certain payments are to be regarded as a contractual benefit for the purposes of section 10(1)(a) (that is, the payment is non-deductible from an award of damages) only if one of the conditions set out in the new subsection (4) is satisfied. Those payments are (a) money paid, or that is due to be paid, to the injured person under a qualifying insurance arrangement or (b) money paid to the injured person by their employer so long as the employer has received that money, or can receive that money, under a qualifying insurance arrangement. The meaning of "qualifying insurance arrangement" is set out in subsection (6) and includes PHI and similar income protection schemes.

Subsection (3) makes it clear that if a payment listed in subsection (2)(a) or (2)(b) does not meet one of the conditions set out in subsection (4), then that payment is to be regarded as remuneration or earnings for the purposes of section 10(1)(i) (that is, the payment is deductible from an award of damages).

Subsection (4) sets out the conditions that, if applying in relation to a payment listed under subsection (2)(a) or (2)(b), will mean that the payment is non-deductible from an award of damages. One condition applying to a payment is sufficient for it to be non-deductible. The conditions are (a) that the injured person made a payment in order to become a member of the insurance scheme (including payment via a deduction from the injured person's wages); (b) the injured person chose to take a lower salary with their employer in order to be a member of the insurance scheme or to receive increased protection under the insurance scheme; or (c) the injured person paid tax or national insurance on membership of the insurance scheme as a benefit. An injured person who satisfies one of the conditions is recognised as having contributed to a PHI scheme and is therefore entitled to benefit from any payment received under that scheme without the risk that any award for damages might be reduced by deducting the PHI scheme payments.

Subsection (5) provides that, for the purposes of determining whether the injured person meets the conditions set out in subsection (4)(a) or (4)(c), it does not matter that they could have chosen not to participate in that particular qualifying insurance arrangement.

4 Expenses relating to medical treatment, care, accommodation and equipment

(1) The Administration of Justice Act 1982 is amended as follows.

(2) After section 10, insert—

"10A Expenses relating to medical treatment, care, accommodation and equipment

In an action for damages for personal injuries (including any such action arising out of a contract), the following possibilities are to be disregarded in determining the reasonableness of any expenses—

(a) the possibility of avoiding those expenses or part of them by taking advantage of—

(i) facilities available under—

(A) the National Health Service (Scotland) Act 1978,

(B) the National Health Service Act 2006, or

(C) the National Health Service (Wales) Act 2006, or

(ii) any corresponding facilities in Northern Ireland,

(b) where the expenses relate to the provision of care, accommodation or equipment for the injured person, any possibility of avoiding those expenses or part of them through the exercise, in relation to the injured person, of any function of a public authority.".

(3) Section 2 of the Law Reform (Personal Injuries) Act 1948 is repealed.

NOTE

Section 4 implements recommendations 8 and 10 by inserting new section 10A into the Administration of Justice Act 1982.

Where an injured person incurs expenses relating to medical treatment, care, accommodation and/or equipment, the existence of facilities and/or equipment available from the National Health Service or a public authority is to be disregarded in determining the reasonableness of those expenses (paragraphs 3.67 to 3.81 and 3.91 to 3.123 of the Report).

The effect of these provisions is that in an action for damages the responsible person may be liable to pay reasonable expenses arising from private medical treatment or private care, accommodation or equipment even where the injured person could have avoided those expenses by using NHS facilities or facilities provided by a public authority.

Section 2 of the Law Reform (Personal Injuries) Act 1948 already provides for private medical expenses to be disregarded in the way described above. Paragraph (a) of new section 10A enacts these provisions in the 1982 Act so that provision on private medical treatment can be dealt with in the same statute as provision on private care, accommodation and equipment. Section 2 of the 1948 Act is consequently repealed by subsection (3) of section 4.

5 Meaning of "relative"

(1) Section 13(1) of the Administration of Justice Act 1982 is amended as follows.

(2) In the definition of "relative"—

(a) in the opening words, after "means" insert "a person who",

(b) in paragraph (a)—

(i) at beginning, insert "is",

(ii) after second "spouse" insert "of the injured person",

(c) in paragraph (aa)—

(i) at beginning, insert "is",

(ii) after second "partner" insert "of the injured person",

(d) for paragraphs (b) to (e) substitute—

"(b) not being the spouse or civil partner of the injured person, is living or has lived with the injured person as if married to the injured person,

(bb) is a parent or child of the injured person, accepts the injured person as a child of the person's family or is accepted by the injured person as a child of the injured person's family,

(bc) is the sibling of the injured person or has been brought up in the same household as the injured person and accepted as a child of

the family in which the injured person was a child,

(bd) is a grandparent or grandchild of the injured person, accepts the injured person as a grandchild of the person or is accepted by the injured person as a grandchild of the injured person,

(c) is an ascendant or descendant of the injured person (other than a parent or grandparent or a child or grandchild of the injured person),

(ca) is a sibling of a parent of the injured person,

(cb) is a child or other issue of—

(i) a sibling of the injured person, or

(ii) a sibling of a parent of the injured person,".

NOTE

Section 5 implements recommendations 1 and 2, and up-dates the definition of "relative" in section 13(1) of the Administration of Justice Act 1982 to reflect today's society.

Subsection (2)(d) substitutes new paragraphs (b) to (cb) for existing paragraphs (b) to (e).

New paragraph (b) of section 13(1) provides that an ex-cohabitant of the injured person is a "relative" for the purposes of the 1982 Act.

New paragraphs (bb) to (bd) provide that a person accepted as the parent, sibling, grandchild or grandparent of the injured person is a "relative" for the purposes of the 1982 Act. The provisions introduce an expanded definition of "relative" that is not restricted to traditional family structures, for the reasons discussed in paragraphs 2.14 to 2.21 of the Report (for example, many modern family units are connected by family bond rather than by blood relation).

New paragraphs (c) to (cb) bring the definition of "relative" in line with section 14 of the Damages (Scotland) Act 2011, thereby ensuring consistency in the legislation on personal injury.

Amendments of Children (Scotland) Act 1995

6 Duty to consider how damages payable to children will be managed

(1) The Children (Scotland) Act 1995 is amended as follows.

(2) In section 13, for subsection (1) substitute—

"(A1) This section applies where in any court proceedings a sum of money becomes payable to, or for the benefit of, a child under the age of 16 years.

(A2) Except where the money is an interim payment, the court must—

(a) consider a written proposal made by or on behalf of the child about how the money is to be invested, applied or otherwise dealt with for the benefit of the child, and

(b) having regard to the matters mentioned in subsection (A3), either—

(i) remit the question of the suitability of the proposal to the Accountant of Court, or

(ii) explain in writing its reasons for not doing so.

(A3) The matters are—

(a) the sum of money involved,

(b) whether the money is intended to be used to provide for the child's care and accommodation needs and, if so, for how long,

(c) where the proposal states that the money will be held by a trust—

(i) the terms of the trust deed under which the trust is, or is proposed to be, constituted, and

(ii) the identity and qualifications of the trustees.

(l) The court may make any order relating to the payment and management of the money for the benefit of the child as it thinks fit.".

NOTE

Section 6 implements recommendation 14 by amending section 13 of the Children (Scotland) Act 1995. Subsection (2) amends section 13(1) of the 1995 Act by substituting new subsections (A1), (A2) and (A3), which require the court to inquire how, when an award of damages becomes payable to or for the benefit of a child under the age of 16, that award will be administered in the future. The duty to inquire provides further protection for damages awarded to or for the benefit of children, to ensure that any money is properly managed until the child gains capacity to take ownership of the award.

New subsection (A2) provides that the court must consider a written proposal about how the money will be invested or applied for the benefit of the child, encouraging parties to plan appropriately (see paragraphs 5.36 to 5.38 of the Report). The court must either remit the case to the Accountant of Court or, if deciding not to remit, explain in writing why it considers it unnecessary to do so. In deciding whether to remit the case, the court must have regard to the matters set out in subsection (A3), which are: (a) the sum of money awarded, (b) the specific care and accommodation needs of the child, and (c) if a trust is proposed, the terms of the trust, and the identity and qualifications of the trustees. By exercising its discretionary power, the court can ensure that, in cases where the award is sizeable or no professional trustee is appointed, independent oversight may be provided.

7 Application of certain duties in cases involving awards of damages to children

(1) The Children (Scotland) Act 1995 is amended as follows.

(2) In section 13, after subsection (3), insert—

"(4) Subsections (7) to (10) of section 11 apply in relation to subsections (A2) and (l) as they apply in relation to subsection (1) of that section.".

NOTE

Section 7 implements recommendation 13 by amending section 13 of the Children (Scotland) Act 1995. Subsection (2) inserts new subsection (4) to section 13 of the 1995 Act, providing that the court must take account of the three principles set out in subsection (7) (and supplemented by subsections (7A) to (10)) of section 11 of the 1995 Act when considering remitting a case to the Accountant of Court under new subsection (A2) (inserted by section 6 of the Bill) or making an order under section 13. The three principles are (i) that the welfare of the child is the court's paramount concern; (ii) that no order shall be made unless it would be better for the child that the order be made than that no order be made; and (iii) the court will have regard, taking into consideration the age and maturity of the child, to the child's views.

Final provisions

8 Commencement

(1) The following provisions come into force on the day after Royal Assent: this section and section 9.

(2) The other provisions of this Act come into force on such day as the Scottish Ministers may by regulations appoint.

(3) Regulations under this section may—

(a) make different provision for different purposes,

(b) include transitional, transitory or saving provision.

9 Short title

The short title of this Act is the Damages (Scotland) Act 2024.

Appendix B

Respondents to the Discussion Paper

Action on Asbestos

Association of British Insurers

Association of Personal Injury Lawyers

Aviva Insurance Ltd

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Clyde & Co (Scotland) LLP

Conway, Ronald E

Courtice, Dr Midori

DAC Beachcroft Scotland

Digby Brown LLP

Direct Line Group

Drummond Miller

Faculty of Advocates

Forum of Complex Injury Solicitors

Forum of Insurance Lawyers Scotland

Forum of Scottish Claims Managers

Horwich Farrelly Scotland

Kennedys Scotland LLP

Kepler, Wendy

Law Society of Scotland

Marshall, Tom

McMillan MSP, Stuart

Medical and Dental Defence Union of Scotland

National Farmers Union Mutual Insurance Society Ltd

Scottish Courts and Tribunals Service

Senators of the College of Justice

Society of Solicitor Advocates

Stagecoach Group plc

Thompsons Solicitors Scotland

Unite the Union Scotland

University of Aberdeen School of Law

Zurich Insurance UK

Appendix C

Advisory Group members

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Steve Love KC	Senior Counsel
Robert Milligan KC	Senior Counsel
Campbell Normand	DAC Beachcroft Scotland
Alan Rogerson	Aviva Insurance Ltd
David Tait	Clyde & Co (Scotland) LLP
Laura Thomson	Advocate

The following individuals with expertise in asbestos-related conditions additionally advised on Recommendation 12

Laura Blane	Thompsons Solicitors Scotland
Phyllis Craig MBE	Action on Asbestos
Euan Love	Digby Brown LLP
Fraser Simpson	Digby Brown LLP

We also received assistance from the Accountant of Court on aspects of Chapter 5: Management of damages awarded to children.

Appendix D

Examples: Asbestos-related disease

The following examples are intended to aid understanding of Recommendation 12 and of section 1 of the draft Damages (Scotland) Bill. For ease of illustration, unless otherwise stated, the assumptions in each case are that (i) the symptomatic condition arose after section 1 comes into force and (ii) the start of the 3-year limitation period was not delayed because it was not clear whether the liability requirements in section 17(2)(b)(ii) and (iii) were satisfied.

1. Person A is diagnosed with pleural plaques and raises no action. Eight years later, A is diagnosed with symptomatic asbestosis. A will be time-barred from raising an action for pleural plaques, but will have three years to raise an action for the symptomatic asbestosis; their failure to raise an action for pleural plaques is immaterial to the limitation period for the symptomatic condition.

2. Person B is diagnosed with asymptomatic asbestosis and raises no action. Four years later, B begins to experience symptoms caused by their asbestosis. B will have three years from the date on which they were informed, by a registered medical practitioner, that they had symptomatic asbestosis to raise an action; the time-bar for raising an action for symptomatic asbestosis only began running on the date that B was informed by a registered medical practitioner that their asbestosis had become symptomatic.

3. Person C is diagnosed with pleural plaques and raises no action. Five years later, C is diagnosed with asymptomatic pleural thickening and raises no action. 40 years later, C is diagnosed with mesothelioma. C will be time-barred from raising an action for pleural plaques or asymptomatic pleural thickening, but will have three years to raise an action for the mesothelioma; their failure to raise an action for either pleural plaques or asymptomatic pleural thickening is immaterial to the claim for mesothelioma.

4. Person D is diagnosed with symptomatic asbestosis and raises no action. Fifteen years later, D is diagnosed with asbestos-induced lung cancer. D will be time-barred from raising an action for lung cancer because of D's failure to bring a claim, within the limitation period, for an earlier symptomatic asbestos-related condition (symptomatic asbestosis).

5. Person E is diagnosed with pleural plaques and raises no action. Six years later, E is diagnosed with asymptomatic pleural thickening. E will be time-barred from raising an action for asymptomatic pleural thickening because of E's failure to bring a claim, within the limitation period, for an earlier asymptomatic asbestos-related condition (pleural plaques). However, should E's pleural thickening develop into a symptomatic condition, E will have three years from the date on which they were informed, by a registered medical practitioner, that they had symptomatic pleural thickening to raise an action.

6. Person F is diagnosed with pleural plaques and raises no action. Sixteen years later, F is diagnosed with symptomatic asbestosis. Two years later, new sections 17ZA and 18ZZA

come into force. F immediately raises an action. F would have one year following commencement of the new sections (three years from the symptomatic condition) to raise an action; their failure to raise an action for pleural plaques is immaterial to the claim for symptomatic asbestosis (which still has one year left of the standard triennium to run when section 17ZA comes into force). However, new section 17ZA would not allow a claim in respect of F's symptomatic asbestosis to be made if, following the pleural plaques being disregarded, the claim was still time-barred under section 17(2). That is, if more than three years have already passed since the symptomatic asbestosis diagnosis.

7. Person G is diagnosed with pleural plaques and raises no action. Thirteen years later, G is diagnosed with mesothelioma and dies the following year. Four years later, new sections 17ZA and 18ZZA come into force. G's relatives will be time-barred from raising an action for the death; G's failure to raise an action for the pleural plaques is immaterial, however, G would not have been able, if still alive on the day on which new section 17ZA came into force, to raise an action as more than three years had already passed since the mesothelioma diagnosis.

8. Person H is diagnosed with pleural plaques and raises no action. Sixteen years later, H is diagnosed with symptomatic asbestosis and dies the following year. One year later, new sections 17ZA and 18ZZA come into force. H's relatives will have two years from commencement of the new sections (three years from the date of death) to raise an action; the 3-year limitation period within which H could bring a claim for the symptomatic asbestosis had not expired on the date that the new sections came into force; H's failure to raise an action for the pleural plaques is immaterial.

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