Scottish Law Commission

promoting law reform

(DISCUSSION PAPER No.174)

Discussion Paper on Damages for Personal Injury

discussion paper

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February 2022

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ISBN: 978-1-9989963-2-2

Produced for the Scottish Law Commission by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA.

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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The Commission would be grateful if comments on this Discussion Paper were submitted by 15 June 2022.

Please ensure that, prior to submitting your comments, you read notes 1-2 on the facing page. Respondents who wish to address only some of the questions and proposals in the Discussion Paper may do so. All non-electronic correspondence should be addressed to:

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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').

Affinity: The relationship arising between the husband and the blood-relations of the wife and between the wife and the blood-relations of the husband.

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').

Bronchial carcinoma: Any type or subtype of lung cancer.

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.

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.

Curator ad litem: A curator appointed by the court to act for a person under disability (eg by reason of youth or mental disorder) whose interests have to be safeguarded in legal proceedings.

***Curator bonis*:** A legal representative appointed by a court to manage the finances or property of someone who does not have capacity to do so themselves.

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 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 Scottish 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.

Discount rate: The rate representing the assumed net investment return from an award of damages invested in bank accounts, bonds, stocks, shares etc.

Estate: All the property that a person owns, both heritable (land) and moveable (non-land).

***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 and distribute the estate of the deceased.

Ex proprio motu: 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.

Government Actuary: A non-ministerial department which provides analytical services to help decision-makers take account of risk and uncertainty. For example, the Government Actuary publishes the Ogden Tables which are designed to assist those concerned with calculating the lump sum compensation due in personal injury and fatal accident cases.

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).

***Incapax*:** A person who is not capable; having legal, mental or physical incapacity.

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 judgement pronounced by the court in the course of a civil action.

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 of a civil litigation. 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 moveable property to a beneficiary conferred by the will of a deceased person.

Legal capacity: The ability to make legally binding contracts or other judicial 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.

Non-patrimonial loss: Pain and suffering arising from physical injury or injury to feelings.

Ogden tables: A set of tables entitled "Actuarial Tables for use in Personal Injury and Fatal Accident cases" composed by a working party initially led by Sir Michael Ogden QC. The tables give a range of rates of net investment return, producing a variety of possible multipliers for use when calculating damages for personal injury.

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').

Patrimonial loss: The loss of money or any property.

Pecuniary: Relating to or consisting of money.

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

Pleural plaques: Areas of thickening of the lining between the lung and chest wall. The plaques themselves are harmless, but in most cases indicate asbestos exposure.

Provisional damages: An award of compensation where there is a chance 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 matter: 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').

Reversionary interest: The interest in heritage of the person entitled to exercise a reversion, ie a right of redemption for debt or as usually set forth in terms of a heritable security (mortgage).

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 and loss of expectation of life.

Statement of valuation of claim: A document stating a party's assessment of the damages claimed.

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

Tender: An offer of money in payment of a debt or liability, especially by a defender to offer money, with expenses, in settlement of an action for the payment of damages (upon refusal of which a pursuer who is subsequently awarded only the amount tendered or less will be liable for the defender's expenses from the date of the tender).

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 his or her 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).

Chapter 1 Introduction

Background

1.1 In this Discussion Paper we review aspects of the law of damages for personal injury. The scope of the project emerged after consultation with leading practitioners in the field. It is set out in our *Tenth Programme of Law Reform*,[1] which was approved by the Scottish Government in 2018. This paper covers all but one of the issues which were raised with us in the course of our consultation as meriting review and possible reform; the exception is mentioned below in paragraphs 1.6-1.14.

1.2 Of the four topics we cover in this paper three relate mainly to provisions in Part II of the Administration of Justice Act 1982 ("the 1982 Act"). They are (i) awards of damages in respect of (a) services provided to an injured person and (b) services provided by the injured person to others (sections 8 and 9); (ii) deductions from awards of damages (section 10); and (iii) awards of provisional damages (section 12).

1.3 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").[2] In this paper we take the opportunity to review the conclusions we reached then and consider to what extent they remain appropriate.

1.4 The fourth topic we examine here does not arise from the 1982 Act. It is the management of awards of damages made for the benefit of children. In our recent consultation referred to above, we were told that there are concerns that awards of damages to children are not always administered scrupulously for their benefit, and that this issue would merit review.

1.5 There are several reasons for reviewing the 1982 Act's provisions now. 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.

1.6 When we consulted on the scope of the current project, it was suggested to us that we should examine the law applying to damages in respect of accommodation claims, and in particular the proper approach to quantifying an award made in order to provide a severely injured person with accommodation specially constructed or modified to meet his or her needs.

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[1] Scottish Law Commission, *Tenth Programme of Law Reform* Scot Law Com No 250, 2018, para 2.39.
[2] Scottish Law Commission, *Damages for Personal Injuries (Report on (1) Admissibility of Claims for Services and (2) Admissible Deductions)* Scot Law Com No 51, 1978.

The established principle was set out in *Roberts v Johnstone*.[3] There it was held that damages to be awarded in respect of the purchase of special accommodation necessitated by the injuries caused by the responsible person should not be the net capital cost of the purchase of the accommodation. They should instead reflect the loss of use of the capital which had to be used to secure the accommodation. The damages awarded under this head were therefore the additional annual cost of the accommodation over the injured person's lifetime, multiplied by the appropriate multiplier.[4] The annual cost was taken as 2% of the net capital cost.

1.7 This method appears to have worked reasonably well when interest rates were positive. In spring 2017, however, it was announced that the discount rate would be changed from 2.5% to -0.75% in England and Wales, and Scotland. Thereafter, in July 2019, a further change to -0.25% in England and Wales was announced.

1.8 In the meantime, the Scottish Government enacted the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019.[5] The statute sets out timescales for review of the discount rate for Scotland. In September 2019, the Government Actuary announced that the discount rate in Scotland would remain unchanged at -0.75%.

1.9 The effect of the negative discount rate is that the award for accommodation costs will be nil, because the multiplicand is nil. Take the facts of the English case of *Swift v Carpenter*:[6] There the judge assessed the additional capital required for a new property for the injured person at £900,000 but awarded no damages on the grounds that she was bound by *Roberts v Johnstone* and that on that basis the multiplicand for the calculation was nil.[7]

1.10 In July 2019, however, the Court of Appeal agreed to hear *Swift v Carpenter* as a test case to consider all other options for quantifying this kind of claim. During the hearing, expert evidence was led from independent financial advisers, surveyors/valuers, economists and actuaries in relation to: (i) indexation of borrowing costs; (ii) the impact of inflation; (iii) investment return and discount rates; (iv) mortgage rates, products and the costs of borrowing for the purchase of property; and (v) valuation of a potential reversionary interest in any property purchased by the appellant.

1.11 The judgement in *Swift v Carpenter*[8] was delivered on 9 October 2020 and departed from the approach in *Roberts v Johnstone*. The court stated:

> " … in the context of modern property prices and a negative discount rate, the formula in *Roberts v Johnstone* no longer achieves fair and reasonable compensation for an injured claimant … it cannot be regarded as full, fair or reasonable compensation to award nil damages in respect of a large established need, on the basis that, if all the relevant predictions hold good over many decades to come, there will arise a windfall to a claimant's estate. Nor is it fair or reasonable compensation to follow the *Roberts v Johnstone* approach on the basis that if all the same predictions hold good, there will

[3] [1989] QB 878 at pp 892-3.
[4] The appropriate multiplier based on the Ogden Tables.
[5] Sections 8, 9 and 10 came into force on 25 April 2019 (that is, on the day after Royal Assent). Sections 1 and 2, and Schedule 1, paragraph 1, came into force on 1 July 2019. See the 2019 Act, s 9 and the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019 (Commencement No 1) Regulations 2019, SSI 2019/197.
[6] [2018] EWHC 2060.
[7] *Ibid* at paras [128]-[137]. For further discussion, see R Weir, "Capital accommodation claims and the discount rate: is it time for a 'conscious uncoupling'?" (2018) 1 JPI Law 53.
[8] [2020] EWCA Civ 1295; [2021] QB 339; [2021] 2 WLR 248; [2021] 3 All ER 827; [2021] PIQR P3.

in addition be in existence a suitable market to enable a claimant, by then elderly or aged, to release equity at a reasonable cost and without unacceptable disruption".[9]

1.12 The new approach taken by the court was to establish the capital amount required to purchase the required accommodation, before deducting the value of the reversionary interest in the windfall at the assumed date of the injured person's death. The court decided that the most appropriate and principled way of determining the discount rate was with a market value approach to reversionary interest; this discount rate was cautiously determined at 5%, that being the lowest individual return on investment seen in practice by the only expert witness in the case with experience in this field.[10] Thus the formula adopted was:

$VP \times 1.05^{\wedge -LE} = RI$

(Where *VP* is the value of the property; 1.05 is the 5% discount rate in decimal form; *LE* is the injured person's life expectancy; and *RI* is the reversionary interest to be subtracted from the value of the property).

This resulted in the injured person in this case receiving over £800,000 of the £900,000 award of damages for accommodation (instead of the previous nil award awarded at first instance).

1.13 This decision does, however, leave some questions unanswered and some concerns unaddressed. For example, although this formula was suitable in quantifying the damages for the injured person in this particular case – where the life expectancy was over 40 years – application of this formula in a case where the injured person's life expectancy is shorter could result in a substantial shortfall of capital for purchasing the necessary accommodation. The court recognised this, stating:

> "… this guidance should not be regarded as a straitjacket to be applied universally and rigidly. There may be cases where this guidance is inappropriate. However, for longer lives, during conditions of negative or low positive discount rates, and subject to particular circumstances, this guidance should be regarded as enduring".[11]

1.14 We are aware that Scottish courts and those expert in personal injury claims are following the ruling in *Swift v Carpenter*. In light of these developments, we do not think it productive now to review the various options for quantifying accommodation claims more satisfactorily at a time of negative discount rates.

Contents of this paper

1.15 In Chapter 2, we examine issues surrounding awards of damages for services rendered to or by the injured person. Chapter 3 looks at the deductibility or otherwise of certain social security benefits, payments of money, and benefits in kind (such as care and accommodation) in assessing the level of damages. Chapter 4 is concerned with provisional damages, and Chapter 5 with the management of damages awarded to children. A list of our provisional proposals and questions is set out in Chapter 6.

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[9] *Ibid*, at para [140].
[10] *Ibid*, at para [198].
[11] *Ibid*, at para [210]; see also para [228].

Legislative competence

1.16 The topics discussed in this paper relate to the law of damages. It is not a reserved matter under Schedule 5 of the Scotland Act 1998. The proposals are therefore within the legislative competence of the Scottish Parliament.

1.17 Furthermore, in our view these provisional proposals, if enacted, would be compatible with the requirements of the European Convention on Human Rights.[12]

Impact assessment

1.18 In the Report which will follow this Discussion Paper we will provide a business and regulatory impact assessment (BRIA) of the probable impact of our eventual recommendations. In the meantime, we would be grateful for any responses to this paper which provide evidence on, or otherwise address, either the economic impact of the present law or the anticipated impact of any of the possible options for reform described in this paper, or both.

1. Do consultees have any comments on economic impact?

Acknowledgements

1.19 We are grateful to Steve Love QC and Gordon Dalyell, Digby Brown LLP for assisting us in defining the scope of the project. Both also kindly agreed to be part of an Advisory Group, along with Laura Thomson, Advocate; Campbell Normand, DAC Beachcroft Scotland; Alan Rogerson, Aviva; Laura Blane, Thompsons; Robert Milligan QC, and David Tait, Clyde and Co. The project has benefited enormously from the contributions of all of the members of the group; we thank them for giving their time so generously. Our thanks also go the Accountant of Court and her staff who have answered our many questions with great patience.

[12] Scotland Act 1998, s 29(2)(d).

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

Current law

2.1 Sections 8 and 9 of the Administration of Justice Act 1982 ("the 1982 Act") provide for claims in respect of "necessary" services rendered by a relative to an injured person, and "personal" services which the injured person is unable to render because of the injury. These sections implement some of the recommendations of our 1978 Report.[1] One particular issue to be discussed in this chapter is the restriction of claims to services rendered to or by a "relative" as defined in section 13(1).

Section 8: necessary services

2.2 Section 8(1) provides that: "[w]here 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 services, the responsible person[2] 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." Subsection (3) relates to future services.

2.3 The loss recoverable in terms of section 8 is, in fact, the loss sustained by the relative or relatives providing services.[3] However, this Commission, seeking to avoid a multiplicity of claims arising from one accident,[4] recommended that the injured person should be able to recover the relevant damages for services, and be under an obligation to account to the relative(s) for those damages.[5] The relative has no direct right of action against the responsible person.[6]

2.4 "Necessary" services are not defined in the 1982 Act but include services such as nursing care, help with bathing, housekeeping, shopping and emotional support.[7] As the law stands at present, where services have been rendered by someone other than a relative, damages are recoverable only if a contractual arrangement exists.[8]

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[1] 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, paras 33 and 44.
[2] The person whose act or omission gives rise to liability to pay damages to the injured person: 1982 Act, s 7.
[3] Scot Law Com No 51, para 22.
[4] *Ibid*, para 19.
[5] *Ibid*, paras 29 and 33. This recommendation was implemented in the 1982 Act, s 8(2).
[6] 1982 Act, s 8(4).
[7] McEwan and Paton, *Damages for Personal Injuries in Scotland* (2nd edn), para 12-02; White and Fletcher, *Delictual Damages* (2000), p 19.
[8] For the background to these provisions of the 1982 Act, see J Blaikie, "Personal Injury Claims – Recovering the Cost of Services" (1992) 37 JLSS 62.

2.5 Depending upon the particular circumstances of the case, the value of a claim for necessary services can be substantial.

Section 9: personal services

2.6 Section 9 deals with circumstances where, owing to the injuries suffered, it is the injured person who can no longer provide personal services to a relative.[9] This loss is regarded as the loss sustained by the injured person.[10] While that approach may seem counter-intuitive, the underlying reasoning is explained in paragraph 38 of our 1978 Report,[11] as follows:

> "38. … 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 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. 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.'"[12]

2.7 "Personal services" are defined in section 9(3) as:

> " … 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."

---

[9] S 9 is entitled "Services to injured person's relative", and subsections (3) and (4) refer to services rendered to a relative.

[10] Scot Law Com No 51, para 38; *McGregor on Damages* (20th edn, 2018), paras 40-063 and 40-090-40-093; D Brodie, *Reparation: Liability for Delict,* Vol 1 A28-028.

[11] Scot Law Com No 51.

[12] Royal Commission on Civil Liability and Compensation for Personal Injury, Report, (HMSO 1978) Cmnd. 7054-I, ("The Pearson Report (1978)"), Vol one, para 356.

Such services may include child care, housework, gardening, shopping and home maintenance.[13]

Restriction to "relative"

2.8 For both section 8 and section 9, the extent of a claim for services is limited by whether the services were provided by a relative to the injured person or by that person to a relative.

2.9 The term "relative" is defined in section 13(1) of the 1982 Act as amended:

> "'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.
>
> In deducing any relationship for the purposes of the foregoing definition—
>
> (a) any relationship by affinity shall be treated as a relationship by consanguinity; any relationship of the half blood shall be treated as a relationship of the whole blood; and the stepchild of any person shall be treated as his child; and
>
> (b) section 1(1) of the Law Reform (Parent and Child) (Scotland) Act 1986 shall apply; and any reference (however expressed) in this Part of this Act to a relative shall be construed accordingly."

2.10 Section 13 of the 1982 Act also has to be read subject to the Marriage and Civil Partnership (Scotland) Act 2014 ("the 2014 Act"), section 4. Section 4 states that references in legislation (within devolved competence) to people who are or were married should be read as referring to both different and same sex married couples;[14] to cohabitants should be read as including same sex cohabitants;[15] and to two persons of the same sex who are (or were) living together as if they are or were in a civil partnership (ie cohabitants) cease to have effect.[16] 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.

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[13] McEwan and Paton, *Damages for Personal Injuries in Scotland* (2nd edn), para 12-05A; White and Fletcher, *Delictual Damages* (2000), p 22; Scot Law Com No 51, para 40.
[14] 2014 Act, s 4(1).
[15] *Ibid*, s 4(2) and (3).
[16] *Ibid*, s 4(4).

2.11 Two questions arise. First, is the definition of "relative" in section 13(1) still appropriate or is it in need of modification to take account of the fact that nowadays our notion of "family" may no longer be (as it may have been in 1982) limited to or at least centred on the nuclear family? Second, is the restriction to services provided to or by relatives (even if that definition of relatives were widened) appropriate in today's society, for either section 8 or 9 or both?

Is the definition of "relative" appropriate?

2.12 The intention underlying this Commission's recommendations in 1978 regarding the definition of "relative" was that the services should be 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.[17] The definition was therefore based on that set out in schedule 1 of the Damages (Scotland) Act 1976 ("the 1976 Act").

2.13 Damages for wrongful death are now governed by the Damages (Scotland) Act 2011 ("the 2011 Act") where the definition of "relative" is set out in section 14(1).[18]

2.14 The 2011 Act definition differs from that of the 1982 Act. So far as parent/child relationships are concerned, in the 2011 Act a "relative" includes "a person who accepted the deceased as a child of the person's family" or was "accepted by the deceased as a child of the deceased's family"; the definition for grandparents and grandchildren is to the same effect.[19] By contrast, the relevant definition in the 1982 Act (as amended) extends only to a "person accepted by the injured person as a child of his family".[20] Similarly, the definition of sibling is wider than in the 1982 Act: it includes a child brought up in the same household as the deceased and accepted as a child of the family in which the deceased was a child.[21]

2.15 For the most part, the 2011 Act implemented the recommendations of our Report on *Damages for Wrongful Death*.[22] However, the Report had recommended narrowing those who should have title to sue for patrimonial (as well as non-patrimonial) loss to those relatives who constituted the deceased's immediate family.[23] The Report concluded that:

> "In these circumstances we have taken the view that title to sue for patrimonial loss should be restricted to those relatives who currently constitute the deceased's immediate family. In the context of contemporary family structures in Scotland, they are the relatives who are most likely to have had an affective relationship with the deceased and who are most likely to have been in receipt of the victim's support at the time of his death. In short the current group of relatives with title to sue for patrimonial loss is too wide and has become anachronistic."

2.16 If the Commission's recommendation had been followed by the Scottish Parliament then those relatives entitled to claim for damages for wrongful death and those relatives in

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[17] Scot Law Com No 51, paras 33 and 44.
[18] Previously, where the injured person had died, in terms of the now repealed s 9(2) of the 1982 Act, any relative entitled to damages in respect of loss of support could include as a head of damages a reasonable sum in respect of the loss to him of personal services rendered by the deceased.
[19] 2011 Act, s 14(1)(b), (d).
[20] 1982 Act, s 13(1)(e).
[21] 2011 Act, s 14(1)(c).
[22] Scottish Law Commission, *Damages for Wrongful Death* (2008) Scot Law Com No 213.
[23] Recommendation 15 and para 3.57.

respect of whom claims for services may be made under the 1982 Act would have markedly diverged in 2011.

2.17 However, the Bill was amended at both stages 2 and 3 of its passage through the Scottish Parliament to essentially re-enact the broader definition of "relative" in the 1976 Act. Parliament considered that the proposal to restrict those entitled to claim for patrimonial loss to immediate family members would "unfairly remove the existing right of certain relatives (beyond those defined as "immediate family") to claim for damages if they could show that they had actually been supported by the victim".[24] Parliament also decided against extending the list of those able to claim for patrimonial and non-patrimonial loss beyond those relatives already able to claim at that time by virtue of the 1976 Act.[25]

2.18 The definition of "relative" in the 1982 Act has not been static: it was amended by the Civil Partnership Act 2004, as well as by the Family Law (Scotland) Act 2006. As we have noted above,[26] the definition now has to be read subject to section 4 of the 2014 Act.

2.19 Our provisional view is that the definition of "relative" in the 1982 Act has been modified adequately so as to cater for the various different kinds of family relationships which exist in contemporary Scotland. That is, interpreted in accordance with the 2014 Act, it extends to marriage between persons of the same sex or different sexes and to cohabitants of the same sex or different sexes. Furthermore, it now extends to civil partnerships between persons of the same or different sexes by virtue of the Civil Partnership (Scotland) Act 2020.[27] There is, however, a question whether there is good reason to retain the differences in relation to children/parents, grandchildren/grandparents, and siblings who are accepted as part of the family, or whether the definition in section 13 of the 1982 Act should be amended to provide for this wider definition of "relative".

2.20 We therefore ask:

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?

Should section 8 be restricted to a "relative"?

2.21 Quite apart from the definition of "relative", there is a wider question whether it is appropriate to restrict awards under section 8 to necessary services provided by a relative.

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[24] Justice Committee, Stage 1 Report on the Damages (Scotland) Bill, (SP Paper 542) at para 187.
[25] *Ibid*, para 190.
[26] See para 2.10 above.
[27] Civil Partnership (Scotland) Act 2020, s 4, repeals s 86(1)(a) of the Civil Partnership Act 2004 (ie the eligibility requirement that civil partners must be of the same sex). The provisions came into force on 1 June 2021.

(We examine below[28] the question whether it is appropriate to restrict awards under section 9 to personal services provided to a relative).

The reasoning underlying the restriction in section 8

2.22 The question whether section 8 claims should be restricted to services provided by a relative to the injured person was addressed in our 1978 Report.[29]

2.23 At that time, this Commission's view was that the value of services provided to an injured person should be recoverable only in respect of members of the injured person's family group or circle. This issue arose in the course of the consultation which preceded our 1978 Report. It was noted that while such a restriction might lead to anomalies between the treatment of persons rendering identical services, one of whom is within the family group and the other not, in the absence of such a restriction:

> "the class of persons whose services must be taken into account might include, according to the circumstances, such bodies as hospitals, ambulance services, the police and fire services. It would, no doubt, be possible in the relevant legislation to allow only private individuals to present claims, but there is a preliminary question whether it would be desirable to admit claims by persons outside the family group."[30]

2.24 It was also noted 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."[31]

2.25 Further points against admitting claims from outside the family group were said to be that (i) it would complicate considerably the procedure for settling claims, because it would in many cases be far from easy to determine who might be entitled to present such a claim; and (ii) there was a risk that any widening of the class of persons entitled to present a claim might increase the number of spurious claims.[32] The Report added that this was not to say that the law should prevent an injured person from entering into a legal obligation to pay for services rendered by persons outside the family group, including an obligation contingent upon the recovery of damages.[33]

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[28] Paras 2.51-2.61 below.
[29] Scot Law Com No 51.
[30] *Ibid*, para 20.
[31] *Ibid*.
[32] *Ibid*.
[33] *Ibid*.

The approach to necessary services adopted in England and Wales

2.26 The Law Commission of England and Wales, in order to remove doubt created by case law,[34] recommended in 1973 that where others have gratuitously incurred expenses in providing an injured person with services or have themselves rendered such services gratuitously, those expenses, so long as they are reasonable, and the reasonable value of the services rendered, should be recoverable from the responsible person.[35] The term "others" was not defined, but the Report referred to help being provided by "members of the family or by friends".[36] The explanation of the policy was this:

> "If the victim is astute and well advised enough to enter into a contractual arrangement with whoever is providing him with the services he needs, then he is able to recover the cost of those services from the tortfeasor [the responsible person], but, if he fails to take this precaution, he may not be. In these cases we do not think that the payment of compensation should depend on whether a largely fictitious contractual relationship has been engineered by the victim's legal advisers."[37]

The preceding Working Paper stated that :

> "[t]he principle behind the suggested claims for loss incurred on the victim's account is that, if the victim were in sufficient funds, he could compensate those who suffered the loss himself; … This being so, we see no reason for restricting these claims to losses incurred by members of the victim's family. Subject to the overriding requirement of reasonableness we think that the losses should be recoverable whether they were incurred by a member of the family or a close friend or even a charitable stranger."[38]

2.27 The Royal Commission on Civil Liability and Compensation for Personal Injury ("the Pearson Report") endorsed the view of the Law Commission of England and Wales, observing that a plaintiff's need to have services rendered to him "is not different in character if it is met by a friend rather than a member of the family."[39]

2.28 Some years later, the Law Commission of England and Wales returned to the issue of gratuitous care,[40] concluding that damages should continue to be awarded at common law in respect of care reasonably provided, or to be provided, gratuitously to the injured person by relatives and friends.[41] It also concluded that the same approach was appropriate in relation to work around the home done by a family member or friend.[42]

The Scottish courts' approach to the restriction to a "relative"

2.29 In construing the term "relative" in marginal cases, the courts have adopted different approaches ranging from wider to more restrictive, with the result that outcomes are difficult

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[34] *Gage v King* [1961] 1 QB 188.
[35] Law Commission of England and Wales, *Personal Injury Litigation – Assessment of Damages* (1973) Law Com No 56, paras 112-114 and 159(a); draft Bill, cl 4; cf *Schneider v Eisovitch* [1960] 2 QB 430 at p 440.
[36] Law Com No 56, para 112.
[37] *Ibid*.
[38] Law Commission of England and Wales, *Personal Injury Litigation – Assessment of Damages* (1971) Published Working Paper No 41, para 204.
[39] The Pearson Report (1978), Vol one, para 346.
[40] Law Commission of England and Wales, *Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits* (1999) Law Com No 262.
[41] *Ibid*, paras 3.60 and 3.62. See also *Hunt v Severs* [1994] 2 AC 350; [1994] 2 All ER 385; and for the development of the law in this area, *McGregor on Damages* (20th edn, 2018), paras 40-225 – 40-230.
[42] Law Com No 262, paras 3.90-3.91.

to predict. The need to apply the current restriction also has the unattractive feature that parties may find details of their private lives being subject to scrutiny as the courts endeavour to identify whether a particular person is or is not a "relative".

2.30 *Dewar v Graham's Dairies Ltd,*[43] for example, reviewed the case law considering the question whether a couple can be regarded as living together as husband and wife.[44] In *Dewar,* the pursuer was injured in an accident at work. He was married, but separated from his wife with whom he had a son. He had been in a relationship with his partner for almost four years and had a daughter with her. The couple did not live together on account of the preference of the partner's daughter from a previous relationship to continue to live elsewhere, but their long term plan was to live together. Since the accident, the partner had given up her job to enable her to care for the pursuer in addition to her own infirm parents. She assisted him both financially and by carrying out necessary services, and estimated that the time spent on assisting the pursuer was some four to five hours per day over and above what would have been the case prior to the accident when each party had contributed to the household. An issue was whether the partner fell within the definition of "relative" in the 1982 Act, section 13(1). Lord Armstrong summarised the case law on this issue:

> "Significant matters to be taken into account in determining whether a couple are living together as man and wife include: the manner in which the couple lived together and their reason for doing so; the extent to which the couple were committed to the relationship and the extent of the time they spent together; whether assistance was provided in intimate respects; and whether, where relevant, there was assistance in building up self-esteem (*Paterson v Paterson* 2013 Rep LR 13, at paragraphs 44, 45). Where the relationship is no more than provisional, the requirement of living as man and wife will not be met (*McPake v SRCL Limited* 2014 Rep LR 41, at paragraphs 77, 78). The hallmarks of a family unit are 'a degree of mutual interdependence, the sharing of lives, of caring and love, of commitment and support' and the term 'family' connotes essentially 'some grouping, usually of persons who were connected with each other, by some particular bond' (*Telfer v Kellock* 2004 SLT 1290, 1294B). In the context of whether people are or were living together as husband and wife:
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> > 'working out whether a particular couple are or were in such a relationship is not always easy. It is a matter of judgment in which several factors are taken into account… What matters most is the essential quality of the relationship, its marriage-like intimacy, social and financial interdependence … the presence of children is a relevant factor in deciding whether a relationship is marriage-like …' (*Ghaidan v Godin-Mendoza* [2004] 2 AC 557, per Lady Hale, at paragraphs 139, 141).
>
> For the defenders, reference was made to observations by Lord Stewart in *McPake,* at paragraph 78, to the effect that, in that case, it had been significant that there had been no evidence of an exchange of rings, nor any evidence about financial support, shared bank accounts, shared hire purchase commitments, or anything of that kind. That could also be said of the pursuer's case. I was also referred to *Lawrie v Lanarkshire Health Board* 1994 SLT 633, in which a claim under section 8 was excluded on the basis that the pursuer's girlfriend, notwithstanding that she had provided the bulk of the assistance rendered, had lived apart from him at the time."[45]

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[43] [2016] CSOH 151.
[44] 1982 Act, s 13(1)(b).
[45] [2016] CSOH 151 at paras [69] and [70].

2.31 Having assessed the matter "against the background of the social norms of contemporary modern life",[46] Lord Armstrong found the partner to fall within the definition of "relative" in section 13(1)(b) of the 1982 Act.

2.32 However, this rationale itself raises another question: whether ex-partners should be excluded from the list of relatives in section 13(1)(b) given that ex-spouses and ex-civil partners are covered. The reality is, however, that many of the cases in which issues of this kind arise are settled out of court, so the law reports provide at best a fragmentary picture.[47]

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

Discussion: section 8 claims and restriction to necessary services rendered by a "relative"

2.33 An injured person may have no support from family members. We note that according to a survey published in 2021, 36% of households in Scotland are one person households.[48] Whilst being in a one person household does not of itself mean that there will be no support from family members it is perhaps indicative at least that that person may depend alternatively or additionally upon a friend or neighbour to provide the necessary care and support. That person clearly does not come within the ambit of the definition of "relative" in the 1982 Act. In such circumstances, should the injured person be able to recover (and account to the person rendering the services) damages for that person's necessary services?

2.34 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, even absent an agreement. It is also arguable that the responsible person should not benefit from this change in demographics and the fact that a large percentage of people no longer live in family units.

2.35 We think that allowing for an award in these circumstances would reflect changing demographics and views current in society at large, and that attitudes have moved on since this Commission said 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."[49] However we also note that, during the passage of the 2011 Act, the Scottish Parliament considered whether people who were not relatives should be able to claim damages for wrongful death and noted the difficulties in "defin[ing] fairly and clearly which non-relatives would be entitled to claim".[50] The Parliament also noted this had not been consulted on and so did not recommend this expansion of those covered in its report at Stage 1. It does not seem to us that there is any principled justification for requiring there to be an agreement where the provider of the services is (for example) a friend rather than a relative. Nor do we think that admitting claims from outside the family group, at least from a single individual, would either complicate the procedure for settling claims or increase the number of spurious claims. When lodging a statement of valuation of claim, generally the person raising the action has to specify the persons by whom the services

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[46] *Ibid* at para [72].
[47] R Milligan, "Scottish law commission reform on damages for personal injuries" (2018) Rep B 143-1.
[48] National Records of Scotland, "Estimates of Households and Dwellings in Scotland, 2020" (2021) at p 11.
[49] Scot Law Com No 51, para 20. See paras 2.23-2.24 above.
[50] Justice Committee, Stage 1 Report on the Damages (Scotland) Bill, (SP Paper 542) at para 188.

were provided.[51] There is scope for the adjustment of statements of valuation of claim within specified time limits.[52] If one wishes to adjust a statement of valuation of claim which has already been lodged, provided that the time limit has not been reached, that presents no difficulty, and is frequently done in practice. If the time limit has passed, a motion would be required to vary the timetable[53] and allow an adjusted statement of valuation of claim to be lodged.

2.36 Where a claim is settled extra-judicially there is a potential difficulty of course if the sum recovered in respect of services is not specified. Under the current law,[54] if the injured person and the person providing the services cannot agree, it is open to the person who provided the services to raise an action requiring the injured party to account. Such a provision would apply if claims from outside the family group were admitted.

2.37 To extend the scope of section 8, by removing the current restriction to necessary services provided by a relative, seems to us to have four principal advantages. First, there would no longer be any need for the courts to delve into the private lives of those who do not clearly fall within the definition of "relative" in section 13(1). Secondly, people would no longer feel compelled to enter into artificial agreements in order to ensure recovery. Thirdly, it would remove some difficulties in practice by aligning Scots law with the position in England and Wales.[55] Fourthly, there would be appropriate monetary recognition of services rendered by persons who are not relatives.

If section 8 were extended beyond family members, should charitable bodies and other voluntary organisations be included?

2.38 There is one further question on which we seek views. If section 8 were extended to enable the recovery of damages in respect of services provided gratuitously to the injured person by individuals who are not relatives, should charitable bodies and other voluntary organisations be included?

2.39 The intention behind extending section 8 to services provided gratuitously to the injured person by individuals who are not relatives would be to include individuals such as friends and neighbours. The Law Commission of England and Wales defined "gratuitous services" in such circumstances as services provided otherwise than under a contract, whether with the injured person or someone else (for example, an employer) which provides payments for those services, and provided otherwise than in the course of a business, profession or vocation. Services provided by, for example, a charity helper would therefore not be gratuitous services, even though provided without a contractual right to payment, because they are performed in the course of a vocation.[56]

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[51] Act of Sederunt (Rules of the Court of Session 1994) 1994 (SI 1994/1443) ("RCS"), Form 43.9; r 43.9; Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 (SI 1993/1956) ("OCR"), Form P16; r 36.J1.

[52] The pursuer's statement of valuation of claim must be lodged not later than 8 weeks after defences were lodged; the defender's statement of valuation of claim must be lodged not later than 16 weeks (12 weeks in the sheriff court) after defences were lodged. See RCS, r 43.6(1) and (2) and Appendix to Practice Note No 2 of 2003 (Personal Injuries Actions); OCR, r 36.G1 and Appendix 3.

[53] RCS, r 43.8(1); OCR, r 36.H1(1).

[54] 1982 Act, s 8(2).

[55] See ch1, para 1.5 and para 2.26 above.

[56] Law Commission of England and Wales, *Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits* (1999) Law Com No 262, draft Bill, clause 3(3).

2.40 In considering the question whether section 8 of the 1982 Act should be extended to cases where a body or organisation (such as a charity) has provided the gratuitous services to the injured person, we refer briefly to the position in England. Two cases have considered the issue of recovery of care costs provided gratuitously by a charitable body. In the case of *Drake v Foster Wheeler Ltd*,[57] an award was made in respect of the cost of palliative care provided gratuitously by a charitable hospice foundation. The claim was made by the estate after the injured person's death. Although there was no previous authority, the judge found no reasonable basis for distinguishing a charitable foundation from a private individual, or from one of the deceased's family members or friends, and concluded that recovery was in accordance with established principles. That view, or at least the possibility of an extension of principle along those lines, has attracted support.[58] But it has also been questioned on the grounds that the gratuitous services of a hospice, which are open to everyone, can be distinguished from gratuitous services provided out of love and affection by family members.[59]

2.41 In the more recent case of *Witham's Executrix v Steve Hill Ltd*,[60] a claim was again made by the estate after the injured person's death. In accordance with the decision in *Drake v Foster Wheeler Ltd*,[61] gratuitous hospice costs were awarded. However, the court held that once the principle is established that the cost of the hospice in providing the deceased's care is properly recoverable, there is no reason to go behind the actual cost of the hospice and award a lower sum. In *Drake v Foster Wheeler Ltd*, on the other hand, it was held the deceased's estate could, on behalf of the hospice, recover as damages the reasonable notional costs of the care. The award was based on 62% of the hospice's running costs for the year in question, being the percentage of such costs that was not funded from donations. The award comprised the appropriately adjusted figures for the costs of the relevant number of days of in-patient care and one episode of community care. Reference was made to the fact that the evidence suggested that the deceased's executrices, like other patients of the hospice, felt under a moral obligation to provide, if able to afford it, by way of donation or legacy, financial gifts so as partially to recompense the hospice for the care it provided. This moral obligation could be partially fulfilled by claiming an appropriate sum from the defendant for the benefit of the hospice.

2.42 We would welcome consultees' views on the advantages and disadvantages which they perceive in a possible extension of section 8 to services provided by organisations or bodies (such as, for instance, charities). 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.

2.43 There is also the matter of how damages should be assessed if section 8 were extended to cases where a body or organisation has provided gratuitous services to an injured person. How should the current measure of "such sum as represents reasonable

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[57] [2010] EWHC 2004 (QB); [2011] 1 All ER 63.
[58] *McGregor on Damages* (20th edn, 2018), para 40-230; S Glynn, "Gratuitous care claims for third parties" (2011) 3 JPI Law 175.
[59] See N Cooksley, "Personal injury: quantum – fatal accidents measure of damages" (2010) 4 JPI Law C203.
[60] [2020] EWHC 299 (QB), a case at first instance.
[61] [2010] EWHC 2004 (QB); [2011] 1 All ER 63.

remuneration for those services and repayment of reasonable expenses incurred in connection therewith"[62] be applied? As in *Witham's Executrix v Steve Hill Ltd*,[63] should the measure be the actual costs incurred (which could be substantial), or, as in *Drake v Foster Wheeler Ltd,*[64] should a concept of reasonable notional costs be adopted?

2.44 We therefore ask:

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?

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

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

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

Necessary services provided by the defender

2.45 Should it make any difference if the care the injured person receives is provided by the defender? In England and Wales, the House of Lords case of *Hunt v Severs*[65] established that a claimant who was cared for by the defendant could not recover damages in respect of that care. It was said that:

> "There can be no ground in public policy or otherwise for requiring the tortfeasor [the responsible person] to pay to the claimant, in respect of the services which he himself has rendered, a sum of money which the claimant must then repay to him."[66]

2.46 While the logic of the decision can be readily understood, it has been widely criticised because of its practical effect, notably that excluding the defendant from benefiting from a services claim may lead to undesirable consequences in practice. Claimants may be

[62] 1982 Act, s 8(1).
[63] [2020] EWHC 299 (QB).
[64] [2010] EWHC 2004 (QB); [2011] 1 All ER 63.
[65] [1994] 2 AC 350; [1994] 2 All ER 385.
[66] *Ibid* at p 363 (Lord Bridge).

encouraged and advised to employ professional outsiders in order to recover for their care, so making claims more expensive for defendants and their insurers. Or they may obtain unpaid care from a relative other than the defendant, even if those care arrangements are less suitable. Or they may enter into a contract with the defendant carer, which the development of the case law in England had rendered unnecessary.[67]

2.47 Largely for these reasons the Law Commission of England and Wales has recommended the reversal of this decision by legislation. Its consultation exercise indicated strong support for that recommendation.[68]

2.48 The issue has come before the Scottish courts. In *Kozikowska v Kozikowski*,[69] it was held, following *Hunt v Severs*, that where one spouse was injured by the other spouse, the injured spouse could not make a claim in terms of section 8 as the sum recovered would be given back to the responsible person.

2.49 The same policy issues mentioned above are relevant in Scots law. We would therefore welcome the views of consultees on whether it would be appropriate for Scots law to provide that there should be nothing to prevent damages from being recovered in respect of the gratuitous provision of services for an injured person merely because the person providing the services is the defender. Depending on the answers given to our earlier questions, this issue may arise only in relation to a defender who falls within the definition of "relative" or it may arise in other circumstances too.

2.50 We therefore ask:

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

Discussion: section 9 claims and restriction to personal services rendered to a "relative"

2.51 As noted already, section 9 of the 1982 Act is concerned with the situation where, owing to the injuries suffered, it is the injured person who can no longer provide personal services to a relative. In that event, damages in respect of the inability to provide services may be recovered by the injured person from the responsible person.

2.52 We explored above[70] whether the scope of section 8 should be extended so that, where necessary services have been rendered gratuitously to an injured person, it should no longer be a requirement for recovering an award of damages that the services were provided by a "relative".

2.53 The question arises whether there should be any extension of the scope of section 9 beyond the family group. Where, owing to the injuries suffered, the injured person can no longer provide personal services to someone who is not a relative, should damages be

[67] *McGregor on Damages* (20th edn, 2018), para 40-232.
[68] Law Commission of England and Wales, *Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits* (1999) Law Com No 262, paras 3.67-3.76.
[69] 1996 SLT 386; [1995] 1 WLUK 386.
[70] Paras 2.21 and following paragraphs.

recoverable? In 1978, this Commission did not support the extension of section 9 outside the family group:[71]

> "38. … 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
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> > 'the loss suffered by those not dependent on the plaintiff seems to us to be altogether more remote.' [72]
>
> 40. … We have also considered in this context whether it would be appropriate to confer on members of the injured person's family a direct right of recovery from the defender. We do not think this would be appropriate, not merely because the defender might be exposed to a multiplicity of actions, but because, during his life, apart from the accident, the injured person would have remained free to choose who is to benefit by his services. For the latter reason we do not consider that, in this context, the injured person should be placed under any obligation to account to the individual relatives who may have suffered from his inability to render the services. The matter must here be left to the moral sense of the injured person, an additional reason for restricting the claim to services rendered within the family."

2.54 Would society today still consider the loss of personal services previously rendered to a non-relative as too remote, and not within the reasonable foreseeability of the responsible person? There would be a broad spectrum of possible claimants, some (but not others) closely reflecting the model of a family group. Examples might include two friends living together, one providing personal care to the other less able party; a neighbour providing personal care such as shopping and grass-cutting for one or more individuals, generally "keeping an eye" on them as they have no-one else to help; someone providing a "befriending" service, perhaps visiting a non-relative in their own home once a week. As a matter of principle, should it be possible for claims for damages to be made where the person who has been providing gratuitous personal services to persons outwith the family group can no longer do so due to injuries sustained as a result of an act or omission of another person? When exploring this question, it may be helpful to consider where, in such circumstances, the loss falls; the definition of "personal services"; and the approach adopted in England and Wales.

Where does the loss fall?

2.55 In cases where personal services were provided gratuitously by the injured person to persons *outside* the family group, we consider that the loss must inevitably fall upon the individual who had previously been receiving the services, and not upon the injured person.[73]

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[71] Scot Law Com No 51, paras 38 and 40.
[72] The Pearson Report (1978), Vol 1, para 356.
[73] Gloag and Henderson, *The Law of Scotland* (14th edn, 2017), para 25.17.

Unlike section 9 claims involving services rendered to a member of the family group, the loss of personal services cannot properly be categorised as "the loss of a species of counterpart for the benefits which [the injured person] receives as a member of the family group", nor could damages payable to the injured person be justified by the proposition that "[i]f 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". Accordingly the loss would be that of a third party, in the same way as in section 8 claims the loss is that of the third party who provided the necessary services. While statute could provide for the injured person to be the channel through which the damages are collected, with an obligation to account to the third party, the initial question of principle is whether the loss in a personal services claim involving a non-family-member is simply too remote to be recoverable.

Definition of personal services

2.56 Currently, "personal services" are defined as follows:[74]

> "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."

2.57 If the scope of section 9 were to be extended to include personal services to those who are not relatives, the definition of "personal services" in section 9 would require adjustment. Paragraph (c) could, if thought appropriate, be retained as a means of assessment of the service (even though it was not being given to a relative). As already noted,[75] the Commission did not favour an extension beyond the family group.

The approach to personal services adopted in England and Wales

2.58 *McGregor on Damages* explains:

> "[t]hat there is no legislative provision in England allowing damages to an injured person for the loss of his capacity gratuitously to render services to his relatives. [This lack] was commented upon critically by the Court of Appeal in the light of such recovery having been not only recommended by the Pearson Commission and the Law Commission but also enacted for Scotland in s 9 of the Administration of Justice Act 1982 …"[76]

2.59 In subsequent paragraphs[77] the author refers to the English courts exercising their ingenuity to achieve awards of damages at common law similar to those provided for in Scotland by section 9 of the 1982 Act with the restriction to "relatives". Accordingly at present

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[74] 1982 Act, s 9(3).
[75] Para 2.53 above.
[76] (20th edn, 2018) at para 40-063.
[77] *Ibid*, paras 40-090 to 40-094.

there is little guidance from England and Wales about awards for an injured person's inability to render personal services to non-relatives.

2.60 We would welcome the views of consultees on whether the ability to recover damages in terms of section 9 of the 1982 Act should be extended to cover the loss of a third party who had been receiving gratuitous personal services from a person who is no longer able to provide those services due to injury sustained as a result of an act or omission of another person.

2.61 Accordingly, we ask:

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?

Chapter 3 Deductions from awards of damages

Introduction

3.1 Certain items are deductible from an award of damages. In our Tenth Programme of Law Reform, we noted that:

> "[t]he law in Scotland and in England differs on the items deductible from damages. This has generated uncertainty in relation (eg) to deductibility of private health insurance and residential care costs, the quantum of which may be very substantial. The policy in relation to deductibility appears to us to be ripe for review".[1]

3.2 There would be nothing particularly odd about the different approaches taken in Scotland and England were it not for the fact that both systems seek to achieve the same general objective: that an award of damages should put an injured person in the financial position they would have been in but for the accident. The responsible person should compensate the injured person fully for the loss or injury, but should not be obliged to do anything more. Conversely, the injured person should be fully compensated, but as a rule should not be better off financially than would have been the case had the accident not occurred. In this context, it is worth noting that England and Wales do not have a statutory equivalent to the Administration of Justice Act 1982 ("the 1982 Act"): the relevant law is entirely common law.

3.3 Following an accident an injured person may receive any or all of (i) social security benefits, (ii) payments of money, and (iii) benefits in kind (such as care and accommodation), none of which would have been received but for the accident. Should these be deducted from an award of damages? If so, which ones, and why?

3.4 After setting out the main current statutory framework on deductions from awards of damages in Scotland, this chapter reviews the problems, if any, arising from these three categories (beginning with those areas which appear to us not to be causing any problems); seeks to establish potential solutions to those problems based on various general principles of the law of damages; and asks consultees a series of questions throughout. It is important to emphasise that this chapter looks only at whether certain receipts should be deducted from awards of damages. It does not raise wider questions of quantification of damages.

Section 10 of the Administration of Justice Act 1982

3.5 The main current statutory framework in Scotland on deductions from awards of damages is section 10 of the 1982 Act which, as explained in Chapter 1, implemented most of the recommendations of our Report, *Damages for Personal Injuries (Report on (1) Admissibility of Claims for Services and (2) Admissible Deductions)* ("the 1978 Report").[2]

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[1] Scottish Law Commission, *Tenth Programme of Law Reform* (2018) Scot Law Com No 250, at para 2.39.
[2] (1978) Scot Law Com No 51.

3.6 Section 10 of the 1982 Act provides:

> "**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;
>
> (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."

3.7 Any reform of the law of deductions from awards of damages may require an amendment to, or replacement of, section 10 of the 1982 Act. With this in mind, we review the three categories of receipts previously mentioned, ie (i) social security benefits, (ii) payments of money, and (iii) benefits in kind (such as care and accommodation). We begin with social security benefits because, at this early stage in our project, this category appears to be the most straightforward of the three.

Social security benefits

3.8 As can be seen above, certain subsections within section 10 of the 1982 Act relate to payments from public funds, whether by way of pension, social security or welfare payments.[3] Our provisional view is that, insofar as the deductibility of social security benefits is concerned, section 10 and the wider law in this area provides an adequately comprehensive statutory framework, and is therefore not in need of reform. However, we do seek consultees' views on this matter for completeness. The following summary of the development of the law in this area is intended to provide the necessary background information to enable consultees to form a view on whether or not our own provisional view is sound, and also to introduce some of the wider principles which we will discuss later in this chapter.

Background

3.9 The Law Reform (Personal Injuries) Act 1948 ("the 1948 Act") had attempted to resolve the difficult question of how to treat social security benefits in the context of damages by proposing a compromise: that for a period of five years, half the amount of certain specified benefits should be deducted from an award of damages.

3.10 As the Pearson Report pointed out, there was no justification in principle for this solution.[4] The Pearson Report rejected two arguments deployed in favour of not deducting social security benefits.[5] The first argument was that, since an injured person would have paid for these benefits by way of contributions, the benefits should be treated in the same way as an insurance policy for which they had paid the premiums (and should therefore be non-deductible). However, this was said to be unrealistic, since some benefits were non-contributory, some were only partly financed by contributions, and, besides, national insurance contributions (where relevant to a benefit) were compulsory rather than voluntary. The second argument was that a responsible person should not be relieved of part of their liability by the state. However, it was pointed out that this mistook the purpose of the law of tort or delict, which was not to punish the offender, but to compensate the injured person.

3.11 That led to the conclusion that there should be full coordination between compensation and social security, so the court, when calculating an award of damages, should be required to deduct social security benefits which were payable as a result of an injury. However, benefits such as the state retirement pension or child or maternity benefit should not be deducted, since they did not become payable as a result of the injury.[6] In our 1978 Report we agreed with the general approach taken by the Pearson Report, that there should be no overlap (ie double compensation) between the compensation to be provided as a result of delict and that to be provided by social security.[7]

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[3] 1982 Act, s 10(b), (c), (d), (ii), and (iii).
[4] Royal Commission on Civil Liability and Compensation for Personal Injury, *Report*, (HMSO 1978) Cmnd 7054-I, ("The Pearson Report (1978)"), Vol 1, para 473.
[5] *Ibid*, paras 471-472.
[6] *Ibid*, paras 475-481.
[7] (1978) Scot Law Com No 51, para 90.

The current position

3.12 The current position on deductibility of social security benefits is regulated in tandem by section 10 of the 1982 Act and by the Social Security (Recovery of Benefits) Act 1997 ("the 1997 Act").[8] The key points in the 1997 Act are the following.

3.13 First, the 1997 Act regime applies only to specified benefits, which are listed in schedule 2 of the Act.

3.14 Second, the list in schedule 2 specifies three heads of compensation arising during the relevant period: compensation for earnings lost; compensation for the cost of care; and compensation for loss of mobility. For each of these heads there is a separate list of deductible social security benefits, namely:

> (a) for loss of earnings: universal credit; disablement pension payable under section 103 of the Social Security Contributions and Benefits Act 1992 ("the 1992 Act"); 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; unemployment benefit;
>
> (b) for cost of care: attendance allowance; daily living component of personal independence payment; care component of disability living allowance; disablement pension increase payable under section 104 or section 105 of the 1992 Act; and
>
> (c) for loss of mobility: mobility allowance; mobility component of personal independence payment; mobility component of disability living allowance.

3.15 Third, the responsible person is obliged to reimburse the state for the total amount of the listed social security benefits received by the injured person in respect of his or her injury during the "relevant period". These benefits are recoverable by the Compensation Recovery Unit ("CRU"), which is part of the Department for Work and Pensions. The "relevant period" is five years from the date of injury; if the claim is settled before those five years have elapsed, the relevant period ends on the date of settlement. But there is no liability to reimburse the state for benefits paid after the five-year period, and these benefits cannot be deducted from damages.

3.16 Fourth, two important consequences flow from this approach to deductibility of benefits. The first is that only "like for like" deductions may be made: in other words, only benefits listed in respect of loss of earnings can be deducted from compensation for lost earnings. They cannot, for example, be deducted from compensation for the cost of care. The second is that there can be no deduction from damages awarded under a head which is not listed in schedule 2. This means, in particular, that no deduction can be made from damages awarded for solatium.

3.17 Our 1978 Report discussed in some detail the appropriate treatment of certain benefits payable from public funds, such as state retirement pensions, supplementary benefits,

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[8] Applicable from 6 October 1997; see also the Social Security (Recovery of Benefits) Regulations 1997. For a general account, see McEwan and Paton, *Damages for Personal Injuries in Scotland* (2nd edn), ch 16.

redundancy payments, and unemployment benefit (now jobseeker's allowance).[9] Section 10 of the 1982 Act also refers to all of these.[10]

3.18 It seems to us that, in light of the rules set out in schedule 2 of the 1997 Act, there is no need for further discussion of these issues here or for these rules to be affected by the 1982 Act. The 1997 Act spells out precisely which benefits may be deducted from which element of compensation. It is therefore clear, for example, that jobseeker's allowance is deductible from compensation for loss of earnings, but the reason it is deductible turns not on applying some legal principle but simply on the fact that it is listed in schedule 2 to the 1997 Act. Conversely, the fact that retirement pensions and redundancy payments are not listed there has the consequence that they are not deductible, without any need to explore the principles which might support their deductibility or otherwise. In any case, reform of the law of social security is outside the scope of this project.

3.19 However, section 10 of the 1982 Act also provides at paragraph (ii) that "any contribution-based jobseeker's allowance (payable under the Jobseekers Act 1995)" is to be taken into account in assessing the amount of damages payable to the injured person. This seems to us to be a duplication of schedule 2 of the 1997 Act but we understand that it does not cause any practical difficulties.

3.20 Before we leave this topic, we should mention that from discussion with our Advisory Group we are aware that the introduction of universal credit causes difficulty in quantifying claims, precisely because the certificates issued by the CRU do not specify the components which make up an award of universal credit. The consequence is that it may not be possible to separate out deductible and non-deductible benefits. It seems to us unrealistic to imagine that the practice of the CRU will change. That being so, the only option available to insurers, and one that is available only where evidence has been led in a case, is first to make payment to the CRU in accordance with the certificate and subsequently to seek, relying on the terms of the evidence given to the court, to submit to the CRU that some elements of the benefits paid do not properly fall within the amount certified, because they relate to benefits which do not fall within the scope of the 1997 Act.

3.21 We therefore ask:

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

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

Payments of money

3.22 In this part of the chapter we review the law on the deductibility of payments of money that an injured person may receive following an accident. We consider which of these payments are (and ought to be) deductible from an award of damages. Adopting the approach taken earlier in this chapter, we begin with benevolent payments (ie payments made to an injured person by other people to reflect their sympathy for his or her loss or injury) as these

[9] (1978) Scot Law Com No 51, paras 73-99.
[10] Section 10(b), (c), (d), and (ii).

appear to be the most straightforward. Thereafter, we consider payments which are made as a result of an insurance policy and occupational health benefits.

Benevolent payments

3.23 Payments made to an injured person by other people to reflect sympathy for their loss or injury are not, as a general rule, deducted from damages. This is known as "the benevolence exception". The benevolence exception has precedent in Scottish case law which pre-dates the 1982 Act;[11] and those who responded to the consultation which led to our 1978 Report (which in turn led to the 1982 Act) were unanimously of the view that payments of this kind ought not to be deducted from damages.[12] Section 10 of the 1982 Act put the benevolence exception on a statutory footing by 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) … 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 …"

3.24 The classic statement spelling out the reasons for the benevolence exception 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."[13]

3.25 In the English case of *Parry v Cleaver*, Lord Reid quoted Sir Andrew James LCJ's passage and 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 …".[14]

3.26 There is, however, a caveat to the benevolence exception in paragraph (iv) of section 10 of the 1982 Act, which states that in assessing an award of damages, there shall be taken into account:

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[11] *Dougan v Rangers Football Club Ltd* 1974 SLT (Sh Ct) 34.
[12] (1978) Scot Law Com No 51, para 59.
[13] [1947] NI 167 at p 170; cf also *Parry v Clea*ver [1970] AC 1; *Gaca v Pirelli General plc* [2004] EWCA Civ 373; [2004] 1 WLR 2683 at paras [13]-[40].
[14] [1970] AC 1 at p 14.

> "(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."

3.27 The case law in England and Wales reflects the same caveat to the benevolence exception as found in paragraph (iv),[15] ie where the benevolent payment is made by the responsible person directly to the injured person. The English Court of Appeal expressed the rationale for this caveat thus:

> "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."[16]

3.28 The reason for the requirement in paragraph (iv) that the payment is made directly, and not through a trust or other fund, is to give effect to the policy of encouraging public support for those injured in an accident. Paragraph (iv) means that payments from funds set up from public subscriptions in order to assist injured people remain excluded from consideration even if the employer has contributed to the fund.

3.29 In light of how well-established and well-justified the benevolence exception is, and the lack of a discrepancy between the approaches in Scotland and England and Wales, we take the view that, insofar as the deductibility of benevolent payments is concerned, no reform of paragraphs (f) or (iv) is desirable.

Repayable advances made by an employer to the injured person

3.30 In addition to benevolent payments, our 1978 Report distinguished cases where an employer who is *not* the person responsible for the injury makes voluntary payments on the understanding that they should be treated in effect as advances, repayable in the event that the injured person was awarded damages to be paid by the responsible person. We recommended that these payments should not be deducted from an award of damages.[17] The policy underlying these recommendations was the social advantage involved in framing the law so as not to discourage employers from continuing, at least for a period, to pay their injured employees their pre-accident wages or conferring other benefits on them.

Insurance policies which the injured person has arranged and contributed to

3.31 The first type of insurance policy payments which we will discuss are those which the injured person has arranged and wholly contributed to.

3.32 Our 1978 Report noted that there was no direct authority on the deductibility of these types of insurance payments in Scotland, but concluded, having considered English authority, that the proceeds of such insurance policies should not be taken into account: in sum, the law

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[15] As mentioned in para 3.2, England and Wales has no statutory equivalent of the 1982 Act; it is all common law.
[16] *Hussain v New Taplow Paper Mills* [1987] 1 WLR 336 at p 350 per Lloyd LJ. See also *Williams v BOC Gases Ltd* [2000] ICR 1181 at p 1190; *Gaca v Pirelli General plc* [2004] EWCA Civ 373; [2004] 1 WLR 2683 at para [39].
[17] (1978) Scot Law Com No 51, paras 62-64.

would be unreasonable if the prudence of an injured person in effecting accident insurance principally benefited not himself but the person responsible for the injuries.[18] This is known as "the insurance exception".

3.33 The English precedent on the insurance exception goes back to the nineteenth century case of *Bradburn v Great Western Railway Co*,[19] where Pigott B held that sums paid to the injured person under an accident insurance policy which they had arranged for themselves should not be deducted from the damages payable by the responsible person, because 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".[20]

3.34 More recently, in the (also English) case of *Parry v Cleaver*, Lord Reid summarised the point in this way:

> "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 [the responsible person]."[21]

3.35 Before going any further, for the sake of completeness, we ask:

> **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 As mentioned above, our 1978 Report accepts the reasoning that the prudence of an injured person in arranging accident insurance should benefit the injured person rather than the responsible person.[22] However, it goes on to conclude that even if the insurance premiums were paid for wholly by the responsible person, the payments resulting from that insurance policy should also not be deductible from an award of damages. The reasoning given in our 1978 Report was that "it would make for consistency and clarity in the law if the same principle were applied". This rationale leads to the general recommendation that:

> "[n]o 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, payments by a friendly society or trade union, and pensions arising from employment."[23]

3.37 From a policy perspective, we think the conclusion in our 1978 Report needs reconsideration. The reasoning that no account should be taken of payments under insurance policies for which the injured person has paid the premiums seems compelling and

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[18] (1978) Scot Law Com No 51, paras 66 and 69.
[19] (1874) LR 10 Ex 1.
[20] *Ibid* at p 3.
[21] *Parry v Cleaver* [1970] AC 1 at p 14.
[22] (1978) Scot Law Com No 51, paras 65-69.
[23] (1978) Scot Law Com No 51, paras 71-72 and recommendation 18, which is reflected in the terms of s 10(a) of the 1982 Act.

uncontroversial. Less intuitively compelling is the conclusion that for reasons of consistency the same approach should apply to all other insurance policies. And least intuitively compelling of all is the conclusion that the same approach should apply to insurance-based payments arranged by the responsible person.

3.38 To the extent that the insurance exception applies, it seems to us that its true rationale covers only payments under an insurance policy for which the injured person has paid the premiums, or has at least contributed to the premiums. Only if that is the case can it be said that the money paid is money that they spent, which should enure to the injured person's benefit rather than that of the responsible person. The case law in England and Wales is clear about this.[24]

Permanent health schemes

3.39 The issue of the deductibility or otherwise of payments from a permanent health scheme[25] has caused difficulty. In *Lewicki v Brown & Root Wimpey Highland Fabricators Ltd*,[26] the Court of Session held that the Permanent Health Insurance ("PHI") payments should not be "taken into account" (ie deducted) when calculating the injured person's damages. As a result, the injured employee received payments equivalent to 175% of the wages which he would have earned had he not been injured. By contrast, in the English case of *Gaca v Pirelli General plc,*[27] the Court of Appeal held that the proceeds of a group personal accident insurance policy (amounting to £122,787.18) *should* be deducted from the damages awarded to the injured employee.

3.40 The tension between leading Scottish and English authorities has attracted comment.[28] There are both critics and supporters of *Lewicki.*

3.41 Critics emphasise (a) the apparent overcompensation or "double recovery", contrary to a fundamental principle of reparation;[29] (b) the fact that it was the employer who paid the PHI premiums, yet the employer, if also the wrongdoer[30] and found liable, would be obliged to pay damages for full wage loss*;* and (c) English decisions such as *Gaca*[31] have ruled that

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[24] *Parry v Cleaver* [1970] AC 1 at p14; cf also at p 35; cf also *Bradburn v Great Western Railway Co* (1874) LR 10 Ex 1; *Hussain v New Taplow Paper Mills* [1988] AC 514 at p 527; *Hodgson v Trapp* [1989] AC 807 at p 819; *Gaca v Pirelli General plc* [2004] EWCA Civ 373, [2004] 1 WLR 2683 at paras [41]-[59].

[25] Many different schemes exist: for example, permanent health insurance (PHI); group personal accident insurance policies; disability schemes; long term disability income policies; group disability insurance; group income protection policies. Some schemes involve a salary sacrifice, or require employees actively to select a particular benefit and pay towards it. Other schemes may not require an opt-in by the employee, but nevertheless the employee is subjected to tax and national insurance contributions (NIC) in respect of the benefit. The different schemes which currently exist are thought to be more varied and sophisticated than those existing when the Administration of Justice Act 1982 was enacted.

[26] 1996 SLT 145 (Outer House); 1996 SC 200 (Inner House).

[27] [2004] 1 WLR 2683.

[28] For example, R Milligan QC, "Scottish law commission reform on damages for personal injuries" (2018) Rep B 143-1, noting at p 2 that "[a]t present, most cases are settled on a compromise basis given that the result in *Lewicki* leads to double compensation, and most pursuers recognise that. However, there is … inconsistency and uncertainty which makes settlement harder."

[29] See, for example, the Pearson Report (1978), Vol 1, para 472: "[t]he aim [in assessing damages] should be for the damages to be equal to the actual net loss".

[30] And not a third party wrongdoer such as a driver in a road traffic accident.

[31] Which cites well-established authorities including *Bradburn v Great Western Railway Co* (1874) LR 10 Ex 1; *Parry v Cleaver* [1970] AC 1 at p 14; *Hussain v New Taplow Paper Mills* [1988] AC 514, at p 527.

group personal accident insurance payments (apparently similar in concept to permanent health insurance) should be deducted when calculating the injured person's damages.

3.42 Supporters of *Lewicki* rely upon (a) the insurance exception,[32] enacted in section 10(a) of the 1982 Act,[33] namely the well-established principle that where an injured person has prudently provided insurance for an event, the fruits of that insurance should not be taken from him or her;[34] and (b) the fact that employers take out PHI policies for many reasons,[35] not necessarily seeking protection against a claim for wage loss. A further reason sometimes advanced for the non-deductibility of PHI payments is unfairness arising if a wrongdoer enjoys the undeserved advantage of having to pay a lesser sum in damages.[36]

3.43 Against that background, doubts and difficulties have arisen when quantifying damages, advising clients, and making decisions concerning tenders and settlement.

3.44 In the following paragraphs, we outline the nature of PHI-type schemes; suggest that the issue of deductibility of payments from such schemes is a fact-sensitive one, and for that reason, that it may be possible to reconcile the apparently conflicting Scottish and English authorities; re-examine *Lewicki* and *Gaca* with particular emphasis on facts; and finally ask whether any clarification or reform of Scots law is required, and if so, in what way.

Nature of PHI-type schemes

3.45 Some employers take out PHI policies.[37] A typical policy provides income to employees who are unavoidably absent from work for prolonged periods. The absence need not relate to an accident at work or elsewhere, or to negligence on the part of the employer or a third party: illness and other relevant reasons may be specified.

3.46 Usually the premiums are paid by the employer. However in some cases the employee may (i) pay the entirety of the premium; (ii) pay part of the premium; (iii) pay tax and NI on the benefit and/or (iv) actually be paid less because of this element of their employee benefit package.

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[32] Lord Dyson in *Gaca v Pirelli General plc* [2004] 1 WLR 2683 para 41, refers to the description of that exception in *Bradburn* at p 465: "… there would be no justice or principle in setting off an amount which the plaintiff has entitled himself to under a contract of insurance, such as any prudent man would make on the principle of as the expression is, 'laying by for a rainy day'. He pays the premiums upon a contract which, if he meets with an accident, entitles him to receive a sum of money … it ought not, upon any principle of justice, to be deducted from the amount of the damages proved to have been sustained by him through the negligence of the defendants."

[33] In the words "any contractual pension or benefit (including any payment by a friendly society or trade union)". As Lord Prosser pointed out in *Lewicki* in the Outer House at p 150C-D of 1996 SLT 145, section 10 now governs matters, but the role of the common law continues as a possible source of assistance in construing the terms of s 10 when discussing principle and what the law was trying to do.

[34] *Parry v Cleaver* [1970] AC 1, at pp 13 and 15 (Lord Reid); Walker, *Damages,* p 601.

[35] Including making an employment package more attractive to potential employees, and/or achieving a degree of certainty in relation to absent employees.

[36] It should be noted, however, that such a suggestion of unfairness is, strictly speaking, irrelevant. As was pointed out in the Pearson Report (1978), Vol 1, para 472 in the context of the deduction of state benefits: "… it was argued that the defendant should not be relieved of part of his liability by the state; the tortfeasor [the responsible person] should pay in full. This view seems to us to be based on a wrong conception of the tort system, which is directed at the compensation of loss rather than the punishment of wrongdoing. The aim should be for the damages to be equal to the actual net loss suffered …".

[37] As already noted in fn 25 above, there are many different types of scheme, with a range of different features and benefits, some requiring opt-ins by employees, some resulting in direct or indirect contributions by employees, and some not involving any choice or action or reduced wage on the part of employees.

3.47 If an employee is absent for a particular period,[38] 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. These payments might be considered to be "replacement income" for the employee, rather than either "wages" or "sick pay". Depending on the length of absence, the employee may ultimately receive a considerable sum from the PHI scheme.[39]

3.48 The growth of permanent health insurance was noted by the Pearson Commission in 1978:

> "153 The number of people covered by permanent health insurance has been growing, and is probably now approaching a million. Permanent health policies are intended to replace income. They provide periodic payments if the insured person becomes unable to follow his normal occupation because of sickness or accident. The cover available is often limited to two thirds or three quarters of previous earnings, less state insurance benefits. Many policies also provide for part payment if the insured person has to change his job and suffers a partial loss of income. Benefit is normally payable after six months' incapacity, although policies offering earlier payment in return for higher premiums are also available. Contracts normally run for at least five years, or until retiring age. Permanent health insurance cover can be of particular value to the self-employed. We estimate at £1 million a year the amount of permanent health insurance benefits paid out in respect of personal injuries.
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> 154 Our personal injury survey found that about 10 per cent of those injured in 1973 had relevant private insurance cover – presumably either permanent health or personal accident insurance – and 7 per cent had made successful claims …".[40]

Scottish and English authority reconciled?

3.49 *Lewicki* and *Gaca* may be reconcilable. The opposite outcomes reached may be the result of the different factual matrix in each case, rather than the application of different legal principles. 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.

3.50 Giving "consideration" would not necessarily be limited to paying monetary contributions to the cost of the scheme by, for example, being subject to the deduction of a premium contribution from wages in addition to standard deductions for tax and National Insurance Contributions ("NIC"). As Lord Dyson explained in *Gaca*:[41]

> "… 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. There is little guidance in the English cases as to what is sufficient to constitute evidence of indirect payment or contribution. The issue has, however, been discussed in a number of Canadian cases, most notably in

[38] Often fixed at 28 weeks.
[39] For example, in *Lewicki,* payments of £12,663.96 per annum were to continue until the injured person reached normal retirement age or returned to work if earlier.
[40] The Pearson Report (1978), Vol 1, paras 153-154; see too para 149 and following paragraphs.
[41] [2004] 1 WLR 2683 at para 56.

Cunningham v Wheeler (1994) 113 DLR (4th) 1. The majority decision was given by Cory J, who said, at p 15, that what was required was:

> 'that there be evidence adduced of some type of consideration given up by the employee in return for the benefit. The method or means of payment of the consideration is not determinative. Evidence of a contribution to the plan by the employee, whether paid for directly or by a reduced hourly wage, reflected in a collective bargaining agreement, will be sufficient.'"

3.51 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.

3.52 If, on the other hand, it appears that the injured person made no identifiable pre-accident acceptance of or opting-into and contribution to the scheme, then we suggest that the insurance exception in section 10 may not apply, with the result that the scheme's payments or benefits would be deductible.

Lewicki and Gaca: the facts

3.53 In *Lewicki*, considerable detail describing the facts of the case can be found in the judgments.[42] For present purposes, the significant facts included the following:

- In April 1992, the employee was offered a permanent employment. The relevant letter contained paragraphs headed "Remuneration", "Sickness Payment", and "Private Health Plan". Membership of the latter scheme was stated to be provided free of charge, *but to be taxable as a benefit*.

- The employee could elect to be (or not to be) a member of the retirement benefits plan. His eligibility for the scheme, and his rights in relation to it, would depend upon that choice.

- The employee elected to be a member of the retirement benefits plan, and thus was eligible for the PHI scheme. The benefit which he received (namely £1,055.33 per month) depended not merely upon his disability, but upon his being a scheme member. If he had not been a scheme member, the amounts he would receive would be based not upon 75 per cent of his salary, but upon 50 per cent of it.

3.54 Lord Ross appeared to focus more on the concept that the employer could have paid the employee more, reasoning that:

[42] 1996 SLT 145 (Outer House);1996 SC 200 (Inner House).

> " … [the injured employee] 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 employer] in theory could have paid him a higher salary …"

But it will be seen that the facts of the case demonstrate that the employee was contributing indirectly by being subjected to tax and NIC on the notional element of wages representing the "benefit" of being a member of the scheme.

3.55 We suggest therefore that the employee in *Lewicki* satisfied the concept of "some type of consideration given up by the employee in return for the benefit … [for example] a reduced hourly wage …". And although the court in *Lewicki* was not referred to the Canadian case of *Cunningham v Wheeler*,[43] and did not have the benefit of the English Court of Appeal's observations in the later case of *Gaca,* the court's approach to the particular facts in *Lewicki* seems to us to accord with the guidance in both *Cunningham* and *Gaca.*

3.56 In *Gaca,* there appears to be no mention of any sort of consideration or contribution (direct or indirect) given by the employee. It would appear that the group personal accident insurance policy in that case did not require any opt-in election by the employee, and did not result in an employee receiving a reduced hourly wage: certainly that is a reasonable assumption on a close reading of the case report, and is our assumption when suggesting that the cases of *Lewicki* and *Gaca* can be reconciled, despite their different outcomes.

Is clarification or reform necessary?

3.57 When discussing the proper approach to deductibility or otherwise of PHI-type payments received by an injured employee in terms of section 10 of the 1982 Act, it is interesting to note that this Commission's draft Bill, which led to the 1982 Act, contained a clause in the following terms:

> "(a) any contractual pension or benefit (including *any payment under an insurance policy and* any payment by a friendly society or trade union)" [emphasis added].

However the words "any payment under an insurance policy and" were not ultimately included in the Bill at its introduction to Parliament. It is not clear why not, or whether the inclusion of those words would have made a significant difference in past cases.

3.58 We seek views on the following questions:

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

[43] See para 3.50 for the discussion of the case in *Gaca v Pirelli General plc* [2004] 1 WLR 2683.

as a benefit, then any payments made under that policy should not be deducted?

Benefits in kind

3.59 So far we have been discussing whether payments of money received by an injured person ought to be deducted from an award of damages. Following an injury a person may of course receive benefits other than payments of money. In this section we are concerned with benefits in kind.

3.60 The most substantial benefits of this nature which an injured person may receive are likely to be (i) medical treatment and (ii) care and accommodation. These raise similar issues for quantification of damages, since medical treatment is available either privately or through the National Health Service ("NHS"); while accommodation may be arranged privately or provided by a local authority under a statutory duty.

Medical treatment

3.61 Section 2(4) of the Law Reform (Personal Injuries) Act 1948 provides:

> "(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."

3.62 This provision directs the court in assessing the quantum of damages to disregard the availability of NHS facilities. It has attracted a good deal of discussion in previous projects of law reform. The Pearson Report recommended that section 2(4) be repealed and provision made instead 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."[44] Our 1978 Report was also concerned that section 2(4) might lead to over-compensation of injured persons and injustice to responsible persons. It favoured a somewhat broader approach than the Pearson Report, under reference to what was reasonable in general (rather than reasonable on medical grounds). It too recommended the repeal of section 2(4).[45]

3.63 In its 1999 Report, *Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits*,[46] the Law Commission of England and Wales disagreed with the proposition that section 2(4) should be repealed.[47] Four-fifths of those who responded to its consultation on this issue agreed with its provisional view that section 2(4) should not be repealed. The Report summarises various considerations that led the Law Commission to this view: that an injured person should have freedom of choice and not be required to justify making a particular choice; the risk that an injured person might incur irrecoverable private medical costs; and pressure on NHS resources owing to recourse to the NHS by people who would otherwise have sought private treatment. The Law Commission was not persuaded by the suggestion that there was a risk of abuse by injured persons claiming damages for private

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[44] The Pearson Report (1978), Vol 1, para 342.
[45] (1978) Scot Law Com No 51, paras 81-83.
[46] (1999) Law Com No 262.
[47] *Ibid*, paras 3.1-3.18.

care and then making use of free NHS facilities. The evidence did not suggest that this was a problem; and the courts were able to consider an injured person's intentions when making an award of damages. Ultimately, the Law Commission was of the view that the objections raised to section 2(4) were objections that could equally be directed at any assessment of future expenses. Given the possible differences between private and NHS treatment (for example, timing; facilities available), the Law Commission concluded that to allow an injured person to choose between private and NHS treatment did not conflict with the duty of that person to mitigate his or her loss: the test was one of reasonableness.[48]

3.64 This is in fact essentially how the courts have approached the matter. For example, in *Harris v Brights Asphalt Contractors Ltd*, Slade J said this:

> "I think all [section 2(4)] means is that, when an injured plaintiff in fact incurs expenses which are reasonable, that expenditure is not to be impeached on the ground that, if he had taken advantage of the facilities available under the National Health Service Act 1946, those reasonable expenses might have been avoided. I do not understand section 2(4) to enact that a plaintiff shall be deemed to be entitled to recover expenses which in fact he will never incur."[49]

3.65 Other cases have followed the same line:[50] section 2(4) means that a responsible person cannot argue that an injured person ought to have used the NHS, since the duty to mitigate does not require him or her to do so. But a responsible person can argue that the injured person is not in fact going to incur the expense. That is an argument about causation of loss, which the court can resolve on the evidence. To say this is, of course, not in any way to underestimate the difficulties a court may have in trying to reach a view on whether the NHS will continue to provide the care needed and, if so, whether the injured person will make use of NHS provision.

3.66 Our provisional view is that, understood in this way, section 2(4) serves a useful purpose. It eliminates the possibility of arguing that failure to use the NHS is a failure to mitigate loss. At the same time it preserves the ordinary approach of quantification of damages.

3.67 We therefore ask:

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

3.68 Although they are not obliged to turn to the NHS for treatment, it is obvious that some people who sustain personal injuries as a result of another person's fault will in fact make use of NHS provision. That means that expense which, it might be argued, ought to fall on the responsible person in fact falls by means of the NHS on to the taxpayer. In their 1999 Report, the Law Commission of England and Wales raised the question whether it ought to be possible for the NHS to recoup from the responsible person the cost of treatment provided to an injured

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[48] (1999) Law Com No 262, para 3.13.
[49] [1953] 1 QB 617 at p 635 (cited with approval in *Lim Poh Choo v Camden and Islington HA* [1980] AC 174 at pp 187-188).
[50] See eg *Woodrup v Nicol* [1993] PIQR Q104 at Q114-115; *Fletcher v Lunan* 2008 Rep LR 72 at para [9]; *Hill's Guardians v Highland Health Board* [2016] CSOH 146; Munkman and Exall, *Damages for Personal Injuries and Death* (14th edn, 2019), paras 8.8-8.11.

person.[51] The Law Commission was persuaded that in principle the costs of NHS treatment should be recouped. At the time, this was a radical view, which is why the Law Commission recognised that the issue was a political one and why it made no recommendations on the matter.

3.69 The situation has changed considerably. Under the Health and Social Care (Community Health and Standards) Act 2003, a person who makes a compensation payment to an injured person in respect of his or her injuries is now liable to pay charges incurred for NHS ambulance services or for treatment at an NHS hospital provided to the injured person.[52]

3.70 Our impression is that issues in relation to medical treatment and who bears the cost of it are being satisfactorily addressed. The main purpose of providing this outline was to compare the position with benefits provided in the form of care and accommodation, to which we turn in the next section.

3.71 Although we have no recommendations to make in relation to medical treatment, we ask the following question in order to give consultees the opportunity to draw to our attention any issues which they consider are in need of further reform.

3.72 We therefore ask:

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

Care and accommodation

3.73 If a local authority is under a statutory obligation to provide an injured person with accommodation, ought that to be taken into account in quantifying the damages awarded to the injured person? Or, (the same point formulated slightly differently) is a failure by an injured person to make use of local authority provision a failure to mitigate his or her loss? Since for expenses of this kind there is no equivalent to section 2(4) of the 1948 Act the argument that it would be unreasonable for an injured person to incur the cost of privately funded care is in principle available to a responsible person.

3.74 There appears to be little Scottish case law which considers this in detail. From discussions with practitioners in the course of preparing this Paper, we have gained the clear impression that the law in this area is neither clear nor well-understood. That is a serious concern, since the sums at issue can be substantial. And that appears also to be the explanation for the dearth of case law, since cases are settled on an economic basis in the absence of clear authority about the applicable principles.

3.75 It seems to us that the law should give effect to three policies.

3.76 First, different injured persons will need different kinds of care and accommodation, and what they need will be a matter for evidence. It seems to us that an injured person is

[51] (1999) Law Com No 262, paras 3.19-3.43.
[52] 2003 Act, Part 3 (s 202 provides that Part 3 (except s 163(3)) extends to Scotland); see also Department for Work and Pensions, *Recovery of benefits and lump sum payments and NHS charges: technical guidance* (updated 23 March 2021).

entitled to have his or her loss made good.[53] For seriously injured persons that will include the cost of care and accommodation. We can see no reason why an injured person in that situation should not be entitled to opt for private care and accommodation rather than rely on local authority provision.

3.77 Second, 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.

3.78 Third, the corollary of the second policy is that there requires to be some mechanism for avoiding double recovery.

3.79 Before we consider the relevant appellate case law in England and Wales, and the various ways of giving effect to these policies, we have to note that on particular facts they may not be achievable. In particular, contributory negligence poses a problem. Suppose that the injured person is found 50% responsible for the damage for which they claim: the consequence is that the award of damages, including any component awarded in respect of private care and accommodation, will be reduced by 50%. Since the damages will have been assessed on the basis of the multiplier appropriate to the injured person's age and life expectancy, it follows that reducing the award by 50% means that it will no longer be capable of providing the private care and accommodation for the period which it was intended to cover. Two points arise. The first is that this is not, we think, an argument for reducing the damages further on the grounds that the injured person is not in fact going to incur the costs for private care and accommodation for the whole period contemplated by the multiplier. That is because section 1 of the Law Reform (Contributory Negligence) Act 1945 ("the 1945 Act") allows for the reduction of damages only "having regard to the claimant's share in the responsibility for the damage"; the fact that an injured person may run out of funding for private care or accommodation is not covered by this.[54] The second point is that at least for certain injured persons, the cost of care and accommodation once the funds run out may fall on the state rather than on the responsible person. We do not think there is any way of avoiding this consequence: it seems to be a necessary consequence of the effect of the 1945 Act on an award of damages that the award will not be adequate to secure the injured person's assessed needs. But the damages assessed are all that the responsible person is liable to pay.

Case law of England and Wales

3.80 There has been a series of cases in the Court of Appeal raising this issue in relation to the costs of care and accommodation. These cases to some extent turn on the specific provisions of legislation, not all of which apply in Scotland, so for present purposes their value resides largely in any general principles which we can derive from them.[55] We comment briefly on four of these cases.

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[53] Although not concerned with deductions from an award of damages, the case of *Swift v Carpenter* [2020] EWCA Civ 1295 [2021] QB 339; [2021] 2 WLR 248; [2021] 3 All ER 827; [2021] PIQR P3 is a recent example of an injured person who has had their loss relating to an accommodation-based claim made good: see ch1 para 1.11.

[54] Cf the discussion in *Sowden v Lodge and Crookdake v Drury* [2004] EWCA Civ 1370; [2005] 1 WLR 2129 at paras [74]-[84].

[55] See also *Tinsley v Manchester City Council* [2017] EWCA Civ 1704; [2018] QB 767; this case turned on the specific provisions of the Mental Health Act 1983, s 117.

3.81 In *Rialas v Mitchell*,[56] the question was whether the responsible person should pay for a 12-year old boy to be cared for at home or whether he should live in an institution, in which case the costs of caring for him would be lower. The court held that, while there might be cases in which it was unreasonable for an injured person or his representative to insist on care at home, this was not such a case. Once it was concluded that it was reasonable for the injured party to remain at home, there was no ground for saying that the responsible person should not meet the reasonable cost of his care at home.[57]

3.82 In *Sowden v Lodge* and *Crookdake v Drury*,[58] the Court of Appeal dealt with two appeals raising the question of assessment of damages in the context of a local authority being under a statutory duty to provide certain care services, with the injured person in each case making use of those services; but there also being an issue about the need for satisfaction of care needs going beyond the local authority provision. The resolution of both appeals turned on the evidence. It may, however, be helpful to identify the key factors in the court's reasoning as well as to note what was said about the problems which confront the courts in deciding cases of this kind.[59]

3.83 The court held that the appropriate test for assessing the injured person's requirements was not (as the judge at first instance had held) the best interests of the injured person, but what was reasonable to meet those requirements. The court found that given that life at home for the injured person was not an option and local authority provision at no cost was available, the injured person suffered no loss. Double recovery[60] was avoided. The conclusion was therefore that a comparison must be made between what the injured person reasonably required and what the local authority was likely to provide in the discharge of its statutory duty (performed either voluntarily or, if need be, compelled by a court). If the statutory provision provided free of charge to the injured person met their reasonable requirements, then the responsible person need not pay for some different care regime.[61] In other words, the responsible person's obligation (if any) was to "top up" the level of care provided by the local authority.

3.84 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?

3.85 The court also commented on the difficulties involved in assessing the measure of damages in cases of this kind. First, if a court concludes that it is reasonable for the injured person to make use of private care for a period of many years, the award of damages is likely to be "astronomically high", and its very amount might become a reason for saying that it is

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[56] [1984] 128 SJ 704; Kemp & Kemp, *Quantum of Damages*, para 13-003, 13-003.1, and 13-003.21.

[57] Note the rule in the 1982 Act, s 11: In an action for damages for personal injuries, any saving to the injured person which is attributable to his maintenance wholly or partly at public expense in "(a) a hospital or other institution, or (b) accommodation provided by a care home service (as defined by section 2(3) of the Regulation of Care (Scotland) Act 2001 (asp 8), shall be set off against any income lost by him as a result of the injuries". (Part I of the Regulation of Care (Scotland) Act 2001, which contained s 2(3), was repealed by the Public Services Reform (Scotland) Act 2010, s 106 and sch 14, para 37). Section 5 of the 1982 Act is the equivalent provision for England, Wales and Northern Ireland.

[58] [2004] EWCA Civ 1370; [2005] 1 WLR 2129.

[59] *Ibid* at paras [90]-[92].

[60] In this context, double recovery means recovering the loss both in damages from the responsible person, and in services from the local authority.

[61] [2004] EWCA Civ 1370; [2005] 1 WLR 2129 at paras [35]-[36] (submissions) and [41].

not reasonable for the injured person to use private care services.[62] Second, the court may suspect that care provided by local authorities will not be of the same standard as that provided privately. Third, a local authority makes its own assessment about whether the care it provides ought to be provided for the injured person at home or in a residential home, but this assessment need not necessarily agree with a judge's assessment of what an injured person's reasonable needs require. Fourth, some judges have an instinctive feeling that if no award for care is made at all, the responsible persons and their insurers will receive an undeserved windfall.

3.86 In *Crofton v National Health Service Litigation Authority*,[63] the court identified two issues. The first, threshold, issue was whether the local authority was satisfied, in a case in which a person was awarded substantial damages, that it had to make any welfare arrangements for that person at all. If so, the second question was whether it could have regard to the award of damages in deciding what payments to make to the injured person to meet his or her needs. The court held that under the relevant legislation the local authority could not take account of the injured person's resources at the threshold stage. But it was held that, given that the local authority was going to make direct payments to meet the cost of the injured person's care, the court should take them into account in quantifying damages. The court went on to make these general observations:

> "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. This point needs to be made because there is much to be said for the view that the tortfeasor [the responsible person] should pay, and that the state should be relieved of the burden of funding the care of the victims of torts and that its hard-pressed resources should be concentrated on the care of those who are not the victims of torts … [Insert added.]
>
> 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."[64]

3.87 In *Peters v East Midlands Strategic Health Authority*,[65] the Court of Protection, which in England and Wales is the body responsible for making decisions on financial or welfare matters for people who lack mental capacity to make them for themselves, had appointed a deputy to manage the injured person's property and affairs. The court returned to the central issue discussed in *Sowden* and took the opportunity to confront the issue of principle whether, when an injured person had both a right of action against a responsible person to recover damages and a statutory right to have the loss made good in kind by the provision of services by a public authority, the injured person was entitled to recover damages as a matter of right or only if in the circumstances it was reasonable for them not to rely on their statutory right. The court concluded:

> "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

[62] *Ibid* at para [90] per Longmore LJ.
[63] [2007] EWCA Civ 71; [2007] 1 WLR 923.
[64] [2007] EWCA Civ 71; [2007] 1 WLR 923 at paras [87] and [91] respectively.
[65] [2009] EWCA Civ 145; [2010] QB 48.

> 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."[66]

3.88 This decision therefore departs from the "top up" approach of *Sowden* and places responsibility for provision of care squarely on the responsible persons and their insurers. Indications so far are that it has been well received.[67]

3.89 The court was, however, concerned about the possibility of double recovery.[68] If necessary, it held that it would be possible to conclude on the evidence that there was no possibility of double recovery, since the trial judge had held that if the responsible person paid the care and accommodation costs, no recourse would be made to the local authority for provision of care or accommodation "in the absence of some wholly unexpected development".[69] But there remained a concern about what would be a wholly unexpected development and who would judge whether one had occurred.

3.90 The court was satisfied, however, 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 their behalf. This is where the role of the Court of Protection became important. The undertaking was to the effect that the senior judge of the Court of Protection would be notified of the proceedings;[70] 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.

3.91 Before leaving this discussion of case law in England and Wales, 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 there should be no double recovery; that the responsible person rather than the state should pay; and that local authorities should perform their statutory duties. Various possible approaches are set out in *McGregor on Damages*:

> "How then should the matter be dealt with so as to ensure that it is the tortfeasor [the responsible person], 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 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 County Council v Hooper*, [1997] 1 All ER 532, 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

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[66] *Ibid* at para [53].
[67] See eg *Dorset NHS Primary Care Trust and Anor v Coombs* [2013] EWCA Civ 471; [2014] 1 WLR 111 at para [11]; *McGregor on Damages* (21st edn, 2021), paras 40-191 to 40-193.
[68] [2009] EWCA Civ 145; [2010] QB 48 at paras [56]-[66].
[69] *Ibid*, at para [62].
[70] I.e. the civil claim for damages.

> route has opened for allowing the full damages to be paid by the tortfeasor [the responsible person]. 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."[71] [Inserts added.]

3.92 This brief review of the recent appellate case law in England and Wales supports the general propositions that an injured person is entitled to the reasonable costs of care; 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 that in making an award of damages the court should seek to guard against the risk of double recovery.

3.93 Accordingly, we ask:

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?

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?

Possible models for reform

3.94 There seem to be three possible models which might effectively implement these policies, allowing for the fact that one injured person will opt for one type of care and another for another.

3.95 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. 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.

3.96 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. 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.[72]

3.97 The third is that the injured person opts for private care and accommodation, and the award of damages covers the cost of obtaining it. It can be seen that this model raises the

[71] (21st edn, 2021), para 40-256 (footnote references omitted).
[72] Cf para 3.69 above.

issue of possible double recovery, since an injured person receiving private care has not waived any entitlement to seek support from a local authority.

3.98 At present there appears to be no systemic means of avoiding double recovery. Instead, in each case it is a matter for the judge on the evidence to form a view about whether the injured person is in fact going to make use of private facilities or public ones. Even if we leave aside the case of an injured person who embellishes his or her evidence or misleads the court about his or her true intentions, the difficulties which confront the judge are serious ones. How can the judge be sure what facilities will be available some years hence either through local authority or private provision? How can the judge assess which kind of facility is likely to be most appropriate for the injured person many years after the date of the proof? What account can be taken of the possibility of the injured person having 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)?

3.99 In one sense, this is simply an aspect of the difficulties inherent in a once and for all quantification of damages, which necessarily involves making assumptions about the future. But we think the issue is particularly concerning here, owing to the size of the sums involved.

3.100 It is notable that the concern about double recovery surfaces repeatedly in the English cases discussed above. In particular, it is striking that in *Peters v East Midlands Strategic Health Authority*[73] the Court of Appeal said that there was no reason in policy or principle why an injured person who wishes to opt for self-funding and damages in preference to relying on the statutory obligations of a public authority should not be entitled to do so as a matter of right. But this conclusion was underpinned by the fact that the court was satisfied that it had identified a robust means of avoiding double recovery. As we have seen, that undertaking related to the Court of Protection.[74] There is no such equivalent in Scotland.

3.101 We have a number of questions following from the discussion above:

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?

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[73] [2009] EWCA Civ 145; [2010] QB 48.
[74] See paras 3.87 and 3.90 above.

Chapter 4 Provisional damages and asbestos-related disease

Background

4.1 In the course of the consultation on items for inclusion in our current programme of law reform, it was suggested to us that the present project might examine the operation of provisional damages, in particular in the context of asbestos-related disease.

4.2 In this chapter we look briefly at the law relating to provisional damages in general and then at how it operates in practice in relation to asbestos-related disease.

Provisional damages in general

4.3 Section 12 of the Administration of Justice Act 1982 ("the 1982 Act") introduced the concept of provisional damages into Scots law.[1] Before section 12 came into force in 1984, the courts applied the well-established rule that, since a pursuer in an action for personal injuries was pursuing a single cause of action, he or she must claim the entirety of the loss in one action.[2] That was a firm rule, in spite of the fact that it was recognised, especially if the pursuer's prognosis was uncertain, that the court might be unable to form a precise estimate of the loss which he or she would or might sustain in the future.

4.4 The Law Commission of England and Wales[3] and, later, the Royal Commission on Civil Liability and Compensation for Personal Injury ("the Pearson Commission")[4] came to the view that this approach involved injustice for some injured people. It was not satisfactory for defenders either. If, for example, the evidence before a court showed that the injury from which a pursuer was suffering at the date of proof might become more serious in the future, all that the court could do in order to reflect this in an award of damages was to quantify damages on the assumption that exacerbation of the injury did take place, and then discount that award by the percentage likelihood that it would not occur. As the case law recognised, however, this approach had the consequence that the court either over-compensated a pursuer who did not in fact go on to develop the exacerbated injury or under-compensated one who did. Provisional damages were intended to address this.

4.5 Section 12 sets out the basis for awarding provisional damages for personal injuries:[5]

> "(1) This section applies to an action for damages for personal injuries in which—

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[1] For general discussion, see J Blaikie, "Provisional Damages: A Progress Report" (1991) 36 JLSS 109; J Blaikie, "Provisional Damages: Please May I Have Some More?" (1995) 1(1) SLPQ 65.
[2] *Stevenson v Pontifex & Wood* (1887) 15 R 125.
[3] Law Commission, *Personal Injury Litigation – Assessment of Damages* Law Com No 56 (1973) paras 232-242.
[4] Royal Commission on Civil Liability and Compensation for Personal Injury, *Report,* (HMSO 1978) Cmnd 7054-I, ("The Pearson Report (1978)") Vol 1, paras 559 and 584-585.
[5] In general, see A Paton QC (ed), *McEwan and Paton on Damages for Personal Injuries in Scotland* (2nd edn, 1989), ch 2. For the equivalent provisions in England and Wales, see Senior Courts Act 1981, s 32A (the drafting of which is very similar to the 1982 Act, s 12); Civil Procedure Rules 1998, (SI 1998/3132) Part 41; and G Exall (ed), *Munkman and Exall: Damages for Personal Injuries and Death* (14th edn, 2019) ch 16.

(a) there is proved or admitted to be a risk that at some definite or indefinite time in the future the injured person will, as a result of the act or omission which gave rise to the cause of the action, develop some serious disease or suffer some serious deterioration in his physical or mental condition; and

(b) the responsible person was, at the time of the act or omission giving rise to the cause of the action,

(i) a public authority or public corporation; or

(ii) insured or otherwise indemnified in respect of the claim.

(2) In any case to which this section applies, the court may, on the application of the injured person, order—

(a) that the damages referred to in subsection (4)(a) below be awarded to the injured person; and

(b) that the injured person may apply for the further award of damages referred to in subsection (4)(b) below, and the court may, if it considers it appropriate, order that an application under paragraph (b) above may be made only within a specified period.

(3) Where an injured person in respect of whom an award has been made under subsection (2)(a) above applies to the court for an award under subsection (2)(b) above, the court may award to the injured person the further damages referred to in subsection (4)(b) below.

(4) The damages referred to in subsections (2) and (3) above are—

(a) damages assessed on the assumption that the injured person will not develop the disease or suffer the deterioration in his condition; and

(b) further damages if he develops the disease or suffers the deterioration …"

4.6 The first point to note is that it is up to the injured person whether or not to apply for provisional damages.[6] If an application is made, the court must be satisfied that there is a risk that at some time in the future the injured person will, as a result of the act or omission, develop some serious disease or serious deterioration in their physical or mental condition. If the court is satisfied of that, then it may award (a) damages assessed on the assumption that the injured person will not develop the disease or suffer the deterioration; and (b) at a future date, on a further application by the injured person, additional damages if the injured person has developed the disease or suffered the condition. Damages under (a) are provisional damages, precisely because they allow for the pursuer to return to the court for a further award. It is always open to an injured person to choose not to apply for provisional damages but to opt for a final settlement.

4.7 Quantification of the provisional element of the damages is straightforward, inasmuch as it is a matter of quantifying at the date of the action the damages appropriate for the injuries

[6] Cf Act of Sederunt (Rules of the Court of Session 1994) 1994 (SI 1994/1443), rule 43.2(2); Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 (SI 1993/1956), rule 36.12.

which the pursuer has already sustained. The award is made on the assumption that the pursuer's condition remains as it is and does not deteriorate.

4.8 Whether the award should be provisional and therefore leave it open to the pursuer to return to the court for a further award will depend on the medical evidence available to the court when the application is made. As section 12(1)(a) makes clear, the court needs to be satisfied that there is a risk that the injured person will in the future suffer a serious disease or serious physical or mental deterioration as a result of the defender's act or omission. The case law makes it clear that the court must be able to satisfy itself of the existence of a risk in relation to specific serious disease or deterioration: so, for example, the court's interlocutor may specify that the pursuer may return to seek a further award of damages in the event that he or she develops mesothelioma or bronchial carcinoma.[7] The specified disease(s) or deterioration which enable the pursuer to return to court are usually known as the "return conditions". If the court is not satisfied on the evidence that it can identify the disease or deterioration which it is apprehended will occur, provisional damages will not be appropriate,[8] and there will be no basis for returning to the court at some future date if some further consequence materialises.

4.9 Case law also makes it clear that where an action is settled by way of tender and acceptance,[9] it is not sufficient that the parties agree that the court should award provisional damages: section 12(1)(a) requires the court itself to be satisfied of that.[10] Acceptance by a pursuer of an offer by the defender to make payment of provisional damages implies that liability is admitted: therefore, if and when the pursuer comes to apply for a further award of damages, the only points in issue will be whether the pursuer has developed the specified condition; whether it was caused by an act or omission of the defender; and the amount of any further damages that should be awarded.[11]

4.10 Accordingly, in any case where a pursuer seeks provisional damages, the key issues with which the court will be faced are: whether there is a real rather than a remote risk of the development of the disease or deterioration; whether the disease or deterioration can be described as "serious"; and whether it can be described with sufficient precision in order to set out the return conditions applicable to the award.

4.11 The law will, no doubt, continue to be developed through future cases. But our review of previous cases does not suggest that there is a general need for reform of the law of provisional damages. There is just one qualification to this conclusion, to which we turn in the next section, entitled "asbestos-related disease". Before we do so, we ask:

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[7] See eg *Fraser v Kitsons Insulation Contractors Ltd* [2015] CSOH 135; 2015 SLT 753 at para [22]; *W v Advocate General for Scotland* [2015] CSOH 111; 2015 SLT 537 at para [49]; also *Bonar v Trafalgar House Offshore Fabrication Ltd* 1996 SLT 548.

[8] See eg *Young v Scottish Coal (Deep Mining) Co Ltd* 2002 SLT 1215.

[9] See McEwan and Paton, *Damages for Personal Injuries in Scotland* (2nd edn), chapter 18. A formal offer in the judicial process, made by the defender to the pursuer to settle the action by payment of a specific sum together with the expenses of the process to the date of the tender. Acceptance of a tender requires a signed minute of acceptance of tender. Once the minute is lodged, there is an enforceable contract.

[10] See eg *Fraser v Kitsons Insulation Contractors Ltd* [2015] CSOH 135; 2015 SLT 753, disagreeing with the approach taken in *Talbot v Babcock International Ltd* [2014] CSOH 160; 2014 SLT 1077.

[11] *Boyd v Gates (UK) Ltd* [2015] CSOH 100; 2015 SLT 483.

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?

Asbestos-related disease

4.12 There are particularities in relation to asbestos-related disease and the treatment of pleural plaques specifically. Pleural plaques are lesions on the pleura, the membrane surrounding the lungs, caused by exposure to asbestos dust. They are nearly always asymptomatic but they may signify an increased risk of developing more serious asbestos-related conditions such as mesothelioma or bronchial carcinoma. Such conditions often arise many years after the diagnosis of pleural plaques.

4.13 Prior to the 2007 House of Lords' decision in *Rothwell v Chemical and Insulating Co Ltd*[12] insurers (acting for former liable employers) habitually admitted liability and settled claims for pleural plaques. This was on the basis of court cases in which damages had been awarded for pleural plaques.[13] However insurers defended ten test cases in England and Wales which ultimately led to the House of Lords deciding in *Rothwell* that pleural plaques did not give rise to a cause of action because they did not signify damage or injury that is sufficiently material to found a claim for damages in tort.

4.14 The House of Lords decision was not in line with Scottish Government policy and the concern was that, whilst it would not be binding in Scotland, it would be highly persuasive. Hence the Cabinet Secretary for Justice made a statement on 29 November 2007 that the Government would "overturn a House of Lords ruling preventing workers suing employers over an asbestos-related condition" and that the new measures would take effect from the date of the House of Lords decision on 17 October 2007.[14]

4.15 The Damages (Asbestos-related Conditions) (Scotland) Act 2009 ("the 2009 Act") now provides that asbestos-related pleural plaques are a personal injury which is not negligible and constitutes actionable harm for the purposes of an action of damages for personal injuries.[15] It contains retrospective provision in order to fully address the effect of the judgment in *Rothwell*[16] and also provides that the time period between 17 October 2007 and the date the Act came into force does not count towards the three year limitation period for raising an action of damages in respect of asbestos-related pleural plaques, pleural thickening or asbestosis.[17]

4.16 A separate but related development then came in 2010 in *Aitchison v Glasgow City Council*[18] where a bench of five judges disapproved the proposition that separate conditions

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[12] [2007] UKHL 39; [2008] 1 AC 281 (heard with three other appeals: *Topping v Benchtown Ltd (formerly Jones Bros Preston Ltd)*; *Johnston v NEI International Combustion Ltd*; and *Grieves v F T Everard & Sons Ltd and another*).
[13] See eg *Gibson v McAndrew Wormald & Co Ltd* [1998] SLT 562 and *Nicol v Scottish Power plc* [1998] SLT 822. Also see para [43] of *Rothwell v Chemical and Insulating Co Ltd* [2007] UKHL 39 (Lord Hope).
[14] "SNP to reverse asbestos decision" *BBC News* (29 November 2007) available at: http://news.bbc.co.uk/1/mobile/scotland/7118805.stm.
[15] Sections 1(1) - (2). Section 2(2) makes similar provision for asbestos-related pleural thickening and asbestosis.
[16] *Ibid,* s 4(2).
[17] *Ibid,* s 3.
[18] [2010] CSIH 9; 2010 SC 411; 2010 SLT 358.

could give rise to separate limitation periods. In that case the issue was whether psychological injury developing some years after a physical injury should be analysed as a separate condition. The answer was that it should not, because that would be inconsistent with the single-action rule referred to above.[19] The case law to the contrary such as *Carrnegie v Lord Advocate*[20] was overruled. More directly relevant to the present issue, the court disapproved the approach adopted in the asbestos case *Shuttleton v Duncan Stewart & Co Ltd,*[21] of identifying separate limitation periods in respect of separate diseases or impairments: in that case the pursuer had sued in respect of (i) pleural plaques; (ii) pleural thickening; and (iii) asbestosis. In *Aitchison* the Lord President observed: "[t]here 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."[22]

4.17 In our 2007 *Report on Personal Injury Actions: Limitation and Prescribed Claims* we too had, prior to the decision in *Aitchison*, reached the conclusion that identifying separate limitation periods for distinct injuries was an approach that could not be reconciled with the single-action rule.[23]

4.18 Therefore the current position for those people who have been negligently exposed to asbestos is that, if they become aware that they have developed pleural plaques, they have three years from the date of that awareness to raise proceedings.[24] Although the pleural plaques are nearly always asymptomatic, nonetheless from the date of awareness of the pleural plaques the limitation period starts to run against any future claim they may have in respect of a more serious and fatal asbestos-related disease, such as mesothelioma.

4.19 A pursuer who has been diagnosed with pleural plaques can either seek provisional damages or seek an award in full and final settlement of the claim. The test for provisional damages under section 12(1)(a) of the 1982 Act requires a court to be satisfied that there is a risk that the pursuer will in the future develop a serious disease or suffer some serious deterioration in his or her condition.

4.20 If the pursuer opts for provisional damages, they will be awarded in respect of the pleural plaques. Depending on the medical evidence, the award may include an element to reflect any anxiety which the diagnosis of pleural plaques causes the pursuer. Again depending on the medical evidence, the pursuer may be found entitled to return to court to seek further damages if he or she develops another asbestos-related condition, such as mesothelioma or bronchial carcinoma.

4.21 If the pursuer opts for an award in full and final settlement of the claim, the award of damages will reflect (i) the pursuer's existing medical condition (ie the existence of the pleural plaques) and (ii) the increased risk that the pursuer may go on to develop a further asbestos-related condition, such as mesothelioma. Quantifying this second part of the award (ie the appropriate award of solatium in respect of prospective mesothelioma) will depend on

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[19] *Ibid,* at para [32].
[20] 2001 SC 802.
[21] 1995 SCLR 1137.
[22] *Aitchison v Glasgow City Council* [2010] CSIH 9; 2010 SC 411 at para [42].
[23] Scottish Law Commission, *Report on Personal Injury Actions: Limitation and Prescribed Claims* (2007) Scot Law Com No 207 at paras 2.17-2.24.
[24] Prescription and Limitation (Scotland) Act 1973, s 17(2)(b).

evidence regarding the likelihood that the pursuer will go on to develop that condition and, if so, when. The resulting figure will then need to be discounted to reflect the fact that the pursuer is receiving the award immediately.

4.22 If provisional damages are sought in a case of pleural plaques then, before considering issues of quantum, liability must either be admitted or established at proof. The scheme under which the court can be invited to make an award of provisional damages is predicated on the admission of liability. The quantum for a claim for pleural plaques is likely to be relatively low, in the range of £6,000 to £10,000, whereas quantum for a fatal condition that the pursuer may subsequently develop is likely to be significantly higher. If an award is sought in full and final settlement then a further £2,000 to £10,000 may be added onto the quantum for pleural plaques giving a potential maximum award of approximately £20,000.[25]

4.23 However, there are various factors at play in cases involving asbestos-related disease which mean that the situation is often far more complex than described in paragraph 4.19 above and that pursuers are often, through no fault of their own, not actually in a position to raise an action for damages let alone to make the choice between provisional damages or damages in full and final settlement. They are therefore often denied an effective remedy not only for the pleural plaques themselves but for a serious and fatal disease such as mesothelioma.

4.24 First of all, as outlined above, the 2009 Act makes an asymptomatic condition, which may be a precursor of a very serious disease, an actionable harm. Without appropriate legal advice it is difficult to imagine that a person with such a condition could know that they have a right of action for the pleural plaques, let alone foresee that if they do not exercise that right then, say 15 years later, should they develop a serious and fatal symptomatic condition such as mesothelioma, they would not have any remedy as a result of that failure to act.

4.25 Secondly, set in context, the pleural plaques may be diagnosed as part of a wider medical investigation and may be incidental at that time to the diagnosis of other symptomatic conditions. The medical records may note the diagnosis but not necessarily what the pursuer has been told or actually understood (bearing in mind also that the pursuer may be being told of other diagnoses that are more serious than the diagnosis of pleural plaques). The pursuer may or may not be referred by the medical practitioner to a charity such as Action on Asbestos: this may depend on the training and experience of the medical practitioner involved, including factors such as whether they were trained in England and Wales where pleural plaques have not been an actionable harm since the House of Lords decision referred to above. Even if so referred, the pursuer, if not suffering from any symptomatic conditions, may not seek advice from a charity – after all they have no symptoms, are unaware of the consequences and therefore continue with life as normal. Moreover, where the person has gone on to develop a more serious condition many years later they may simply not remember what they were told at the time of diagnosis as it may well have seemed, for the reasons mentioned above, relatively unimportant to them at the time.

[25] *Harris v Advocate General for Scotland* 2016 SLT 572 sets out a formula for calculating quantum and is now used in practice rather than the previous voluntary frameworks.

4.26 Regardless of those factors, the result of a combination of the 2009 Act and the law on limitation as it stands after *Aitchison* means that the time bar clock starts running on diagnosis of the pleural plaques.

4.27 One solution might be thought to be section 19A of the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act"). Section 19A provides the court with discretion to allow an action to be taken outwith the limitation period where it considers it equitable to do so. That section provides specifically that:

> "(1) Where a person would be entitled, but for any of the provisions of section 17, 18, 18A or 18B of this Act, to bring an action, the court may, if it seems to it equitable to do so, allow him to bring the action notwithstanding that provision.
>
> (2) The provisions of subsection (1) above shall have effect not only as regards rights of action accruing after the commencement of this section but also as regards those, in respect of which a final judgment has not been pronounced, accruing before such commencement.
>
> (3) In subsection (2) above, the expression 'final judgment' means an interlocutor of a court of first instance which, by itself, or taken along with previous interlocutors, disposes of the subject matter of a cause notwithstanding that judgment may not have been pronounced on every question raised or that the expenses found due may not have been modified, taxed or decerned for; but the expression does not include an interlocutor dismissing a cause by reason only of a provision mentioned in subsection (1) above.
>
> (4) An action which would not be entertained but for this section shall not be tried by jury."

4.28 As background to the operation of section 19A, it should be noted that our Report on Personal Injury Actions: Limitation and Prescribed Claims recommended that section 19A should be retained, and that its exercise should not be subject to a time-limit. We also recommended the introduction of a list of factors to which the court may have regard in the exercise of its discretion.[26] At the time, nearly all consultees agreed that a judicial discretion to override the time-bar should be retained, and a significant minority of consultees considered that a statutory non-exhaustive list of factors would be of benefit. Our consultation was followed in December 2012 by the Scottish Government's consultation paper on the Civil Law of Damages: Issues in Personal Injury.[27] The analysis of written responses noted that concerns had been raised by defenders that the discretionary power increased uncertainty, and by pursuers that it was used too sparingly.[28] That analysis also noted that respondents were evenly split over whether there should be a statutory, non-exhaustive list of matters relevant to determining whether it would be equitable for the courts to exercise the discretion in section 19A.[29]

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[26] Scottish Law Commission, *Report on Personal Injury Actions: Limitation and Prescribed Claims* Scot Law Com No 207 (2007) para 3.1 *et seq* and recommendations 13 to 15; see paragraphs 3.36 and 3.37 for our proposed list of factors. A similar but not identical set of factors is found in the equivalent provision applying in England and Wales: section 33 of the Limitation Act 1980.

[27] Scottish Government, *Civil Law of Damages: Issues in Personal Injury - A Consultation Paper* (2012).

[28] Scottish Government, *Civil law of Damages: Issues in Personal Injury - Analysis of Written Consultation Responses* (2013) para 4.35.

[29] *Ibid,* para 4.39

4.29 Leaving aside the question of whether section 19A can be regarded as operating satisfactorily in personal injury cases generally, we understand that practitioners representing both pursuers and defenders have concerns about its operation in the context of pleural plaques. There is a view that the application of section 19A by different courts causes too much uncertainty, and possibly unfairness. Recent decisions on where the equities lie include *Quinn v Wright's Insulations Ltd*[30] and *John Kelman v Moray Council*[31]. In *Quinn* the pursuer's claim was held to be time-barred, the court noting that there was "no explanation for the failure of the deceased to raise an action within 3 years of his acquiring the relevant knowledge in late 1993 or early 1994"[32] and that there was an "absence of any explanation as to why the limitation period expired in the first place"[33]. Whereas in *Kelman*, the pursuer's claim was allowed to proceed, the court noting that "[t]he evidence that he was not aware that he had a right to claim compensation for having been exposed to asbestos until his diagnosis with mesothelioma in 2019"[34] was "a relevant factor"[35] and that "Mr Kelman conducted his life in complete ignorance of the implications of a diagnosis of pleural plaques. As soon as the link between mesothelioma from which he now suffers and that asymptomatic condition was pointed out, he took immediate action".[36] The court in Kelman distinguished the circumstances in that case to those in *Quinn* in stating that "there is here a very clear, reasonable and convincing explanation for the failure to raise proceedings timeously." [37]

4.30 While accepting that each case is fact-sensitive, it is possible that the law on provisional damages as it operates in the context of pleural plaques in combination with the law on limitation and the 2009 Act may produce some inequitable results, and on any view, a high degree of uncertainty. We understand from practitioners in our Advisory Group that there are in excess of 700 new claims for pleural plaques every year, and that the number of such cases has not yet reached its peak and may not do so until around 2025. We therefore consider that the way that the law operates in this area should be carefully examined.

4.31 The law on limitation as it affects such cases has been considered extensively in the past. Paragraph 4.28 above mentions the review of section 19A both in our *Report on Personal Injury Actions: Limitation and Prescribed Claims* in 2007 and in the subsequent Scottish Government consultation paper on the Civil Law of Damages: Issues in Personal Injury in December 2012. The Scottish Government consultation paper and subsequent analysis also considered another of our recommendations, that the subsequent emergence of additional injury should not give rise to a fresh date of knowledge and a further consequential limitation period for a claim for that additional injury.[38] That recommendation was effectively implemented by the Inner House decision in *Aitchison*. The paper expressly considered fatal industrial diseases such as mesothelioma and explained that:

> "3.39 In reviewing these issues, it is recognised that the Commission and, in the subsequent *Aitchison* case, the Inner House marshalled extremely cogent arguments

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[30] [2020] CSOH 21; 2020 SCLR 731.
[31] [2021] CSOH 131. See also David Tait, "Recent time bar decisions in asbestos claims in Scotland", 19 January 2022, SLN https://www.scottishlegal.com/articles/david-tait-recent-time-bar-decisions-in-asbestos-claims-in-scotland
[32] [2020] CSOH 21; 2020 SCLR 731, para 65.
[33] *Ibid*, para 70.
[34] [2021] CSOH 131, para 46.
[35] *Ibid*, para 46.
[36] *Ibid*, para 51.
[37] *Ibid*, para 47.
[38] Scottish Government, *Civil Law of Damages: Issues in Personal Injury – A Consultation Paper* (2012) para 3.32 *et seq*.

around the fundamental principle that following a delictual act a single cause of action arises, in which all associated damages must be sought. The Commission highlighted that although the approach adopted in *Carnegie* might appear initially attractive; it presented a number of practical difficulties and was liable to produce anomalous results."

4.32 On the other hand, the court in *Aitchison* noted that the problems occasioned by later-emerging injuries are not new and have always been a feature of personal injury litigation. The court highlighted the potential difficulty in many cases of deciding whether a later-emerging condition was wholly distinct and that there seemed to be no reason in principle why damages in the one case should be irrecoverable as of right, but in the other be recoverable. The court's view was that there will always be hard cases however the line is drawn and the discretionary remedy provided by section 19A of the 1973 Act caters for these:

> "3.42 The effect of the law as it currently stands following *Aitchison* and as it stood before *Carnegie* is that damages can be obtained for the immediate injury. Pursuers who wish to protect their position against the risk that a significantly more serious physical or psychiatric injury might emerge in future will require to initiate a claim timeously or reach agreement that the time bar point will not be taken for subsequent injuries. Where a subsequent claim is time-barred, the court can be asked to use its discretion under section 19A to allow the action to continue."[39]

4.33 The Scottish Government consultation paper specifically asked:

> "Do you agree that it is in the interests of justice that there should be only one limitation period following the discovery of a harmful act, during which all claims for damages for associated injuries must be brought?"[40]

The majority of those who responded agreed that the principle of "one action; one harm" (also known as the single-action rule) should be retained.[41] It was argued that this principle brought a degree of certainty for both pursuers and defenders. It was also considered that the discretion afforded to the courts under section 19A of the 1973 Act is an effective means of overriding limitation periods. Those who disagreed considered that the principle had serious consequences for both people suffering latent industrial diseases, such as asbestos-related conditions, and survivors of historic child abuse. In particular one respondent stated that:

> "As a result of *Aitchison* ... a terminally ill mesothelioma victim who claims compensation for this condition but who (having known about the presence of pleural plaques but failed to claim for it) will no longer be able to receive the help he desperately needs, quite literally, dying without compensation."[42]

4.34 The Scottish Government concluded, as a result of this consultation, that they did not intend to make any amendments to the existing law, explaining that that decision must also

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[39] *Ibid*, para 3.42.
[40] *Ibid*, para 3.43.
[41] Scottish Government, *Civil Law of Damages: Issues in Personal Injury – Scottish Government Response to the Consultation* (2013) p 13.
[42] Scottish Government, *Civil Law of Damages: Issues in Personal Injury – Analysis of Written Consultation Responses* (2013) para 4.53.

be seen in the context of their proposals to, amongst other things, extend the limitation period from 3 to 5 years.[43]

4.35 Notwithstanding the 2012 consultation, the law of limitation of actions has been amended in relation to one specific type of personal injury, namely that arising from childhood abuse. The Limitation (Childhood Abuse) (Scotland) Act 2017 ("the 2017 Act") removed the three-year limitation period for an action of damages in respect of personal injuries arising from childhood abuse (which includes sexual abuse, physical abuse and emotional abuse).[44] The abuse must have taken place when the pursuer was under 18, but the injury may manifest itself only much later. Claims of this nature are not subject to limitation, although a court may decide not to allow an action to proceed if it is satisfied that it is not possible for a fair hearing to take place or that the defender would be substantially prejudiced if the action were to proceed.[45] The Policy Memorandum to the Bill at introduction explained that the Scottish Government took the view that the law on limitation at that time did not strike the right policy balance in relation to cases of childhood abuse and that survivors often do not acknowledge or disclose the abuse for many years.[46]

4.36 We would welcome views as to whether the law strikes the right policy balance as between the interests of pursuers, defenders and insurers in cases involving work-induced asbestos-related conditions. We are unaware of any other latent diseases which produce the same consequences. In *Quinn v Wright's Insulations Ltd* the policy balance was referred to as follows:

> "It is pre-eminently for Parliament to determine how the interests of pursuers, defenders and insurers ought to be balanced in the public interest where particular conditions or categories of claim may come to merit special treatment making exceptions from the normal operation of the law. The Compensation Act 2006, the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007 and the Damages (Asbestos-related Conditions) (Scotland) Act 2009 are all examples of legislation of that sort.
>
> In relation to claims for childhood abuse, Parliament has recognised that a number of special features justify a different approach to time-bar, nothwithstanding the existing provision in s.19A: ss17A-D of the 1973 Act, added by the Limitation (Childhood Abuse) (Scotland) Act 2017. The considerations relating to childhood abuse are obviously rather different from those relating to mesothelioma. It is, however, an example of Parliament weighing the competing considerations in the public interest where there may be grounds for treating a particular type of claim in a special way in relation to the limitation of claims. Since the decision in *Aitchison*, Parliament has not made any special provision in relation to mesothelioma or any other late-emerging industrial disease, so far as time-bar is concerned."[47]

4.37 Whilst noting that the circumstances and considerations around childhood abuse are very different from those around asbestos-related disease, we would nevertheless welcome

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[43] Scottish Government, *Civil Law of Damages: Issues in Personal Injury – Scottish Government Response to the Consultation* (2013) p 14.
[44] Section 1 of the 2017 Act, inserting a new s 17A into the 1973 Act.
[45] New s 17D of the 1973 Act inserted by s 1 of the 2017 Act.
[46] Policy Memorandum to the Limitation (Childhood Abuse) (Scotland) Bill, available at: https://www.parliament.scot/-/media/files/legislation/bills/previous-bills/limitation-childhood-abuse-scotland-bill/introduced/policy-memorandum-limitation-childhood-abuse-scotland-bill.pdf.
[47] [2020] CSOH 21, paras [59] – [60].

views as to whether it would be appropriate to have a similar policy-driven law reform in the context of asbestos-related disease, and in particular in the context of pleural plaques. Various approaches could be considered, for example:

(a) Given that the difficulties outlined above arise as a result of what happens at the time of the diagnosis of the asbestos-related pleural plaques itself (or pleural thickening or asbestosis), one solution could be to provide that a diagnosis of pleural plaques would not, on the basis of time bar, preclude further action at any future time. In other words, this option would remove the diagnosis of pleural plaques from all consideration of time bar.

(b) A related solution could be to provide that a claim for asbestos-related pleural plaques (or pleural thickening or asbestosis) would become time-barred 3 years after diagnosis but that claims for any subsequent related disease such as mesothelioma would not be affected by the diagnosis of pleural plaques itself. It could be said that this would simply be reverting from the single action rule in *Aitchison* to the approach in *Carnegie* of identifying separate limitation periods in respect of separate diseases or impairments. The important distinction to that approach would be that it would be a specific rule for asbestos-related disease cases only.

(c) Another solution could be to create a special category of pursuer exempt from limitation: an injured person diagnosed with asbestos-related pleural plaques, pleural thickening or asbestosis could be made exempt from limitation following the model offered by the 2017 Act.

4.38 Although the concerns and uncertainties that we have identified do not centre around the fact that liability is admitted by the defender or established at proof at the time that provisional damages are awarded, we suggest that consideration could be given as to whether the establishment of liability could be deferred, by agreement between the parties, to a later point should a subsequent more serious condition emerge.

4.39 For the sake of completeness we also noted that difficulties surrounding the framing of a tender and an acceptance in a case of provisional damages were highlighted in *Fraser v Kitsons Insulation Contractors Ltd* and *Talbot v Babcock International Ltd* but that practice now seems to be settled in line with the former case.[48] Of note is that in England and Wales the court rules require an order for an award of provisional damages to "specify the disease or type of deterioration in respect of which an application may be made at a future date" whereas court rules in Scotland do not.[49]

4.40 Accordingly, we ask:

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

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[48] *Fraser v Kitsons Insulation Contractors Ltd* [2015] CSOH 135 and *Talbot v Babcock International Ltd* [2014] CSOH 160. For commentary, see Robert Milligan QC, "Scottish Law Commission Reform on Damages for Personal Injuries" (2018) 143 Rep B 1-4.

[49] Civil Procedure Rules 1998, (SI 1998/3132) rule 41.2(2)(a).

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?

Chapter 5 Management of damages awarded to children

Introduction

5.1 This chapter is concerned with awards of damages to children. If a child is seriously injured he or she may receive substantial awards of damages in relation to heads of loss, including future loss. An award of damages to meet the costs of care or accommodation for the rest of the child's lifetime may be substantial. It will be important to ensure that these damages are invested appropriately in the best interests of the child so that their needs will be protected for as long as that is required.

5.2 In terms of the Age of Legal Capacity (Scotland) Act 1991,[1] a person under the age of 16 has legal capacity to instruct a solicitor, in connection with any civil matter, where that person has a general understanding of what it means to do so. A person aged 12 or more is presumed to be of sufficient age and maturity to have that understanding, but there is no presumption that a child under that age does not. A person who has legal capacity to instruct a solicitor also has legal capacity to sue, or to defend, in any civil proceedings.[2] All children under 16 have capacity to hold any right, title or interest.[3]

5.3 Despite provision for children under 16 having capacity to raise an action it is, in most cases, the parents[4] or guardians[5] of the child who will make a damages claim on the child's behalf. Where a parent or guardian makes a successful damages claim on the child's behalf, the award will be paid to that person on behalf of the child. It has been suggested that "(e)ven if the decree is for a very substantial amount, it is considered demeaning to concerned parents to suggest that they are not capable of managing a capital sum awarded to their child, when they have responsibility for his or her care, education and upbringing and with all the other major decisions in his or her life."[6] It may be however that some parents or guardians, when faced with the task of the management and appropriate investment of large sums of money for the interest of the child over the longer term, choose to seek assistance in managing the award. In a minority of cases, there can be concerns about the management of such awards by the parents or guardian, for example in endeavouring to ensure that the damages are indeed employed in the interests of the child.

5.4 This chapter reviews the current legal measures to provide supervision and support when an award of damages is made to a child, whether the need arises from parental choice or from the need for supervision. In doing so, we are mindful of ensuring our review stays within the scope of this project, namely awards of damages for personal injury. There may be other situations where parents or guardians are required to manage substantial assets on

[1] Section 2.
[2] Section 2(4B).
[3] Section 1(3)(e).
[4] See paragraph 5.7 for a definition of the term "parent".
[5] Persons appointed as guardian by a will or court order have the responsibilities and rights of a parent imposed and conferred on them by the Children (Scotland) Act 1995, ss 1, 2, 7 and 11.
[6] DA Kinloch and C McEachran, "Damages for Children – Some Reflections" (2003) 51 Rep B 2.

behalf of their child, as for example where a child inherits money or property. Moreover, awards of damages may be intermingled with other assets held on behalf of the child. For present purposes, the focus of this chapter is on the court's role and power when awarding damages and ways of managing a child's damages, whether awarded by way of judicial decision or by extra-judicial settlement. General questions of trust law and succession are beyond the scope of the current project. Nevertheless, we invite general comments at the end of the chapter on whether any further reform is required to safeguard awards of damages to children.

5.5 This chapter is therefore structured as follows: in the first section, we review the primary provisions regarding awards of damages to children contained in section 13 of the Children (Scotland) Act 1995 ("the 1995 Act"), and provide a brief overview of sections 9 and 11 of that Act; in the second section, we move on to consider personal injury trusts for children; and in the third and final section we outline a range of other measures which may be used when damages are awarded to children, including the appointment of *curators bonis* and *curators ad litem*. Before turning to the first section, however, we wish to draw attention to a preliminary point, concerning the possible cost implications of reform, as regards the Accountant of Court.

Children (Scotland) Act 1995: The Accountant of Court

5.6 The paragraphs which follow examine the provisions in the1995 Act which address the safeguarding and management of a child's property, and which are applicable to awards of damages. In all of the processes in place, an important role is played by the Accountant of Court. At the outset, we wish to point out that, currently, the Accountant of Court does not charge a fee, or recover expenses and outlays, in respect of work carried out by her office under these provisions. This is because the relevant Fees Order does not provide for that to be done. If the extent of the work of the Accountant of Court were to be increased or altered in line with any of the proposals discussed below, there could be cost implications in relation to resources and additional training needs.

Children (Scotland) Act 1995, section 13

5.7 The key provision of the 1995 Act dealing with managing and safeguarding an award of damages to a child is section 13. It empowers the court, where in any court proceedings a sum "becomes payable to, or for the benefit of" a child under 16 years of age, to make such order as it thinks fit "relating to the payment and management of the sum for the benefit of the child." The phrase "in any court proceedings … becomes payable" encompasses an extra-judicial settlement in the course of an action.[7] Where an order is made in favour of a child's parent in terms of section 13(2)(b)(ii), "parent" is defined in section 15 of the 1995 Act and is importantly not limited to parents with parental responsibilities and rights ("PRRs").[8]

[7] McEwan and Paton, *Damages for Personal Injuries in Scotland* (2nd edn), para 8-18, fn 5.
[8] Section 15 defines "parent" as "in relation to any person, means, subject to Part IV of the Adoption (Scotland) Act 1978 and sections 27 to 30 of the Human Fertilisation and Embryology Act 1990 and Chapter 3 of Part 1 of the Adoption and Children (Scotland) Act 2007 and Part 2 of the Human Fertilisation and Embryology Act 2008 and any regulations made under section 55(1) of that Act of 2008, someone, of whatever age, who is that person's genetic father or mother".

5.8 Possible orders in terms of section 13 include:

(a) the appointment of a judicial factor to invest, apply or otherwise deal with the money for the benefit of the child (section 13(2)(a));

(b) that the money be paid -

(i) to the sheriff clerk or the Accountant of Court (section 13(2)(b)(i)); or

(ii) to the child's parent or guardian (section 13(2)(b)(ii)),

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

(c) that the money be paid directly to the child (section 13(2)(c)).

We understand from the Accountant of Court that, in the period 2007-2021, there have been 14 referrals to her Office in terms of section 13(2)(b)(i).

5.9 The first point to note is that there is no obligation on the court when making an order under section 13 to take account of the three fundamental principles which inform many other decisions affecting children, namely, the welfare of the child, the no order principle[9], and the views of the child.[10] Instead the court is given a very general discretion to make "such order 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 an application may be made for an order under section 11(1)(d) for administration of the child's property, where an order under section 13 has been made, in which case the court is directed to have regard to those principles.[11] As set out in section 11(7) of the 1995 Act, where the court makes an order relating to PRRs in terms of section 11, it "shall regard the welfare of the child concerned as its paramount consideration and shall not make any such order unless it considers that it would be better for the child that the order be made than that none should be made at all" and must, so far as practicable, give the child an opportunity to express his or her views and then have regard to those views. In terms of the Children (Scotland) Act 2020 ("the 2020 Act"), section 11(7) will in due course be repealed and replaced by new sections 11ZA and 11ZB of the 1995 Act which further expand the matters the court must have regard to under these three principles when deciding whether or not to make an order under section 11.[12] Would it be desirable to require any order made by the court in relation to an award of damages to a child to be made with the welfare of the child as the paramount consideration? Moreover, would it be appropriate to have regard to the views of the child as to what should happen to an award which is, after all, being made specifically because the child has sustained an injury? The minimum intervention principle may also help inform the shape of any investment of an award of damages. We would therefore welcome views of consultees as to whether the court should retain its general discretion to make an order under section 13 where it sees fit or whether its order making

[9] 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.
[10] K Norrie (ed), *Green's Scottish Family Law Legislation*, para A.880.2.
[11] Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 No 1956 (S 223), r 33.95: "Where the sheriff has made an order under section 13 of the Act of 1995 (awards of damages to children), an application by a person for an order by virtue of section 11(1)(d) of that Act (administration of child's property) may be made in the process of the cause in which the order under section 13 of that Act was made."
[12] Inserted by section 1(4) of the Children (Scotland) Act 2020 and not yet in force. See para 5.32.

power should be more prescribed in line with section 11 of the 1995 Act (as amended by the 2020 Act) or whether any other reform should be considered.

5.10 Accordingly, we ask:

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

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?

5.11 When looking at the circumstances in which the court might make one of the various orders available in terms of section 13, Lord Carloway, in *I v Argyll and Clyde Health Board*, put it like this:

> "However, a question remains in relation to the identification of circumstances under which the court, either *ex proprio motu* or, for example, on the application of the law agents acting for the child's representatives, might appoint a factor, order payment to the Accountant or attach conditions to any payment made to the child's parents. No doubt it is not possible to lay down any hard and fast rules. However, unless there is at least some basis for supposing that the parents or guardians might misappropriate or misapply the child's funds, it would seem an extreme and costly remedy to appoint a judicial factor (especially if such an appointment has not been taken into account in the award of damages or settlement figure). At the other end of the spectrum, even where parents appear reliable and trustworthy, it may be prudent to attach some form of reporting requirement, such as is contained in the conditions attached to this case, at least where the sum involved is very large and upon which a child, who will require a guardian as an adult, may be largely dependent in later life. … It should not be assumed, however, that the court will consider it necessary to impose conditions in every case involving a substantial award or settlement to a child even where that child might require a guardian upon reaching adulthood."[13]

We examine this discretionary power of the court further in the paragraphs which follow.

Children (Scotland) Act 1995, section 13: "Wide discretionary power"

5.12 This Commission, in the Report which preceded the 1995 Act, recommended that the "general powers" which were at that time contained in rules of court, should be in primary legislation. This Commission's view was that having the main provision on awards of damages to children in primary legislation would provide uniform powers for all courts, and that any necessary supplementary rules should be in rules of court.[14] Section 13 implements that recommendation.[15]

5.13 The court's power in terms of section 13 is regarded as a "wide discretionary power".[16] The orders which the court may make under section 13(2), without prejudice to the general

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[13] 2003 SLT 231 at p235 at para [18].
[14] Scot Law Com No 135, 1992, para 4.7.
[15] *Ibid*, rec 20.
[16] *I v Argyll and Clyde Health Board* 2003 SLT 231 at p233 at para [8] per Lord Carloway.

power to make such order relating to the payment and management of the sum for the benefit of the child as it thinks fit, are examined below.[17]

5.14 *The appointment of a judicial factor:* We understand from the Accountant of Court that in relation to the administration of awards of damages, judicial factors are appointed infrequently under section 13(2)(a). The costs of appointment and administration can be substantial, with the result that the appointment of a judicial factor will generally be considered to be appropriate only in cases which are complex, and potentially where the sum of damages awarded is itself substantial.

5.15 The expenses of administration by a judicial factor can comprise a head of claim in the proceedings.[18] Although the current law relating to judicial factors can be cumbersome, the Scottish Government consulted[19] in 2019 on the recommendations of this Commission to modernise it, for example, by replacing the current requirement to find caution with a discretion of the court (to be exercised sparingly) as to whether or not to require a judicial factor to find caution.[20] (Of the three consultees who answered this question, all three supported the proposal that caution should only be required in exceptional circumstances.[21]) This Commission also recommended a move away from a duty to preserve the assets of the estate to a general duty to manage the estate for the benefit of those who have an interest in it.[22] We remain of the view that a reformed law governing judicial factors can provide "an efficient system under which a capable, independent person, supervised by the Accountant, may take over the administration of property with which the owner cannot or will not deal properly."[23]

5.16 *Money to be paid to the sheriff clerk:* We understand from the Scottish Courts and Tribunals Service that, for the calendar years 2014 to 2020, no funds appear to have been consigned with any sheriff clerk under an order of the court in terms of section 13(2)(b)(i) of the 1995 Act.[24] If funds were to be consigned with the sheriff clerk under the direction of the court, no fees would be chargeable, as the current Sheriff Court Fees Order makes no provision for fees to be charged. It is apparent that this option is not being used. It is possible that the All Scotland Sheriff Personal Injury Court ("ASPIC")[25] may have an effect on the frequency of consignation of funds with the sheriff clerk. Since the court has only been operational for a few years, it is too early to form a clear view.

5.17 *Money to be paid to the Accountant of Court:* Where money has been paid to the Accountant of Court in terms of section 13(2)(b)(i), she takes professional financial advice as to its management. Appropriate investment will depend on the circumstances of the individual case. The involvement of the Accountant of Court can continue until the child's 16th birthday.

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[17] *Green's Annotated Rules of the Court of Session* 2020-2021 (W Green), Vol 1, para 49.88.2, contains observations on the orders which are possible in terms of the 1995 Act, s 13.
[18] *Forsyth's CB v Govan Shipbuilders* Ltd 1988 SLT 321.
[19] Scottish Government, *Consultation on Judicial Factors* (Scottish Government, August 2019).
[20] Scottish Law Commission, *Judicial Factors* (2013) Scot Law Com No 233, paras 3.30-3.36.
[21] Scottish Government, *Judicial Factors: Analysis of Responses to Scottish Government Consultation* (Scottish Government, July 2020), page 15.
[22] Scottish Law Commission, *Judicial Factors* (2013) Scot Law Com No 233, paras 4.10-4.14.
[23] *Ibid*, para 1.3.
[24] Whilst an order of the court under the 1995 Act, s 13, would be recorded in an interlocutor of the proceedings to which it relates, the information on funds deposited with sheriff clerks is based on a manual search of the appropriate court's consignation register.
[25] Courts Reform (Scotland) Act 2014 with effect from 22 September 2015, and secondary legislation extending the jurisdiction of ASPIC to the whole of Scotland.

5.18 If the funds to be invested are relatively small, the Accountant of Court will deposit the funds in an interest-bearing bank account. Otherwise, the funds will generally be invested in an investment portfolio to achieve capital growth, although it should be noted that these funds are not "tied up" in the investment: requests for access to funds can be accommodated. The Accountant of Court will usually retain a small cash balance in a "working account". Although the Accountant of Court does not charge fees or recover expenses or outlays in relation to the administration of the child's funds, management charges will be incurred in relation to any investment portfolio. It appears to us that management of such funds by the Accountant of Court works well.

5.19 *Money to be paid to the child's parent or guardian*: We noted above[26] the words of Lord Carloway in *I v Argyll and Clyde Health Board*, on the circumstances under which the court might attach conditions to any payment made to the child's parent or guardian under section 13(2)(b)(ii). Indeed, in that case, the court did attach a number of conditions, as recommended by the Accountant of Court and accepted by the parents in question, as follows:

> "[The Accountant] observed that the court could attach conditions to the payment of the funds to the parents including those whereby: (i) the parents confirmed to the Accountant that the funds had been invested in accordance with the advice disclosed; (ii) the parents lodged with the Accountant a voucher demonstrating the level of initial investment; (iii) the funds would be held in joint names of the pursuers on behalf of the child; (iv) any withdrawals of in excess of 2.5 per cent of the capital would require the approval of the Accountant; (v) all revenue would be expended for the benefit of the child; and (vi) each year, the parents would lodge with the Accountant a report on the state of the funds and a summary of the level and nature of expenditure during the course of the year. Although [the Accountant] would not normally have considered it prudent to transfer large sums to non-professionals, the circumstances here were sufficiently special as to merit such an action if the conditions set out above were attached to any order made."[27]

5.20 It may indeed be prudent to attach some form of reporting requirement, at least where the sum involved is substantial and the child may be largely dependent upon it in later life.[28] We are of the provisional view that these matters are best left to the discretion of the court in the circumstances of each particular case but would welcome views.

5.21 We are also aware that in the early 2000s, in cases involving large settlements, there were a handful of referrals to the Accountant of Court from the court asking for her views on what arrangements would be most suitable for the management of these sums. In those cases the Accountant of Court provided a report to the court before it made its order. In doing so the Accountant of Court could provide advice on whether she thought it appropriate for the child's parent or guardian to administer the award and, if so, any conditions that she thought advisable. We are of the provisional view that there is merit in the court being obliged, prior to granting decree, to inquire into the future administration of the child's damages[29] and, if the court considers it necessary, to remit the case to the Accountant of Court in terms of section 13 for advice.[30] We appreciate that the imposition of such an obligation would ultimately be a

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[26] Para 5.11 above.
[27] *I v Argyll and Clyde Health Board* 2003 SLT 231 at pp 234-235, para [14] per Lord Carloway.
[28] *Ibid*.
[29] Whether awarded by the court after proof, or arising from settlement arrangements such that the court simply interpones authority to a Joint Minute, and does not grant decree for a specified sum of money.
[30] Usually given in the form of a report from the Accountant of Court.

matter for the Scottish Civil Justice Council and the Lord President to consider, possibly by way of rules of court or a practice note.

5.22 Accordingly we seek views on the following questions:

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

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?

5.23 *Money to be paid directly to the child:* In the case of sums paid directly to the child under section 13(2)(c), regard will be had to the capacity of the child. Generally, such an order will be appropriate only in relation to smaller sums. Again, we are of the provisional view that this matter is best left to the discretion of the court in the circumstances of each particular case but would welcome views.

5.24 As far as the wide discretionary powers of section 13 are concerned, we are of the provisional view that there are two aspects to be addressed.

5.25 The first is whether it is necessary to clarify the scope of the discretion conferred upon the court in terms of trusts. Does the current wording of section 13 empower the court to direct payment of damages into a trust, and if so, into anything more than a bare trust? A bare trust is one where (in this case) the injured person is the sole beneficiary, both as to income and capital. A trust may however be constituted to benefit different beneficiaries, may differentiate between the beneficiaries for income or capital, and may leave the determination of the beneficiaries to the trustees' election from a defined class of beneficiary. For present purposes we call such a trust a "substantive trust". On one view, it is arguable that, where an award of damages has not yet been paid, the wide powers conferred by section 13 would permit the court to order that a substantive trust be set up for a child.[31] But the case law which preceded the 1995 Act[32] makes that proposition questionable, given that the effect of the appointment of trustees would be to take the place of or supersede the rights of the child's parents or guardians. Moreover, where the court orders that a substantive trust be set up for a child, there will need to be a direction as to who the beneficiary is in the residue of the trust. This effectively requires the court to make a decision which is testamentary in nature, regarding

[31] D Francis, "Personal injury trusts – the PITs? (Pt 2)" 2011 SLT (News) 95.
[32] *Boylan v Hunter* 1922 SC 80 (where a judicial factor was appointed to manage the award for the child where the mother was accepted as being "unfit" to have this responsibility).

who will benefit from the residue of the trust on the death of the child. Kessler and Grant suggest that:

> "… it is clear that [section 13] empowers the court to direct the payment to a bare trust, that is, a trust where the trustees hold property on trust for the underage beneficiary absolutely. It may be that the discretion is wide enough for the court to authorise payment under a settlement agreement to a substantive trust (i.e. a trust which is not a bare trust, for instance, a trust under which the principal beneficiary is only entitled to the income of the fund during their life, with capital held for some other beneficiary after their death). It might even be wide enough to empower the court to order payment direct to a substantive trust. But both those possibilities are uncertain and untested."[33]

This uncertainty is unhelpful and undesirable. The alternative position was set out, prior to the enactment of section 13, in *Scott v Occidental Petroleum (Caledonian) Ltd*, where it was held that "the proper practice, in cases where the court is satisfied that the administration of damages cannot otherwise be reasonably secured, is for a judicial factor to be appointed and not for the powers of the tutor or curator to be superseded by the appointment of a trustee".[34]

We consider that it would be beneficial to remove such uncertainty, and to clarify the extent of the court's power, if any, to order or authorise an award of damages to be placed in trust.

5.26 In this context, it should be noted that the discretionary power of the court under section 13(1) must also be read and given effect to in a way which is compatible with article 1 of the First Protocol to the European Convention of Human Rights ("A1P1").[35] An order or authorisation by the court to the effect that the child's damages be paid into a trust might amount to deprivation of the child of their possessions in terms of A1P1. This is because ownership of the trust fund into which the damages are paid will rest with trustees who might be empowered by the trust deed to make the fund over to persons other than the child. While a statutory provision enabling the court to order that one private person[36] be deprived of their possessions in favour of others[37] might be justifiable in the public interest, provided that it was a proportionate means of achieving a legitimate objective, the matter is untested.[38] Assuming that section 13 gives the court power to authorise a substantive trust[39] it is possible that the effect of A1P1 is to restrict the discretion of the court to the approval of trusts only where the trustees cannot use the funds to benefit persons other than the child during the child's lifetime.

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[33] Kessler and Grant, *Drafting Trusts and Will Trusts in Scotland* (2nd ed), para 25.3.
[34] *Scott v Occidental Petroleum (Caledonian) Ltd* 1990 SC 201 at p207; cf *Boylan v Hunter* 1922 SC 80.
[35] Human Rights Act 1998, s.3(1). Under A1P1 every person is entitled to the peaceful enjoyment of their possessions and no-one is to be deprived of their possessions except in the public interest and subject to the conditions provided for by law. It also provides that a state may control the use of property in accordance with the general interest.
[36] ie the child.
[37] ie the trustees.
[38] As one example the public interest might be to ensure that the damages be available to educate the child once the child reaches the age of majority (16 years).
[39] Akin to the substantive trust authorised by the English court in the Thalidomide damages case *Allen v Distillers Co (Biochemicals) Ltd* [1974] QB 384. In that case the trust deed provided that upon the death of the child the funds should be distributed under the law of intestacy, failing which to a thalidomide charity.

5.27 Accordingly, we ask:

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?

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

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

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

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

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

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

5.28 The second aspect arising from section 13 concerns the power to make an order that money be paid to the sheriff clerk. We understand that the power is never exercised. One option for reform might be the abolition of the power. However the effect of the introduction of the ASPIC with the consequent transfer of personal injury cases from the Court of Session to the Sheriff Court, has yet to be fully assessed.[40] It is possible that, in personal injury cases, sheriff clerks may come to provide services similar to those currently provided by the Accountant of Court. We propose that the power should be retained meantime.

5.29 Accordingly, we ask:

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

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

[40] See para 5.16 above.

Children (Scotland) Act 1995, section 13: where "a sum becomes payable to"

5.30 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. So, for example, once damages have already been paid then it seems that section 13 no longer applies. In *S v Argyll and Clyde Acute Hospitals NHS Trust*,[41] Lord Brodie opined in this scenario that "it seemed to me that counsel was correct when he accepted that "the horse has bolted"."[42]

5.31 However, this apparent gap is covered by section 11. As we discuss below,[43] where there are existing proceedings, an application under section 11(1) of the 1995 Act may be made by minute in the existing process. The application might seek an order under section 11(1)(d) for the administration of property, which could include an award of provisional damages, that a child has already received. The court may make such order as it thinks fit and, without prejudice to the generality of subsection (1), may make an order 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.[44]

5.32 An application in terms of section 11(1)(d) of the 1995 Act in relation to the administration of a child's property is also available, in the relevant circumstances in proceedings in the Court of Session or sheriff court, whether those proceedings are or are not independent of any other action.[45] The "relevant circumstances" are where an application for an order under that subsection is made by a wide variety of persons, including a person who, not having, and never having had, PRRs in relation to the child, claims an interest, and also a person who has PRRs in relation to the child.[46]

5.33 It therefore appears to us that there is adequate provision in section 11 to enable 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, but we would be grateful for the views of consultees. In this context, it may be worth noting that a court using section 11 to make an order is required to take account of the three principles in section 11(7).[47] By contrast, section 13 does not contain such a requirement, but the court has a wide discretion.[48]

5.34 We therefore ask:

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.

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[41] 2009 SLT 1016.
[42] *Ibid* at para [6].
[43] Para 5.39, fn 54 below.
[44] 1995 Act, s 11(2)(g).
[45] *Ibid*, s 11(1)(d).
[46] *Ibid*, s 11(3)(a).
[47] As soon to be amended by the 2020 Act.
[48] See para 5.9 above.

Children (Scotland) Act 1995, section 13: need for procedure where no court proceedings?

5.35 For completeness, we mention that the 2019 Consultation on Judicial Factors by the Scottish Government drew attention to the fact that section 13 of the 1995 Act is limited in its effect in that it applies only where the award of damages to the child is made in court proceedings.[49] The Consultation sought views on setting out a procedure where options similar to those available under section 13(2) would apply where there is an extra-judicial settlement, namely, where no joint minute of settlement or subsequent decree has taken place. Five of the nine respondents answered this question, all of them in support of the proposal to create a procedure to make it consistent with situations where there is a formal settlement.[50]

5.36 It is important to note that there are other routes to payment of damages which do not involve court proceedings. Such routes are often referred to as "extra-judicial settlement", and might include payment by an insurance company before any court proceedings are raised, or possibly an award made by an arbitrator.[51]

Children (Scotland) Act 1995, section 11

5.37 A further provision in the 1995 Act dealing with managing and safeguarding a child's property is section 11. Section 11(1)(d) provides that, in relevant circumstances, in court proceedings whether these are or are not independent of any other action, an order may be made relating to certain matters including the administration of a child's property. Again, while this could extend more broadly to other property, it could include administration of an award of damages, and a court, in making such an award, could include an order under section 11(1)(d).

5.38 The court may make an order 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.[52] In considering whether to make such an order, the court shall regard the welfare of the child as its paramount consideration, and shall take appropriate account of the child's views.[53] Remits to the Accountant of Court involve a substantial amount of work with the child's parents and others to establish the child's future needs. Thereafter, options for managing the funds are put to the court by the Accountant of Court.

5.39 Any person with an interest (such as a solicitor acting for the child) who has concerns about the way in which a sum awarded as damages to a child is being administered may apply for an order.[54] In the words of this Commission in our 1992 Report, which preceded the 1995 Act:

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[49] Scottish Government, *Consultation on Judicial Factors* (Scottish Government, August 2019), para 3.12. The consultation closed on 20 November 2019.
[50] Scottish Government, *Judicial Factors: Analysis of Responses to Scottish Government Consultation* (Scottish Government, July 2020), page 12.
[51] Although such an award is rare in personal injury cases.
[52] Section 11(2)(g).
[53] 1995 Act, s 11(7). The Children (Scotland) Act 2020 re-enacts, with modifications, s 11(7) in ss 11ZA and 11ZB, clarifying that all children who are capable of forming a view, and who may wish to give a view, are able to do so.
[54] Note the 1995 Act, s 14(1) and (2), regarding jurisdiction in relation to applications for administration of a child's property. Also, rules of court provide that where the court has made an order under the 1995 Act, s 13, a subsequent application for an order in relation to the administration of the child's property under s 11(1)(d) may be made by minute in the process in which the s 13 order was made: Act of Sederunt (Rules of the Court of Session 1994) 1994 (SI 1994/1443), r 49.88; Act of Sederunt (Ordinary Cause Rules) 1993 (SI 1993/1956), r 33.95; Act of Sederunt (Simple Procedure) 2016 (SSI 2016/200), r 17.11 and r 17.12.

> "This would provide an extra layer of protection for those cases where, for example, damages or a legacy or other funds belonging to a child had been transferred to a parent for administration but where subsequent events showed that there was a serious risk of maladministration."[55]

5.40 Use of the provisions appears to be infrequent however. The Accountant of Court is not aware of any appointments of a judicial factor in terms of sections 11(1)(d) and 11(2)(g), and is aware of only two cases since 2006 where the court has granted an order remitting the matter to the Accountant of Court to report on suitable arrangements for the future management of an award of damages made to a child.

5.41 We therefore propose no change to the process for the administration of a child's property under section 11.

Children (Scotland) Act 1995, section 9

5.42 For completeness, we mention section 9, which 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. We would agree with Professor Norrie's analysis that awards of damages are not covered by section 9: "the defender who is obliged to pay does not "hold" property owned by or due to a child: rather he has an obligation to pay money to the child, which is a entirely different matter."[56] Accordingly, section 9 does not fall within the scope of this review.

Low usage of provisions

5.43 Before we leave discussion of the 1995 Act, we draw attention to the fact that those provisions which involve the Accountant of Court have one factor in common: their usage is lower than might be expected.

5.44 Since 2007, there appear to have been approximately 135 applications to the Accountant of Court for a direction in terms of section 9(3). Such applications are optional, but the concern is that there might be instances where an application for a direction could be in the interests of the proper administration of the funds on behalf of the child, but is not being made. Also, although the website of the Accountant of Court sets out details of the process, it might be that holders of awards of damages on behalf of a child (or their advisors) are not always aware that this option is available to them.

5.45 It appears that, since 2006, there have been only two cases where the court has granted an order remitting the matter to the Accountant of Court. Furthermore, since 2007, there have been only 14 referrals to the Accountant of Court in terms of section 13(2)(b)(i). Again, it is, of course, open to the court in terms of section 13 to make such order as it thinks fit relating to the payment and management of the sum for the benefit of the child.

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[55] Scot Law Com No 135, 1992, para 4.18.
[56] K Norrie (ed), *Green's Scottish Family Law Legislation*, para A.876.3.

5.46 We therefore ask:

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?

Personal injury trusts for a child

5.47 One method of safeguarding an award of damages made to a child is to set up a personal injury trust. We understand that a common form of trust used for these purposes is a personal injury trust ("PIT"), which has the advantage of protecting payments made to the beneficiary from being considered in assessing entitlement to means tested benefits and local authority services.[57] Where appropriate, the terms of the trust can set out the age at which the funds will be transferred to the child. Transfer could therefore be at an age later than the age of legal capacity, although it should be noted that, if the trust was a bare trust, then upon reaching 16 years of age the child (or his or her guardian under the Adults with Incapacity (Scotland) Act 2000 ("the 2000 Act") if the child were incapable), would be entitled to have the trust fund transferred to them.[58] The child's parents or guardians can act as trustees. A professional person may be appointed as an additional trustee but, if in a minority, might not constitute an effective safeguard against the decision making of the other trustees should that safeguard be necessary. In short: the effectiveness of the trust will depend largely on who the trustees are.

5.48 There are costs involved in setting up a PIT. Where it is necessary owing to the child's incapacity or vulnerability, the costs of setting it up and administering it should be recoverable heads of loss. If setting up a PIT would be beneficial but cannot be said to be necessary, the costs of establishing it are unlikely to be recoverable.[59] This might be the case where the reason for setting up the trust was not the child's lack of capacity or vulnerability but was instead to optimise the child's financial position. We understand that, if sums received by way of an award of damages are settled into an appropriately drafted trust, they are effectively ring-fenced, with the consequence that the child remains eligible to receive means-tested benefits. This being so, it may be that a solicitor should advise that damages should be settled in trust.[60] For present purposes, however, it is enough to note that there may be advantages currently enjoyed by PITs which may mean that they play an important role in practice.

Personal injury trusts for a child: authority?

5.49 There appears, however, to be a difference of opinion on how PITs can be set up for children.

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[57] A "PIT" was defined in para [15] of *Good v Lanarkshire Health Board* 2015 Rep L R 99 as follows: "the principal purpose of a personal injury trust … is to prevent any award of damages from affecting the payment of means tested benefits. It is disregarded capital, ring fenced from current or future assessment."

[58] See Scottish Law Commission, *Trusts*, Scot Law Com No 239, 2014, paras 17.2 and 17.3.

[59] *Forsyth's CB v Govan Shipbuilders Ltd* 1988 SC 421; *Good v Lanarkshire Health Board* [2015] CSOH 75; 2015 Rep. L.R. 99 at paras [15]-[17]; cf also *SRC on behalf of NSEC v Kemp* [2011] CSOH 43. See also R Milligan, "Can I recover the costs of investing my damages and protecting them in a personal injuries trust?" (2015) 127 Rep B 2.

[60] R Milligan, "Can I recover the costs of investing my damages and protecting them in a personal injuries trust?" (2015) 127 Rep B 2, 3; T Lawton, "The perils and pitfalls of personal injury practice" (2013) 4 JPI Law 254, 258.

5.50 As we noted above, the powers conferred on the court by section 13 of the 1995 Act appear broad, but are largely untested. Subsection (1) empowers the court, where in any court proceedings a sum "becomes payable to, or for the benefit of" a child under 16 years of age, to make such order as it thinks fit "relating to the payment and management of the sum for the benefit of the child." As we discussed above, it might be beneficial to clarify whether, under section 13, the court is empowered to order or authorise that an award of damages may be paid into a trust to be set up for the administration of the payment.

5.51 There is also a question as to whether parents and guardians are empowered to set up a PIT in respect of the child's award.

5.52 The uncertainty turns on the scope of section 10(1)(b) of the 1995 Act which regulates the rights and obligations of a person acting as a child's legal representative. It provides that someone acting as a child's legal representative in relation to the administration of the child's property "shall be entitled to do anything which the child, if of full age and capacity, could do in relation to that property".[61] Thus it may be argued that a parent or guardian, as the child's legal representative, can set up a trust, including a PIT.[62] Section 10(1) also provides for a duty to account to the child on ceasing to act as a legal representative, which is qualified in subsection (2), to the effect that no liability to account is incurred in respect of funds "which have been used in the proper discharge of the person's responsibility to safeguard and promote the child's health, development and welfare".

5.53 Yet it may be said that for the parent or guardian as legal representative to settle funds on another person as trustee (for example where the trust is structured to have other beneficiaries, in addition to the child in question) does not represent the proper discharge of "the person's responsibility" to safeguard and promote the child's health, development and welfare.[63] That is because the power in section 10(1)(b) (which in its opening words refers to acting in relation to "the administration of the child's property") is "essentially administrative rather than dispositive".[64] This concern applies with even greater force where the trust is structured to have other beneficiaries, in addition to the child in question.

5.54 While it might be thought desirable to clarify whether there is any impediment to a child's legal representative acting in terms of section 10 by setting up a trust for the benefit of the child, we have concluded that it would be inappropriate to include that issue in the present project, for the following reason: section 10 extends to funds other than damages for personal injury.[65] To seek statutory clarification for such damages alone would result in this Commission either (i) exceeding the scope of the present project, or (ii) inviting an unsatisfactory piece-meal reform.[66] Accordingly we have not pursued the issue, but acknowledge that there is scope for review in the future.

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[61] In addition, s 10(1)(a) provides that a person acting as a child's legal representative in relation to the administration of the child's property shall be required to act as a reasonable and prudent person would act on his own behalf. Note too the important *caveat* at the beginning of s 10(1)(b) – "Subject to any order made under section 11 of this Act …". A person acting as a child's representative may be obliged, as a result of an order in terms of section 11, to consult with another individual, or to act within certain restrictions (see s 11(2)(e) and (f)).

[62] Y Evans, "Personal injury trusts: benefits and PITfalls", 2011 JLSS (February) p26.

[63] D Francis, "Personal injury trusts – the PITs? (Pt 2)" 2011 SLT (News) 95.

[64] *Ibid*.

[65] For example, the child may have acquired funds as a result of a lifetime gift, or a legacy, or prize money, or a grant.

[66] Sometimes referred to as a "carve-out".

Personal injury trusts for a child: lack of independent oversight

5.55 A more general question which can usefully be raised in the present project is whether there should be some independent oversight of children's awards of damages for personal injury being placed in trust.

5.56 Currently, where a child's personal injury 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. This contrasts with the situation in relation to an adult with incapacity.

5.57 The Public Guardian supervises those such as guardians who have financial powers in terms of the 2000 Act in the exercise of their functions relating to the property or financial affairs of the adult with incapacity.[67] A guardian may be granted the power to deal only with specific financial matters or with all matters concerning the adult's financial affairs. Where the guardian has been granted power to set up a trust on behalf of the incapable adult, we understand that the guardian must send a draft of any proposed trust deed to the Public Guardian for consideration, along with a statement explaining the rationale behind setting up the trust.[68] This statement should include, in particular and where relevant, detail of planning relating to means-tested benefits and care contributions. Our understanding is that the Public Guardian is of the view that, ideally, at least one neutral, professional trustee should be appointed.

5.58 Similarly, if a child receives an award in terms of the Criminal Injuries Compensation Scheme, oversight by an official of a proposed trust is possible. A claims officer may give directions, impose conditions and make such other arrangements as she or he considers appropriate in connection with the acceptance, payment or administration of an award, including for the purpose of establishing a trust to administer the award, on such terms or in accordance with such arrangements as the claims officer may specify.[69]

5.59 Our Advisory Group suggested that, similarly, where sums awarded in respect of damages for personal injury to a child are 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 misinvestment 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 trust following a final settlement, or where there is a change of trustees.

5.60 We would welcome the views of consultees on whether it is appropriate to address the lack of independent oversight in relation to trusts for managing awards of damages to children. Or would such an approach be regarded as inappropriate, being limited to children who receive damages for personal injuries when there are many other types of child-benefiting trusts?[70] Further, would such an approach be regarded as an unwelcome interference in a matter which is essentially a private one? Should there be some form of independent oversight

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[67] Section 6.

[68] See the Office of the Public Guardian (Scotland) website, at: https://www.publicguardian-scotland.gov.uk/guardianship-orders/faqs#setup.

[69] Criminal Injuries Compensation Scheme 2012, as amended, para 106.

[70] In other words, would this be a statutory carve-out for trusts for managing awards of damages to children (as opposed to other trusts)?

where it is proposed to place a child's damages in trust? Would such oversight be necessary in all cases, or only in certain specific circumstances?[71] What procedure might be adopted? For example, there could be a requirement that a draft of the proposed trust deed be sent to the Accountant of Court for consideration of its terms. The Accountant could consider the suitability of the choice of trustees and, where appropriate, recommend that an additional, neutral, trustee be appointed. Such oversight could also be triggered by a significant change in circumstances as outlined in the paragraph above.

5.61 We acknowledge that an extension of the role of the Accountant of Court in the way described above would raise resourcing issues.

5.62 We therefore ask:

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?

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

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

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

(c) another process? If so, what?

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

5.63 In the following final section of this chapter, we examine some further provisions which are in place to manage and safeguard awards of damages in respect of personal injury made to children.

Curator bonis

5.64 A representational and administrative role can be carried out by a *curator bonis* appointed to a child.[72] The circumstances in which the appointment of a *curators bonis* is appropriate include where the child's parent or guardian was bankrupt, where they had been mis-managing the child's estate or where there was a conflict of patrimonial interests between the child on the one hand and the parent or guardian on the other hand. Appointment of a *curator bonis* may also be appropriate where the child is mentally *incapax* and likely to

[71] For example, where the trust has beneficiaries other than the child to whom damages have been awarded.
[72] Age of Legal Capacity (Scotland) Act 1991, s1(3)(f)(iv).

continue to be so. In terms of the 2000 Act, when the child attains 16 years of age, the appointment of a *curator bonis* is treated as if it were the appointment of a guardian with power to manage his property or financial affairs.[73]

5.65 The 2000 Act created a new public official, the Public Guardian, to supervise those appointed as guardians to persons on or over the age of 16 years with incapacity, and provided that the Accountant of Court was to be the Public Guardian. Further, section 80 of the 2000 Act made it incompetent to appoint a *curator bonis* to the estates of such persons. In consequence, all references to *curators bonis* were removed, by schedule 6 to the 2000 Act, from the legislation relating to judicial factors.

5.66 This gave rise to an anomaly between guardians for those over 16 and *curator bonis* for those under 16. An appointment of the latter, if made, appears no longer to be subject to the system of supervision by the Accountant of Court. We understand from the Accountant of Court that, in recent years, there have been no applications for the appointment of a *curator bonis* to a person under 16.

5.67 In order to remove the lingering possibility of an unsupervised appointment, this Commission recommended that it should no longer be competent to appoint a *curator bonis* on the estate of any person.[74] This recommendation was supported by the Scottish Government in their consultation and awaits implementation.[75]

Curator ad litem

5.68 Where the child is a party to litigation, a *curator ad litem* may be appointed if the court considers that the interests of the child require such an appointment.[76] The curator acts on behalf of the child to ensure that the case before the court is properly conducted on her or his behalf so that the interests of the child are safeguarded. The legal representative of the child should not be displaced without cause.[77] The *curator ad litem* will, where relevant, prepare a report setting out the arrangements in place for the management of any assets of the child and all the information "that he has obtained and has considered relevant to his own judgment on the suitability of the arrangements proposed."[78]

Criminal Injuries Compensation Scheme and compensation paid by the Motor Insurers' Bureau

5.69 Finally, other examples of situations where payments to children in respect of personal injury require to be managed are payments in terms of the Criminal Injuries Compensation Scheme,[79] and compensation paid by the Motor Insurers' Bureau.

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[73] Adults with Incapacity (Scotland) Act 2000, sch 4, para 1(2). On *curators bonis* generally, see Wilkinson and Norrie, *The Law relating to Parent and Child in Scotland* (3rd edn, 2013), paras 5.60-5.63.

[74] Scottish Law Commission, Judicial Factors (2013) Scot Law Com No 233, paras 7.35-7.37.In the event of circumstances arising which currently give rise to the possible appointment of a *curator bonis*, section 11(2)(g) of the 1995 Act allows for the appointment of a judicial factor.

[75] Scottish Government, *Consultation on Judicial Factors* (Scottish Government, August 2019), para 1.57.

[76] The Children (Scotland) Act 2020, s 17(2), inserts s 11D into the 1995 Act, which makes provision about the appointment of a curator *ad litem*. Further, s 17(3) of the 2020 Act inserts s 101B into the 1995 Act, which adds a requirement for the establishment of a register of *curators ad litem*.

[77] Wilkinson and Norrie, *The Law relating to Parent and Child in Scotland* (3rd edn, 2013), para 5.58.

[78] *Riddoch v Occidental Petroleum (Caledonia) Ltd* 1991 SLT 721 at 722L per Lord McCluskey.

[79] Criminal Injuries Compensation Scheme 2012 (as amended), is made by the Secretary of State under the Criminal Injuries Compensation Act 1995. See para 5.58 above.

5.70 In terms of the Criminal Injuries Compensation Scheme, a claims officer may give directions, impose conditions and make such other arrangements as she or he considers appropriate in connection with the acceptance, payment or administration of an award, including for the purpose of establishing a trust to administer the award, on such terms or in accordance with such arrangements as the claims officer may specify; retaining the sum awarded until the applicant's 18th birthday; or requiring the appointment of a guardian.[80]

5.71 The Motor Insurers' Bureau compensates victims of accidents caused by uninsured drivers and untraced drivers. In the case of uninsured drivers, its obligation is to satisfy a judgment obtained by the claimant in respect of a relevant liability which is not met by the offending driver.[81] In these cases, a solicitor can apply to the court in terms of section 13 of the 1995 Act for directions regarding the administration of the funds.

5.72 In the case of untraced drivers, it is the Motor Insurers' Bureau which considers claims and makes awards. In the case of claimants under 16, when the Motor Insurers' Bureau receives unconditional acceptance of its proposed award or the claimant has provided neither unconditional acceptance nor a notice of appeal, it applies to the Secretary of State for the appointment of an arbitrator. The arbitrator's principal function is to determine whether the proposed award represents a fair settlement for the claimant. If in any case it appears to the arbitrator that no suitable appropriate representative exists or is available to receive payment of the award, the arbitrator may direct the Motor Insurers' Bureau to pay the reasonable costs of the claimant in setting up a trust of the whole or part of the award or to initiate any proceedings necessary to have the award administered by an appropriate representative.[82]

Concluding issues

5.73 We have outlined the various statutory provisions in place to manage and safeguard awards of damages made to children, both where there are court proceedings and where there are not.

5.74 Although the Accountant of Court plays an important role in the management and safeguarding of awards of damages made to children, it is worth mentioning that Scotland has no direct equivalent of the Court of Protection in England and Wales. In terms of the Mental Capacity Act 2005, the Court of Protection has jurisdiction over the welfare and finances of those lacking capacity to manage their own affairs. It is empowered to make decisions on behalf of such a person or it may appoint a deputy to make decisions in relation to certain matters.[83] These powers may be exercised if the person is under 16 if the court considers it likely that the person will still lack capacity at age 18.[84] If not, a trust should be established.

5.75 However, our preliminary view is that appropriate measures are available, on application to the Accountant of Court or to the courts, to manage and safeguard awards of damages made to children. The possibility of some improvement of those measures has been explored above. We are, however, keen to know of any other problems which may arise in

[80] Criminal Injuries Compensation Scheme 2012, as amended, para 106.
[81] Uninsured Drivers Agreement 2015 as amended. (MIB also assists UK residents involved in accidents with foreign-registered vehicles, either in the UK or elsewhere in Europe).
[82] Untraced Drivers Agreement 2017, para 14(10).
[83] Mental Capacity Act 2005, s 16(2)(a) and (b).
[84] *Ibid*, s 18(3). See *Halsbury's Laws of England* (5th edn, 2013), Vol 75, paras 724 and 727.

practice and whether any other improvements to the supervisory powers of the Accountant of Court or to the courts are desirable.

5.76 Accordingly, we ask:

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

Chapter 6 Summary of questions

1. Do consultees have any comments on economic impact?

(Paragraph 1.18)

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

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

(Paragraph 2.20)

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

(Paragraph 2.32)

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

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

(Paragraph 2.44)

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

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

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

(Paragraph 2.44)

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

(Paragraph 2.50)

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

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

(Paragraph 2.61)

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

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

(Paragraph 3.21)

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

(Paragraph 3.35)

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

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

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

(Paragraph 3.58)

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

(Paragraph 3.67)

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

(Paragraph 3.72)

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

(Paragraph 3.93)

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

(Paragraph 3.93)

15. Do you have any other comments?

(Paragraph 3.93)

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

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

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

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

(Paragraph 3.101)

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

(Paragraph 3.101)

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

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

(Paragraph 4.11)

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

(Paragraph 4.41)

20. If so, do you favour:

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

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

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

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

(Paragraph 4.41)

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

(Paragraph 4.41)

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

(Paragraph 4.41)

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

(Paragraph 5.10)

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

(Paragraph 5.10)

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

(Paragraph 5.22)

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

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

(Paragraph 5.22)

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

(Paragraph 5.27)

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

(Paragraph 5.27)

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

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

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

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

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

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

(Paragraph 5.27)

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

(Paragraph 5.29)

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

(Paragraph 5.29)

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

(Paragraph 5.34)

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

(Paragraph 5.46)

34. What might increase use of these provisions?

(Paragraph 5.46)

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

(Paragraph 5.62)

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

(Paragraph 5.62)

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

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

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

(c) another process? If so, what?

(Paragraph 5.62)

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

(Paragraph 5.62)

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

(Paragraph 5.76)

Published on behalf of the Scottish Law Commission by APS Group Scotland

This Document is also available for download from:
www.scotlawcom.gov.uk/

ISBN 978-1-9989963-2-2

PPDAS1028698 (02/22)