

Business and Regulatory Impact Assessment

Title of Proposal

The Damages (Scotland) Bill (“**the Bill**”)

Purpose and intended effect

Background

The scope of the Scottish Law Commission’s (“the SLC”) review of the law of damages for personal injury and the associated Bill emerged after consultation with leading legal practitioners in the field. Our initial research on the scope of the project identified a number of topics possibly suitable for reform including:

- Whether awards of damages for services in terms of sections 8 and 9 of the Administration of Justice Act 1982 should continue to be restricted to ‘relatives’, and whether the current definition of ‘relative’ remains appropriate;
- What items should be deductible from an award of damages and in particular, whether Permanent Health Insurance scheme (“PHI scheme”) payments should be deducted;
- Whether an injured person is entitled to opt for private care and accommodation rather than rely on local authority provision where it is available;
- Whether awards of provisional damages are operating satisfactorily in the context of asbestos-related disease; and
- Whether safeguards should be put in place to protect awards of damages made to children.

Much of the law in this area, with the exception of safeguarding awards of damages made to children, is found in Part II of the Administration of Justice Act 1982 (“the 1982 Act”). The 1982 Act implemented recommendations made by this Commission in our 1978 Report, Damages for Personal Injuries (Report on (1) Admissibility of Claims for Services and (2) Admissible Deductions) (“the 1978 Report”).

In our Discussion Paper on Damages for Personal Injury (“Discussion Paper”), published in February 2022, we explain the reasons for reviewing the 1982 Act provisions :

“There has been substantial social change since 1982. One of our tasks is to ensure that the law keeps pace with societal change. In addition, as the case law has developed it has emerged that some of the provisions of the 1982 Act appear to be unduly complex or to give rise to uncertainty. In some instances, the law in Scotland has diverged from the law in England and Wales although both systems profess to be aiming to arrive at the same result. Again, this leads to uncertainty and can only increase the costs for those involved in litigating these issues.”

Sections 8 and 9, services rendered to or by an injured person

Sections 8 and 9 of the 1982 Act 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 of the 1982 Act. In our Discussion Paper we considered whether the definition of 'relative' should be widened.

A significant number of consultees expressed their support for amending the definition of 'relative' in the 1982 Act.

Section 10, deductions from awards of damages

The main statutory framework on deductions from awards of damages is section 10 of the 1982 Act. Our Discussion Paper reviewed three categories of possible deductions: (i) social security benefits, (ii) payments of money, and (iii) benefits in kind (such as care and accommodation).

We focused on (ii) payments of money centred on Permanent Health Insurance Schemes ("PHI Schemes"). It is a widely held view that there is a tension between Scottish and English authorities on the deductibility of payments from PHI schemes, with Scottish and English courts reaching different conclusions on the matter.

Consultees strongly indicated their desire for clarification of section 10 of the 1982 Act as it relates to PHI Scheme payments.

Section 12, provisional damages and asbestos-related disease

The law on provisional damages is set out in section 12 of the 1982 Act. The purpose of section 12 is to allow a pursuer, diagnosed with an injury or a condition which may deteriorate, to apply to the court for provisional damages calculated on the pursuer's condition at the time of the action, while reserving the right to return to the court for further damages should the injury or condition deteriorate. We do not propose any reform to the law of provisional damages itself. We set the law out for background, as provisional damages are often sought for asbestos-related disease.

Consultees told us that addressing the issues in relation to damages and asbestos-related conditions was a priority. The Damages (Asbestos-related Conditions) (Scotland) Act 2009 provides that (i) asbestos-related pleural plaques are a personal injury which is not negligible and (ii) they constitute actionable harm for the purposes of an action of damages for personal injuries. The Act is also clear that symptomless asbestos-related pleural thickening and symptomless asbestosis (a chronic lung disease) constitute actionable harm in Scots law.

The limitation period for bringing an action for a non-fatal personal injury is set out in section 17 of the Prescription and Limitation (Scotland) Act 1973. An action must be brought within three years of (i) the date on which the pursuer sustained the injury, or (ii) if later, the date the pursuer became aware – or reasonably should have become aware – that they had sustained an injury sufficiently serious to found a claim and that the injury was attributable to the defender or the defender's employer or principal.

In cases of asbestos-related personal injury, the limitation period will almost always begin running on the date the pursuer became aware (or reasonably should have become aware) of the injury. This may be the date on which the condition was diagnosed by a medical practitioner, even if the condition is symptomless.

The case law in this area goes back and forth but in *Aitchison v Glasgow City Council* the Inner House held that separate conditions, caused by the same injury, do not give rise to separate limitation periods. *Aitchison* has had a profound adverse effect on pursuers in certain asbestos-related personal injury cases. Following the decision in *Aitchison*, an injured person who fails to bring a claim for an asbestos-related condition (even if symptomless) within three years of diagnosis will be time-barred from bringing a subsequent claim for any asbestos-related condition which is attributable to the same delict. This has caused particular problems for those diagnosed with pleural plaques, who often do not seek damages.

Aviva Insurance commented:

“Yes, there is a problem with the way provisional damages operate in cases involving asbestos-related disease. One of the unintended consequences of the Damages (Asbestos Related Conditions) (Scotland) Act 2009 is that the Act states that there is an injury following a diagnosis of pleural plaques, asymptomatic diffuse pleural thickening and/or asymptomatic asbestosis. Consequently, if an individual wishes to protect their position in relation to developing any future asbestos related condition, they require to raise and settle a pleural plaques claim on a provisional basis. If they do not raise an action, then they risk being time-barred for future asbestos related disease claims. This is exclusively an issue caused by making pleural plaques an actionable harm.”

Thompsons Solicitors commented:

“The Damages (Asbestos Related Conditions) Act 2009 established that Pleural Plaques are a compensable injury and as such, we accept that the provisions of the Prescription and Limitation Act 1973 must apply for the purposes of establishing limitation and whilst we have previously set out our wider views on those provisions in our response to the Scottish Government’s consultation paper on the Civil Law of Damages: Issues in Personal Injury, we must reiterate here that the single-action rule as applied to asbestos related disease, in our experience, leads to gross inequity not only for the victims of asbestos exposure but also their families. The discretionary provision in Section 19A of the 1973 Act is too uncertain to provide any reassurance to individuals, their families and their legal advisers when pursuing a claim which is prima facie time-barred.

The most common response when explaining the current law to clients and their families is ‘but that cannot be right’. If ever there was a need for a policy-driven change to limitation, it is here.”

Ensuring the law produces fair outcomes for people with an asbestos-related disease is a fundamental aim of the Bill.

Private care and accommodation

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. We recognise the utility of section 2(4) and its effect in ensuring injured persons have recourse to private medical treatment.

However, in the context of whether an injured person can opt for private care and accommodation rather than rely on local authority provision where it is available, there is no equivalent to section 2(4) for expenses of this kind, meaning that the argument that the

injured person failed to mitigate their loss is, in principle, currently open to the responsible person.

There was considerable support among consultees in favour of the propositions that: (i) it is the responsible person who should pay for the injured person's care and accommodation costs and (ii) the injured person should have the option of private care and accommodation.

Awards of damages made to children

The key provision for managing and safeguarding an award of damages made to a child is section 13 of the Children (Scotland) 1995 Act.

Consultees were generally of the view that section 13 operates satisfactorily. However, 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.

Proposals from consultees to improve the law in this area focused on increased involvement from (i) the court and (ii) the Accountant of Court.

The Damages (Scotland) Bill

Our Bill seeks to address these issues and ensure awards of damages made to children are appropriately safeguarded.

The aims of our recommendations are to modernise, simplify and clarify these aspects of the law, and to ensure that (i) the definition of 'relative' is suitable for modern Scotland, (ii) appropriate deductions are made from awards of damages, (iii) there is clarification of whether an injured person is entitled to opt for private care and accommodation rather than rely on local authority provision (iv) those with an asbestos-related disease are treated fairly, and (iv) awards of damages made to a child are protected.

Our Report on *Damages for Personal Injury* (Scot Law Com No. 266, 2024) ("the Report") was published on 4th December 2024. It followed a consultation on our Discussion Paper which closed in June 2022. The Discussion Paper reviewed the law of damages for personal injury, particularly in relation to Part II of the 1982 Act, and awards of damages made to children. The Report was also informed by informal consultation with legal practitioners, charitable organisations and the Accountant of Court.

Objective

The passage and implementation of this Bill would give effect to the recommendations contained in the Report.

The Bill contains a range of proposals to modernise, simplify and clarify the law of damages for personal injury.

In general terms, the Bill aims to achieve greater fairness for those receiving an award of damages for personal injury. In particular, the Bill does this by –

- Redefining 'relative' in section 13(1) of the 1982 Act to include persons accepted into family as a parent, grandparent, sibling, or grandchild of the injured person, or an ex-cohabitant of the injured person.
- Extending section 8 of the 1982 Act to non-relatives.
- Amending section 10 of the 1982 Act to clarify the deductibility of payments made to an injured employee from a PHI scheme.
- Providing 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.
- Introducing a new legislative provision to address 'the pleural plaques time-bar problem' by distinguishing asymptomatic asbestos-related conditions from symptomatic asbestos-related conditions, such that failure to raise an action within the limitation period for an asymptomatic condition such as pleural plaques, would not preclude an injured person from subsequently raising an action for a symptomatic asbestos-related condition such as mesothelioma.
- Providing that the court, when applying section 13 of the Children (Scotland) Act 1995, is to have regard to the same matters that it must consider under section 11 of that Act, namely (i) the welfare of the child, (ii) the "no order" principle and (iii) the views of the child.
- Enhancing the role of the court and the Accountant of Court in supervising awards of damages made to children by imposing a duty on the court to inquire into the administration of an award of damages made to a child and to remit the matter to the Accountant of Court for consideration. If the court does not remit the case to the Accountant of Court, they must explain in a written report why this was not necessary.

Rationale for Government intervention

As noted above, the Bill stems from a project that was included in the SLC's Tenth Programme of Law Reform.

A modernised and refined law of damages for personal injury would contribute to greater legal certainty and fairer outcomes. The Bill would make the law easier to understand, advise on and apply. In turn, this increases accessibility. Improved transparency of the law overall leads to lower legal costs and greater efficiency in the legal sector, as well as higher levels of satisfaction in the legal profession.

The Bill would therefore contribute to the overarching purpose and values of the Scottish Government's National Performance Framework:

- purpose – 'to focus on creating a more successful country, to give opportunities to all people in Scotland and increase the wellbeing of all people in Scotland'.
- values – 'to treat all our people with kindness, dignity and compassion, respect the rule of law, and act in an open and transparent way'.

Left as it is, the law in this area would become further outdated and would continue to draw criticism from practitioners for being unfair, not in keeping with modern Scotland, lacking in

clarity, and not suitably protecting the most vulnerable in society. The Bill introduces reforms to deal with all of the issues referred to above.

Generally, respondents to our Discussion Paper supported reform of the law to widen the definition of 'relative' in section 13 of the 1982 Act, clarify when PHI scheme payments are deductible from an award of damages, clarify whether an injured person is entitled to opt for private care and accommodation rather than rely on local authority provision, tackle the major mischief identified in relation to damages and asbestos-related disease, and to ensure a child's award of damages is safeguarded appropriately.

They were in favour of these particular reforms largely to increase fairness, legal certainty and to modernise the law.

Consultation

Within Government

The Damages for Personal Injury project is part of the SLC's Tenth Programme of Law Reform, a five-year programme, running from 2018 to 2023 which was discussed with Scottish Government officials before being submitted and approved by the Scottish Government and laid before the Scottish Parliament in February 2018. The project carried over into the SLC's Eleventh Programme of Law Reform running from 2023 – 2027.

Copies of the Damages for Personal Injury Discussion Paper and our Report were sent to the Private Law Unit of the Scottish Government Justice Directorate prior to publication.

The SLC team met with members of the Private Law Unit of Scottish Government before and during the project to keep them informed of our progress and to discuss any issues or concerns that arose. The team has discussed implementation of the project with the Unit in the 6 months prior to publication.

Public Consultation

Our proposed Bill has been heavily informed by public consultation.

The team established an Advisory Group in July 2019 to advise us at the outset of the project. Members included legal practitioners from private law firms, members of the Faculty of Advocates, and insurance professionals. This Group met twice prior to the publication of our Discussion Paper.

In February 2022, we published our Discussion Paper and circulated it to individuals and organisations whom we identified as having a potential interest in the topic, including the judiciary, advocates, solicitors, academics, equality organisations, and other organisations (such as the Accountant of Court, the Scottish Legal Aid Board, the Scottish Courts and Tribunal Service, and the Law Society of Scotland). The Discussion Paper was published on the SLC website and links to it were circulated on social media. It was freely available to the public to access online. The consultation period ran from February 2022 – June 2022 and generated 32 responses.

Following publication of the Discussion Paper, the Chair contributed an article to the Journal of the Law Society of Scotland in March 2022: 'Fair Compensation?' The Chair also delivered an online seminar to the Legal Services Agency on 20 July 2022. During the seminar the Chair provided legal practitioners and Legal Services Agency staff with an overview of the Damages project, with particular reference to (i) services in terms of sections 8 and 9 of the 1982 Act; (ii) deductions from damages, particularly in the context of PHI schemes; (iii) provisional damages, pleural plaques and the time-bar problem; and (iv) awards of damages to children.

In addition to this engagement, we sought additional specialist input on Chapter 4 (which relates to asbestos-related disease) and Chapter 5 (which relates to an award of damages made to a child) of the Report. An advisory sub-group consisting of experts in personal injury claims for asbestos-related conditions and the director of an asbestos charity met with the team and provided written assistance to help inform our understanding of this area of personal injury law. We also circulated one section of our draft Bill to this sub-group for their views. Additionally, we consulted with the Accountant of Court (who is *ex officio* the Public Guardian) on current court procedure and oversight of damages awarded to children to assist with the Recommendations contained in Chapter 5 of the Report.

The advice and input from the Advisory Group, asbestos-related disease sub-group and the Accountant of Court contributed greatly to the development of the recommendations in our Report.

Business

Discussion with the Advisory Group helped define the scope of the project, and our Discussion Paper generated significant interest from legal practitioners, insurance companies, charities and organisations. Consultees included individuals from the following businesses and organisations:

- Law firms (Clyde and Co (Scotland) LLP, Digby Brown LLP, Thompsons Solicitors Scotland, Drummond Miller LLP, DAC Beachcroft, Horwich Farrelly Scotland, Kennedys Law);
- Insurance companies (Zurich Insurance UK, Aviva Insurance, NFU Mutual);
- Unions (Medical and Dental Defence Union of Scotland, Unite the Union Scotland);
- Legal practitioner and insurance representative bodies (Association of Personal Injury Lawyers, Forum of Insurance Lawyers, Forum of Complex Injury Solicitors, Forum of Scottish Claims Managers, Society of Solicitor Advocates, Association of British Insurers);
- Advocates specialising in family law;
- The judiciary (the Senators of the College of Justice);
- Legal academics (the University of Aberdeen Law School);
- Charities (Action on Asbestos);
- Other organisations (Stagecoach Group, Scottish Courts and Tribunal Service).

As discussed above, following publication of the Discussion Paper, the Chair contributed an article to the Journal of the Law Society of Scotland ('Fair Compensation?') and delivered an online seminar to the Legal Services Agency on 20 July 2022. The Chair provided legal practitioners and Legal Services Agency staff with an overview of the Damages project, with particular reference to (i) services in terms of sections 8 and 9 of the 1982 Act; (ii) deductions from damages, in particular PHI schemes; (iii) provisional damages, pleural plaques and the time-bar problem; and (iv) awards of damages to children.

In addition to the Journal contribution and the Legal Services Agency engagement, we sought additional specialist input on Chapter 4 (which relates to asbestos-related disease) and Chapter 5 (which relates to an award of damages made to a child) of the Report. An advisory sub-group consisting of experts in personal injury claims for asbestos-related conditions and the Director of an asbestos charity met with the team and provided written assistance to help inform our understanding of this area of personal injury law.

Options

Option 1 – Do nothing

In terms of Option 1, the Bill would not be introduced and the current Scots law on damages for personal injury would remain. The opportunity to modernise, clarify and reform the law in this area would be lost. The benefits discussed in more detail below would not be realised.

Option 2 – Introduce the Bill

In terms of Option 2, the Bill would be introduced. If implemented, the changes to the law listed under "Objective" above would crystallise. The benefits of Option 2 are discussed below in more detail (see "Benefits").

Sectors, groups and individuals affected

- Private individuals who claim damages for a personal injury;
- Children who are awarded damages for a personal injury;
- Legal professionals – solicitors, advocates, judges and sheriffs;
- Legal professional representative bodies – the Law Society of Scotland, the Association of Personal Injury Lawyers, Forum of Complex Injury Solicitors, Forum of Insurance Lawyers, the Faculty of Advocates;
- Insurance providers and professionals;
- The Scottish Legal Aid Board;
- The Accountant of Court;

- The Scottish Courts and Tribunal Service (SCTS).

Generally, for those mentioned above, Option 1 (do nothing) would not result in any obvious benefit. The law would remain in need of modernisation and continue to be complex and unfair in certain areas.

Option 2 (to introduce the Bill) on the other hand, would present these sectors, groups and individuals with the benefits of increased certainty and clarity. The law would be modernised in order to better meet the needs of Scottish society, which has changed dramatically since the 1982 Act was enacted. Those with an asbestos-related disease would benefit from a fairer opportunity to seek redress for their injuries, the most serious of which may be life threatening. For damages awarded to children, increased involvement from the court and the Accountant of Court will help ensure the award is appropriately safeguarded. While, as with any change to the law, there may be an initial period of uncertainty, legal practitioners will ultimately find it easier to advise their clients about how a claim for damages will proceed, and decision makers will benefit from the extra guidance and clarity in terms of the powers of the court.

The SLC therefore recommends Option 2.

Benefits

Option 1 - Do nothing

Option 1 would not produce any benefits, given that the result would be that the law of damages for personal injury would remain in need of modernisation, clarity and certainty. The 1982 Act would remain outdated, pursuers with an asbestos-related disease would continue to struggle with the unique complexities which they face as a result of the combination of (i) the 2009 Act, (ii) symptomless pleural plaques and (iii) the case of *Aitchison*, and awards of damages made to children would continue to be vulnerable to possible misappropriation and inappropriate investment.

Option 2 - Introduce the Bill

The Bill, if introduced and implemented, would bring the following benefits:

a) Ensuring the law is fit-for-purpose for modern Scottish society

The Bill modernises the law by expanding the definition of 'relative' in section 13 of the 1982 Act to include persons accepted into family as a parent, grandparent, sibling, or grandchild of the injured person, or an ex-cohabitant of the injured person. The family makeup in Scotland, and public policy in relation to family law, has changed significantly since the 1982 Act was enacted. Family units in which siblings, parents, grandparents, etc. are connected by family bond, even if not by consanguinity, are not uncommon. Further, an increasing number of individuals in long-term committed relationships are making the deliberate decision not to formalise their relationships by marriage or civil partnership. The changes to section 13 of the 1982 Act seek to reflect these changes.

The Bill also extends section 8 of the 1982 Act to non-relatives, in recognition of the fact that neighbours or friends may also render services to an injured person in addition to or in place of family members.

Both of these changes are key benefits in terms of developing law that is modern, in touch with today's society and also clear and accessible to the public and stakeholders.

b) Clarification of when PHI scheme payments deductible from an award of damages

The Bill will provide clarity on whether PHI scheme payments are deductible from an award of damages. The case law in this area is complex, and conflicting authorities in Scotland and England make the position even more challenging for the courts. This change will make it easier for legal practitioners to advise clients on the likely outcome of a claim for damages for personal injury, as the policy underpinning the provisions and the test for making deductions from an award of damages in relation to PHI schemes will be clearer. As a result, the time spent by legal advisers, and the resultant costs incurred by individuals, will be reduced. It will also make it easier for decision-makers to make a determination on a claim, as the Bill provides a clearer test concerning when a deduction should be made.

c) Provide that an injured person is entitled to opt for private care and accommodation rather than rely on local authority provision

The Bill will provide clarity about whether an injured person is entitled to opt for private care and accommodation rather than rely on local authority provision where it is available.

Often, a local authority will be under a statutory duty to provide care and accommodation to an injured person. However, in the case of a personal injury, where a person caused the injury in question (the responsible person), the 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. Where there is such a duty on the local authority, but the injured person decides instead to arrange private care and accommodation, the current law is unclear as to whether the responsible person should be liable for the costs of private care and accommodation.

There was considerable support among consultees in favour of the propositions that: (i) it is the responsible person who should pay for the injured person's care and accommodation costs and (ii) the injured person should have the option of private care and accommodation.

The Bill will provide much needed clarity in this area of law which will reduce the costs and length of litigations.

d) Asbestos-related disease sufferers will benefit from an opportunity to seek redress for their condition

The broad policy objective of section 1 of the Bill is to treat those with an asbestos-related disease fairly. The Bill will provide pursuers with an opportunity to seek damages for the personal injuries caused by asbestos exposure. Consultees from all sectors made it abundantly clear that there should be a change in this area of law to address the unfairness faced by pursuers as a result of the terms of the combination of (i) the 2009 Act, (ii) the symptomless nature of pleural plaques (and some manifestations of pleural thickening and asbestosis) and (iii) the case of *Aitchison* which resulted in the 'one action, one harm' rule. The Bill provides that an injured person making a claim for a symptomatic asbestos-related condition will not be time-barred by an earlier asymptomatic asbestos-related condition. The Bill also ensures that, in the case of an asbestos-related condition that has become symptomatic after a period with no symptoms, the limitation period will not begin running until after a medical practitioner has informed the injured person that their condition has become symptomatic.

This is a targeted policy-driven approach which seeks to resolve the pleural plaques time-bar problem and will result in individuals not being 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.

e) Children awarded damages for a personal injury will benefit from increased supervision from the court and Accountant of Court

The Bill provides that a duty is imposed on the judge to inquire into the future administration of an award of damages and, if the court considers it necessary, to remit the case to the Accountant of Court. If the court does not consider it necessary to remit the case, the judge will have a duty to explain, in a report, why this is not necessary. By providing this type of oversight 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 how the award will be used in the best interests of the child. Longer term oversight of an award of damages may be provided by the Accountant of Court to ensure the award is safeguarded for the duration of the child's life, if that is required. This may be via a trust deed, a copy of which will be provided to the court.

This approach will provide clear guidance to the judge or sheriff, as well as ensure that there is consistency of practice for children, parents and advisers.

f) The Bill is broadly supported by stakeholders

The provisions in the draft Bill have the broad support of those who responded to our Discussion Paper. There was consensus that the existing statutory regime could be more modern, clearer and fairer. The Bill contains provisions which implement all of these changes. Examples of some of the support shown for change include--

The Faculty of Advocates in its response to Chapter 2 of our Discussion Paper:

"The Faculty considers that the definition of 'relative' in section 13(1) should be amended to include any person who has been accepted by the injured person as a part of their family, either as a parent, grandparent, grandchild or sibling."

Digby Brown LLP on why ex-partners should be included in the definition of relative in section 13 of the 1982 Act (also Chapter 2):

"...both for the sake of consistency with the definition of "relative" in s14 of the 2011 Act, in terms of which former partners can claim for loss of financial support, and also to reflect the realities of family life in the 21st century. It has to be borne in mind that the section was enacted over 40 years ago, and the make-up of families has changed, with blended families being much more common now. This often means that former partners, while no longer in a relationship, remain part of each other's lives and provide mutual support. This may include the provision of services following an accident and we have had cases in which this situation has arisen."

Zurich Insurance UK commenting in response to Chapter 3 on whether deductions should be made from an award of damages for payments from a PHI scheme:

"We agree that clarification/reform of section 10 of the Administration of Justice Act 1982 is required. We would favour an approach where if an employee contributes financially, then any payments made under that policy should not be deducted. Conversely, if there is no evidence that an employee has contributed financially, then any payments made should be deducted."

Wendy Kepler's lived experience of asbestos-related disease, as discussed in Chapter 4:

"As a family who have been personally impacted by the failings in the current law. We would be in favour of any new provision which protects anyone who goes onto develop Mesothelioma, regardless of whether they had previously acted on a Pleural Plaques diagnosis or not. A diagnosis potentially years later with a terminal illness such as Mesothelioma should have no bearing on whether or not a claim had been previously made"

for Pleural Plaques. The Pleural Plaques diagnosis should be treated separately with regards to any claim being raised.”

Association of Personal Injury Lawyers on Chapter 4:

“The law as it stands following Aitchison is extremely unfair. Many people choose not to claim compensation for pleural plaques, which is often symptomless, as they see no need to do so. As a result of Aitchison, a terminally ill mesothelioma victim will be prevented from receiving compensation for this devastating disease if he knew that he had symptomless pleural plaques but decided not to bring a claim when he became aware of them. Many people will be unaware, as detailed in the Scottish Law Commission’s paper, that they will need to bring a claim upon learning about the existence of the plaques, to preserve their ability to bring a further claim should their condition worsen in the future. As detailed in the Scottish Law Commission’s paper, their doctor may simply be unaware of the law surrounding this area, and the patient may not be properly directed to the right support such as Action on Asbestos. Some people may not even properly acknowledge that they have pleural plaques at the time they are told (if they are also given more serious diagnoses at the same time), and most will certainly not understand the importance of the diagnosis without further explanation. Even if they are aware, it is unlikely that they will consider the diagnosis as the subject of a negligence claim, given that pleural plaques are most often symptomless. We welcome that the Scottish Law Commission is looking at this issue again, and suggest the correct approach would be to maintain the three-year time-bar for a diagnosis of pleural plaques, but to allow subsequent claims for asbestos related disease in the future, even if a claim is not brought for the plaques.”

Senators of the College of Justice commenting on whether the court should have a duty to inquire into an award of damages made to a child in Chapter 5:

“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, in terms of section 13, for advice.”

Costs

Option 1

As Option 1 is to do nothing, there would be no additional costs or savings associated with this option. Given the need for change outlined above in Option 2, however, the lack of additional costs imposed by Option 1 would not add any positive value.

Option 2

We anticipate that the introduction of our draft Bill would give rise to a period of adaptation for those directly impacted by the reforms.

Training costs

An initial training and familiarisation cost for solicitors and for those in the insurance profession would be likely. The costs would be small and would only be incurred on implementation of the reforms.

Generally, familiarisation costs of any change in the law will be incurred by those providing the training within the solicitors’ firms. Professional Support Lawyers could, for example, prepare a seminar which will explain the reforms to fee-earners. Arrangements may be made, by firms or individual practitioners, for attendance at seminars provided by

organisations, such as CLT and the Law Society, on a commercial basis. However, the provision of such training is typically already provided for within a firm's budget. It is probable that a proportion of the fee that a lawyer charges represents the cost of maintaining the fee-earner's current legal knowledge. For the fee-earners, there is a requirement that 20 hours of Continuing Professional Development is completed throughout the year so the additional time taken by familiarisation will count towards this figure. It is therefore unlikely that initial training on this Bill would represent a significant additional cost to law firms. There may also be additional costs incurred by specialists in personal injury law (particularly those accredited by the Law Society) to ensure their specialist knowledge is up to date and complete and meets the requirements for accreditation. Otherwise, it is anticipated that solicitors and counsel will familiarise themselves with changes in the law in their own time, and perhaps also on a case-by-case basis.

It is possible that some initial training might be provided to the judiciary. We understand that in 2024 the average daily cost per head of providing in person training to the judiciary by the Judicial Institute is between £3000 - £3500. It is anticipated that training on the Bill would comprise a "one off" session of no more than two hours in a half day's training on assorted issues.

Impact on volume of litigation

There is the potential that the Bill, if implemented, may result in an increase in personal injury actions. Specifically:

- The redefining of 'relative' in section 13(1) of the 1982 Act and the extension of section 8 of the 1982 Act to non-relatives may result in an increase in damages claims. It may also result in an increase in the value of the damages claimed by injured persons.
- The new provisions on asbestos-related disease may increase the number of applications made to the court. However, we anticipate that many claims will also be settled out of court.

Question 1 of the Discussion Paper asks for comments on the economic impact of the reforms. In response, consultees told us that if, as a result of the recommendations in the Report, the costs to defenders of personal injury claims increase, consumers may expect to pay slightly higher insurance premiums. The principal conclusion is that any increase in relation to the extent of recoverable claims is likely to be reflected in increases in insurance premiums.

However, any increase in court actions should be balanced by noting that clarification of the law will increase certainty in the law as the test the court is to apply to determine claims will be set out – this is likely to greatly assist legal practitioners when advising clients on the likely outcome of a claim. For example, clarification about the deductibility of payments made to an injured employee from a PHI scheme is likely to bring increased certainty and fairness, which will ultimately reduce litigation costs. Similarly, clarification about whether an injured person is entitled to opt for private care and accommodation rather than local authority provision where it is available will reduce litigation costs. Further, the new legislative provision concerning the pleural plaques time-bar problem is likely to bring increased certainty and fairness, and therefore reduce litigation costs, but may increase the damages payable for asbestos-related conditions.

Overall, whilst we acknowledge that there may be a small increase in the volume of litigation and 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 caused 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.

Scottish Firms Impact Test

No Scottish Firms Impact Test was carried out.

The aim of the Bill is principally to modernise and provide clarification in the law of damages for personal injury. The law of damages - was highlighted as an area of the law in need of reform by legal and non-legal stakeholders. We anticipate that the Bill will be beneficial to relevant professionals and individuals alike.

Competition Assessment

It is not anticipated that the Bill will have an impact on competition within Scotland. The recommendations reflected in the Bill do not create a competitive advantage for any particular sector or individual.

The Bill would not result in any restrictions on competition in the legal services market or in other relevant professional markets, namely, the insurance sector. The number and range of suppliers would not be affected, nor would the ability of suppliers to compete be limited. We do not consider that the proposal would reduce incentive to compete vigorously.

Test run of business forms

The Bill does not introduce any new business forms.

Legal Aid Impact Test

It is not anticipated that the Bill will have a significant impact on Legal Aid in Scotland. The Damages Team consulted the Scottish Legal Aid Board three months prior to publication in order to further understand the potential impact on legal aid.

The Scottish Legal Aid Board said in response to the Bill:

“...in the personal injury area, in recent years there has been an increase in the range of funding options available to pursuers, through damages-based agreements, QOCS, and so on. Legal aid is only one of the funding options, and while it is an important provision for those who cannot fund proceedings on another basis, there is no doubt that other forms of funding will be used for the new claims.

It is also perhaps useful to flag that the Fund only tends to bear the cost where personal injury actions are unsuccessful. Where actions are successful the most common outcome is for costs to be recovered to the effect that there is no net cost to the Fund. In successful cases where there is no full expense recovery, there will be clawback from the award of damages, again with no cost to the Fund.

For these various reasons, it is unlikely that there will be a significant impact for legal aid with the proposed changes.”

Enforcement, sanctions and monitoring

The Bill does not require public enforcement, imposes no sanctions and as such there is no need to monitor compliance.

As previously noted, the Bill clarifies, increases the certainty of and modernises the law of damages for personal injury. Ultimately, any disputes concerning the provisions of the Bill would be resolved by litigation or during any other dispute resolution process between the affected parties in relation to their own particular sets of circumstances.

Implementation and delivery plan

If passed by the Scottish Parliament, sections 8 and 9 will come into force on the day after Royal Assent and the other provisions will come into force on the day or days appointed by the Scottish Ministers by regulations, as advised by Scottish Government officials.

Post-implementation review

In accordance with section 3(1) of the Law Commissions Act 1965, the SLC has a duty to “keep under review” the laws with which it is concerned, and will endeavour to stay informed of the Bill’s reception by the legal profession and wider business community. We anticipate that a review of the legislation by the Scottish Ministers would be appropriate 10 years from the date on which it is brought into effect.

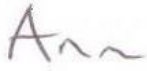
Summary costs and benefits table

Option	Total benefit per annum: - economic, environmental, social	Total cost per annum: - economic, environmental, social - policy and administrative
1	No benefits	As Option 1 is to do nothing, there would be no additional costs or savings associated with this option.
2	<p>Option 2 would result in a variety of benefits including:</p> <ul style="list-style-type: none"> (i) Modernisation of the law (ii) Improved certainty and clarity (iii) Reduced unfairness arising from the current regime. <p>Implementing the Bill--</p> <p><i>a) Ensures the law is fit-for-purpose for modern Scottish society</i></p> <p><i>b) Clarifies when PHI scheme payments are deductible from an award of damages</i></p> <p><i>(c) Clarifies that an injured person may opt for private care and accommodation rather than rely on local authority provision where it is available</i></p> <p><i>(d) Provides asbestos-related disease sufferers with an opportunity to seek redress for their injuries</i></p> <p><i>d) Ensures children awarded damages for a personal injury will benefit from increased supervision from the court and Accountant of Court</i></p> <p><i>(f) The Bill is broadly supported by stakeholders.</i></p>	<p>Option 2 may have a slight impact on costs in the following areas:</p> <ul style="list-style-type: none"> (i) Implementation training (ii) Increase in the volume of litigation (iii) Insurance premiums. <p>Overall, in our view, the benefits of implementing the Bill outweigh the estimated cost increases.</p>

Declaration and publication

I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed:

A handwritten signature in blue ink that appears to read "Ann".

Lady Paton, Chair, Scottish Law Commission

4 December 2024