



Scottish Law Commission
promoting law reform

(SCO

196)

Report on Damages for Psychiatric Injury

report



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promoting law reform

Report on Damages for Psychiatric Injury

Report on a reference under section 3(1)(e) of the Law Commissions Act 1965
Laid before the Scottish Parliament by the Scottish Ministers

August 2004

SCOT LAW COM No 196
SE/2004/129
EDINBURGH: The Stationery Office

£12.60

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SCOTTISH LAW COMMISSION

Report on a reference under section 3(1)(e) of the Law Commissions Act 1965

Report on Damages for Psychiatric Injury

To: Ms Cathy Jamieson MSP, Minister for Justice

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

(Signed) RONALD D MACKAY, *Chairman*
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Miss Jane L McLeod, *Chief Executive*
8 July 2004

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Part 1 Introduction

Remit

1.1 In July 2001 we received the following reference¹ from the Deputy First Minister and then Minister for Justice, Mr Jim Wallace, QC, MSP;

"To examine the law of Scotland relating to psychiatric injury caused by another person and to make recommendations as to possible changes in the law."

We published Discussion Paper No 120 *Damages for Psychiatric Injury* ("the Discussion Paper") in August 2002 which contained a detailed examination of the law in the United Kingdom, a summary of the position in many other jurisdictions and our proposals for reform. The Discussion Paper was widely distributed and we are grateful to those who submitted comments on our proposals.²

Scope of the Report

1.2 This Report deals with delictual claims for "pure" mental harm where the act or omission of the wrongdoer gives rise to mental harm without also causing any physical or other injury to the victim. Such claims generally arise where people are caught up in serious incidents from which they emerge physically unscathed or where close relatives are killed or injured. Large scale disasters, such as Piper Alpha or Hillsborough, give rise to many such claims.³ There are however many more claims arising out of accidents on the roads or in the workplace. A growing source of claims is stress at work. We are not concerned in this Report with the rules governing damages for mental harm which may be claimed in relation to breaches of certain types of contract. Another exclusion is the claim under the Damages (Scotland) Act 1976 for non-patrimonial loss, including grief and distress arising from the death of an immediate family member, as a result of wrongful conduct.⁴

1.3 In many areas of life entitlement to compensation is regulated by primary or subordinate legislation,⁵ rather than common law. It is often not clear whether the provisions include claims for psychiatric injury by those who were involved in the accident but were physically uninjured, or by those (often called secondary victims) whose psychiatric injury arose from witnessing or learning of the death or personal injury of the immediate victims.⁶

¹ Under the Law Commissions Act 1965, s 3(1)(e).

² A list of those who submitted written comments forms Appendix B.

³ Two of the leading cases in this area arose out of the Hillsborough disaster: *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 and *Frost v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 (sometimes cited as *White v Chief Constable of South Yorkshire Police*).

⁴ Our Report on *Title to Sue for Non-Patrimonial Loss* (Scot Law Com No 187, 2002) recommended changes in the definition of immediate family member.

⁵ Such as the Criminal Injuries Compensation Scheme 2001 (made under the Criminal Injuries Compensation Act 1995), the Offshore Installations (Operational Safety, Health and Welfare) Regulations 1976 and the Workplace Regulations 1992.

⁶ The Consumer Protection Act 1987, s 45(1) defines personal injury to include impairment of a person's mental condition, for example, but it is thought secondary victims are not covered.

Case law is gradually resolving these areas of doubt,⁷ and we consider that clarification of the meaning of existing and future statutes can be left to the courts.

1.4 By contrast, the current common law of delictual liability for psychiatric injury or mental harm is widely recognised by both judges and academics as suffering from defects and being in need of reform. For example, in *Alcock v Chief Constable of South Yorkshire Police*⁸ Lord Oliver said, "I cannot, for my part, regard the present state of the law as either entirely satisfactory or as logically defensible". Professor Teff has considered that "Unquestionably the prevailing liability rules are a source of embarrassment....At times it almost seems as if they have been crafted with an eye to untenable distinctions."⁹ while Professor Stapleton has expressed the view that liability for nervous shock is where the silliest rules exist.¹⁰ The courts have developed these rules of liability over the past hundred or so years on an almost ad hoc basis. As a result they are complex, productive of unjustifiable distinctions and ignore modern developments in the understanding of psychiatric injury.

1.5 The main defects of the present common law rules in the sphere of pure psychiatric injury or mental harm are:

- Victims are divided into two categories, primary victims and secondary victims. Roughly speaking, primary victims are those directly involved in the accident or incident, while secondary victims are those who see or learn of others being killed or injured. The two categories have different rules for compensation, yet the boundary between them is unclear.¹¹
- While, in general, liability arises only if the injury to the victim is reasonably foreseeable by the wrongdoer, a primary victim may recover for an unforeseeable psychiatric injury if some physical injury was foreseeable but did not occur.¹²
- For secondary victims at least, compensation is awarded only if they have suffered a shock – the sudden appreciation by sight or sound of a horrifying event.¹³
- Secondary victims can recover only if they meet the so-called *Alcock* criteria:¹⁴
 - There must be a close tie of love and affection between the secondary victim and the injured person;

⁷Eg *King v Bristow Helicopters Ltd* 2002 SC(HL) 59 - a pure psychiatric illness is not "bodily injury" for the purposes of a claim under the Carriage by Air Act 1961; *Glen v Korean Airlines Co Ltd* [2003] QB 1386 - loss or damage in terms of s 76(2) of the Civil Aviation Act 1982 did include psychiatric injury, but compensation to observers of an accident was awardable under the Act only if their claim would have been competent at common law; and *Magnohard Ltd v United Kingdom Atomic Energy Authority* 2003 SLT 1083 - damages under the Nuclear Installations Act 1965 were refused to estate owners who averred that they had suffered stress and anxiety (but no physical or recognised psychiatric injury) due to the presence of radioactive particles on their beach. However, the Lord Ordinary (Lady Paton) said that such claims might be relevant to an action grounded on a breach of Article 8 of the European Convention on Human Rights.

⁸ [1992] 1 AC 310, at 418

⁹ In "Liability for Negligently Inflicted Psychiatric Harm: Justifications and Boundaries", (1998) 57 CLJ 91 at 94.

¹⁰ "In Restriction of Tort" in P Birks (ed), *The Frontiers of Liability*, vol 2 at 95.

¹¹ See paras 2.6-2.13 below.

¹² See paras 2.15-2.16 below.

¹³ See paras 2.4-2.5 below.

¹⁴ See paras 2.21-2.24 below.

- The secondary victim must have been present at the accident or at its immediate aftermath; and
 - The secondary victim's psychiatric injury must have been caused by direct perception (ie through his or her own unaided senses) of the accident or its immediate aftermath.
- Secondary victims can recover only if their psychiatric injuries were foreseeable in a person of "ordinary fortitude"¹⁵ – a legal construct that is difficult to evaluate.
 - Rescuers are treated as primary rather than secondary victims in that they do not have to meet the *Alcock* criteria. However, they may well have to have feared for their own safety.¹⁶

1.6 In our view these defects, many of which stem from decisions of the House of Lords over many years, are incapable of being remedied speedily by the courts. Reform by that route would require suitable cases to be litigated up to that level and for the House of Lords then to be persuaded that it should depart from these earlier decisions. This seems unlikely in view of Lord Steyn's remark in *Frost v Chief Constable of South Yorkshire Police*,¹⁷ that "... the law on the recovery of compensation for pure psychiatric harm is a patchwork quilt of distinctions which are difficult to justify... It must be left to Parliament to undertake the task of radical law reform." Our Report therefore recommends the replacement of the common law rules by a new legislative scheme. The Law Commission has also recommended new legislation in its Report on *Liability for Psychiatric Illness*.¹⁸

Terminology

1.7 Traditionally this area of the law of delict was known as liability for nervous shock. While that term continues to be used to some extent, and a shock which violently agitates the mind continues to be a requirement for liability in many situations,¹⁹ the main terms in current use are recognised psychiatric injury, illness or disorder. The Discussion Paper used this terminology. We understand that there is some doubt as to the precise scope of the terms "psychiatric" and "psychological". In order to ensure that all kinds of psychiatric and psychological injuries or illnesses are included we have decided to adopt, after consultation with some members of the Scottish Division of the Royal College of Psychiatrists, the general term "medically recognised mental disorder". Where the wrongdoer did not act with the intention of deliberately inflicting injury, the victim will be entitled to damages in terms of our recommendations only if he or she sustains a medically recognised mental disorder. We do not think there is much risk of confusion between that term and the term "mental disorder" defined in section 238 of the Mental Health (Care and Treatment) (Scotland) Act 2003. "Medically recognised mental disorder" will be used in the field of delictual liability, whereas "mental disorder" applies in the field of mental health and adult incapacity.²⁰

¹⁵ See paras 2.19-2.20 below.

¹⁶ See paras 2.17-2.18 below.

¹⁷ [1999] 2 AC 455, at 500.

¹⁸ Law Com No 249 (1998).

¹⁹ See para 2.4-2.5 below.

²⁰ The Adults with Incapacity (Scotland) Act 2000 has been amended by the Mental Health (Care and Treatment)(Scotland) Act 2003, para 9(5), Sch 4 so that it now uses the 2003 Act definition of mental disorder.

1.8 The Discussion Paper focussed on psychiatric injuries or illnesses caused by some negligent act or omission on the part of a wrongdoer. We have taken the opportunity in this Report to extend our recommendations to cases where the wrongdoer acted with the deliberate intention of inflicting mental injury on the victim. As we argue later in Part 3,²¹ we think that in such a situation victims should be entitled to damages even if they thereby suffer distress falling short of a medically recognised mental disorder. We use the very wide term "mental harm" (defined to include any medically recognised mental disorder) to encompass distress and the more serious disorders.

Our recommendations in outline

1.9 The policy underlying our recommendations is the replacement of the current unprincipled and technical rules by a principled yet flexible framework within which the courts can decide individual cases and which does not extend liability unduly. In summary, our recommendations would provide that:

(i) There would be no liability for mental harm, whether caused intentionally or unintentionally, if a person could reasonably be expected to endure it without seeking damages. People would be expected to put up with mental harm resulting from bereavements and the normal stresses or vicissitudes of life or the particular life that they lead.

(ii) The wrongdoer would be liable for unintentionally caused mental harm only if it constituted a medically recognised mental disorder and was a reasonably foreseeable consequence of the wrongdoer's act or omission.

(iii) A person who suffers unintended mental harm as a consequence of witnessing or learning of an incident (in which he or she was not directly involved) would not be entitled to damages unless he or she had a close relationship with another person killed, injured or imperilled in the incident or was acting as a rescuer in relation to the incident. These requirements would be in addition to those in (ii) above.

1.10 The main changes to the existing law would be:

(i) Abolition of the requirement that in certain types of action the mental harm has to be induced by shock,²² a sudden assault on the senses.

(ii) Replacement of the current classification of pursuers as such into either primary victims or secondary victims (which gives rise to difficulties at present) with new rules. People who suffer mental harm as a consequence of witnessing or learning of an incident in which others are killed, injured or imperilled (but in which they themselves were not directly involved) will have to meet certain additional criteria (see (iv) below) before being entitled to damages.

(iii) Replacement of the current rule that secondary but not primary victims are expected to be of ordinary fortitude, by a rule that all victims are expected to endure

²¹ See para 3.7 below.

²² See para 2.4-2.5 below.

(without claiming damages) mental harm resulting from bereavements and the normal stresses or vicissitudes of life or the particular life that they lead.

(iv) Replacement of the so-called *Alcock* criteria (whereby a person who suffers mental harm as a consequence of witnessing or learning of an incident can recover damages for that harm only if he or she: had a close tie of love and affection with the person injured or killed in the incident, was sufficiently close in time and space to the incident or its immediate aftermath, and perceived the incident or its immediate aftermath directly with unaided senses) by a rule that such a person has to have had a close relationship with the dead or injured person. This new requirement would not apply to rescuers.

(v) Abolition of the rule in the case of *Page v Smith*.²³ There will then be no liability for unintentionally inflicted mental harm which was not a reasonably foreseeable consequence of the wrongdoer's actions, unless (as under the existing law) the mental harm resulted from another type of harm for which there is delictual liability (eg a physical injury) and the mental harm was not too remote.

1.11 The implementation of our recommendations would produce a number of advantages. First, the result would be a coherent and principled set of rules which would be easier to apply than the current law since they would be based to a large extent on familiar principles of delict. Mental harm would no longer be an area of the law where there were many special rules. The new rules would give the courts a sound basis on which to decide cases and develop the law. They would also make it easier for parties to negotiate and settle claims without resort to litigation. Secondly, the draft Bill annexed to our Report abolishes all the common law rules on delictual liability for mental harm and sets out the new rules. We decided to adopt this approach rather than recommending piecemeal statutory provisions amending or clarifying the existing rules. The law will therefore be contained in a modern statute, so making it easier for users to find and apply.

1.12 We would emphasise that our recommendations have been framed with the intention of not increasing liability to any substantial extent. Naturally, as a result of the changes, there will be some who are entitled to damages under the new rules who are not so entitled at present and the reverse will also be true. Overall, we expect the effects of our recommendations to be fairly neutral.

Plan of the Report

1.13 In Part 2 we set out the present legal rules in the sphere of pure psychiatric injury or mental harm that apply in Scotland and consider their defects. Part 3 puts forward recommendations for reform to remedy these defects in the light of comments submitted on the proposals in our Discussion Paper. Part 4 lists our recommendations for reform. Appendix A contains the draft Reparation for Mental Harm (Scotland) Bill, being a draft of the legislation required to implement our recommendations. Appendix B lists those who submitted written comments on our Discussion Paper and Appendix C sets out the members of our Advisory Group.

²³ [1996] AC 155.

Advisory Group

1.14 In preparing this Report and the preceding Discussion Paper we have been greatly assisted by an Advisory Group whose members are listed in Appendix C. In the later stages of preparing this Report, Professor Eric Clive also provided advice. We are very grateful to all of them.

Legislative competence

1.15 The recommendations put forward in this Report lie within the legislative competence of the Scottish Parliament. Delict is not a reserved matter and none of our recommendations would result in amendment to any of the enactments set out in Schedule 4 of the Scotland Act 1998 that are protected from modification by the Scottish Parliament.²⁴ The draft Reparation for Mental Harm (Scotland) Bill, which forms Appendix A, has therefore been drafted as a Scottish Parliament Bill.

1.16 In our view implementation of our recommendations would not give rise to any breach of the European Convention on Human Rights or Community law.

²⁴ Scotland Act 1998, s 29(2)(c) and Sch 4.

Part 2 The Existing Law and its Defects

Introduction

2.1 Damages for mental distress, anxiety or loss of enjoyment may be recovered under the rules of the common law along with damages for personal injuries or other losses.¹ Thus a person pursuing a claim for physical injury will be entitled to compensation for mental distress etc. arising as a consequence of the injury.² In *Martin v Bell-Ingram Ltd*³ a married couple who owned a house were awarded £1,000 each for the anxiety and disturbance they suffered (in addition to their patrimonial losses) when they could not sell their house without extensive repairs being carried out. The house contained a defect which the surveyor had negligently failed to spot when they bought it some years before.⁴ Some statutes confer an entitlement to damages for mental distress and similar states. Where a person dies as a result of another's wrongdoing, a member of the deceased's immediate family has a claim for non-patrimonial loss under section 1(4) of the Damages (Scotland) Act 1976, whether or not he or she suffered any patrimonial loss. In this Part, however, we are concerned only with the existing common law rules relating to "pure" mental harm, ie where the pursuer suffers no other injury or loss

Need for psychiatric injury or disorder

2.2 A successful claim for pure psychiatric injury requires pursuers to establish that they suffered something beyond the normal emotional responses to an incident such as grief, distress or fear. What is required has been described in various ways. In *Simpson v Imperial Chemical Industries Ltd*⁵ the Inner House held that employees who had suffered shocks as a result of an explosion at the defender's Grangemouth plant were not entitled to damages. Lord Robertson said that:⁶

"It is not enough for a person to say that he received a shock or a fright from an explosion which caused normal emotional reaction with no lasting effect, and to claim on account of this 'shock' alone. He can only claim damages if he proves that he suffered some physical, mental or nervous injury."

In the same case Lord Grieve quoted⁷ Lord Bridge's dictum in *McLoughlin v O'Brian*:⁸

¹ In *Reid v Ski Independence* 1999 SLT(Sh Ct) 62, damages for distress and annoyance were awarded in addition to patrimonial losses when the pursuer's flight was delayed and luggage mislaid at the start of a short skiing holiday.

² *Anderson v Secretary of State for Scotland* 1999 SLT 515. Where the death of young children is concerned distress, pain and suffering may be the only claim, see for example *Jarvie v Sharp* 1992 SLT 350.

³ 1986 SC 208.

⁴ In *Attia v British Gas Plc* [1988] QB 304 a woman was awarded damages for the psychiatric injury she sustained as a result of witnessing her house being burned down.

⁵ 1983 SLT 601.

⁶ *Ibid* at 605. See also *Harvey v Cairns* 1989 SLT 107, Lord Ordinary (Murray) at 109; *Page v Smith* [1996] AC 155, Lord Keith at 167, Lord Jauncey at 171 and Lord Lloyd at 189 and 197.

⁷ 1983 SLT 601 at 609.

"The common law gives no damages for the emotional distress which any normal person experiences when someone he loves is killed or injured...So, the first hurdle which a plaintiff claiming damages of the kind in question must surmount is to establish that he is suffering, not merely grief, distress or any other normal emotion, but a positive psychiatric illness."

and Lord Grieve then went on to say that:⁹

"While it is well established that damages can be recovered on the ground of nervous shock, as well as the ground of actual physical injury, there must be some evidence that the 'nervous shock' complained of is a condition which can reasonably be described as an illness."

2.3 In *Rorrison v West Lothian Council*¹⁰ the Lord Ordinary (Reed) dismissed the pursuer's claim saying that she "can recover only if she has sustained psychiatric injury in the form of a recognised psychiatric illness". Later on, in dealing with foreseeability he said:¹¹

"Many, if not all, employees are liable to suffer those emotions [frustration and embarrassment], and others mentioned in the present case such as stress, anxiety, loss of confidence and low mood. To suffer such emotions from time to time, not least because of problems at work, is a normal part of human existence. It is only if they are liable to be suffered to such a pathological degree as to constitute a psychiatric disorder that a duty of care to protect against them can arise..."

The law on this point appears to us satisfactory, although there will be cases in which drawing the line between a recognised psychiatric injury or disorder and mere stress or anxiety may not be easy.

Need for a shock

2.4 Traditionally, this aspect of the law of delict has been known as liability for nervous shock. Originally, this nomenclature simply reflected contemporary medical and judicial understanding of how mental injury was incurred. In turn, "shock" has been defined as the "sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind".¹² Reparation, at least in the case of secondary victims whose psychiatric injuries are due to witnessing the death or injury of others, is possible only where the injuries have been induced by shock.¹³ Thus in *Wood v Miller*,¹⁴ for example, it was held that a woman who was rendered unconscious by an accident which seriously injured her husband could not claim damages for her psychiatric injury since her psychiatric injury arose from her slow realisation of the extent of her husband's injuries after she recovered consciousness. Similarly, in *Sion v Hampstead Health Authority*¹⁵ a father who watched his son slowly die in hospital as a result of alleged mistreatment of the son's physical injuries failed in his claim

⁸ [1983] 1 AC 410, at 431. In a later case, *Hicks v Chief Constable of South Yorkshire Police* [1992] 2 All ER 65 at 69, Lord Bridge said "...fear by itself, of whatever degree, is a normal human emotion for which no damages can be awarded".

⁹ 1983 SLT 601 at 609.

¹⁰ 2000 SCLR 245 at 250.

¹¹ *Ibid* at 254.

¹² *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, Lord Ackner at 401.

¹³ *Ibid*, Lord Keith at 398, Lord Oliver at 411.

¹⁴ 1958 SLT (Notes) 49.

¹⁵ [1994] 5 Med LR 170 (CA).

for damages as his psychiatric illness had not been caused by shock. The deterioration in the son's health had been a continuing process.¹⁶ But damages may be awarded if there is a sudden realisation of danger within a continuing process. Thus in *Walters v North Glamorgan NHS Trust*¹⁷ a mother was awarded damages where she had been present from the time her baby son had a major epileptic seizure (due to acute hepatitis that the hospital had failed to diagnose) until his death 36 hours later. She was wrongly told that the seizure was not serious when in fact it had caused major irreparable brain damage. Thomas J held that the mother had suffered a sudden appreciation of her son's injuries.

2.5 In general, reparation is allowed only where the psychiatric injuries have been induced by shock, ie a "sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind". The shock requirement reflects an outdated view of how mental harm is sustained. It also produces harsh results and renders some forms of mental harm, such as post-traumatic stress syndrome, more reparable than others, for example depression. However, in recent employment cases where the pursuer was a primary victim whose psychiatric injury arose out of stressful conditions at work, the need for a single "shock" has not been applied.¹⁸

Primary and secondary victims

2.6 The categorisation of those sustaining psychiatric injury into primary and secondary victims stems from Lord Oliver's speech in *Alcock v Chief Constable of South Yorkshire Police*.¹⁹ The two categories are "those cases in which the injured plaintiff was involved, either mediately or immediately, as a participant" (a primary victim) and "those in which the plaintiff was no more than the passive and unwilling witness of injury caused to others" (a secondary victim).²⁰ Three examples of primary victims were given: those who feared for their own safety, rescuers and involuntary participants.²¹ However, in the later case of *Page v Smith* Lord Lloyd referred to primary victims as being those who were "directly involved in the accident and well within the range of foreseeable physical injury", and secondary victims as those who were "in the position of a spectator or bystander".²²

2.7 The discrepancy between these two definitions has given rise to much discussion. In *Frost v Chief Constable of South Yorkshire Police*²³ the House of Lords adopted Lord Lloyd's approach. Lord Griffiths said, "In my view [the Alcock criteria] should apply to all those not directly imperilled or who reasonably believe themselves to be imperilled...".²⁴ Lord Steyn regarded Lord Lloyd as having intended to narrow the range of primary victims. He remarked that "Lord Lloyd said that a plaintiff who had been within the range of foreseeable [physical] injury was a primary victim. Mr Page fulfilled this requirement and could in principle recover compensation for psychiatric loss. In my view it follows that all other

¹⁶ See also *Taylorson v Shieldness Produce Ltd* [1994] PIQR P329.

¹⁷ [2002] EWHC 321.

¹⁸ *Cross v Highland and Islands Enterprise* 2001 SLT 1060, Lord Ordinary (Macfadyen) at 1075-76 (express denial of requirement). In *Fraser v State Hospitals Board for Scotland* 2001 SLT 1051 a claim by an employee arising out of a series of disciplinary measures was dismissed not because of the absence of shock but because his psychiatric injury was not foreseeable.

¹⁹ [1992] 1 AC 310.

²⁰ *Ibid* at 407.

²¹ Involuntary participants and rescuers are discussed further at paras 2.11 and 2.17-2.18 below respectively.

²² [1996] AC 155 at 184.

²³ [1999] 2 AC 455.

²⁴ *Ibid* at 464.

victims, who suffer pure psychiatric harm, are secondary victims and must satisfy the control mechanisms laid down in the *Alcock* case.²⁵ Lord Hoffman, dealing with the argument for the police officer plaintiffs that they were primary victims as they had been akin to rescuers, said that there was no reason why "they should be given special treatment as primary victims when they were not within the range of foreseeable physical injury and their psychiatric injury was caused by witnessing or participating in the aftermath of accidents which caused death or injury to others."²⁶ Lord Browne-Wilkinson agreed with Lord Steyn and Lord Hoffman, but Lord Goff dissented on the basis that Lord Lloyd's remarks in *Page v Smith* could not have been intended to alter Lord Oliver's definition of primary victims in the earlier case of *Alcock*.²⁷

2.8 In *Frost v Chief Constable of South Yorkshire Police* Lord Hoffman suggested that the distinction between primary and secondary victims should depend on the cause of their psychiatric injury.²⁸ A secondary victim would be an individual who suffers a psychiatric injury as a consequence of the death, injury or imperilment of another person that had been caused by the defender's negligence.

2.9 As shown in paragraphs 2.6 to 2.8 above, there is doubt as to how primary victims and secondary victims are to be defined. It is unsatisfactory that the classification, which may affect whether a mental injury is reparable,²⁹ is unclear. There are also many situations, described in paragraphs 2.10 to 2.13 below, where the courts have held people to be primary victims although they were not within the range of foreseeable physical injury, the view taken by the majority in *Frost*.

2.10 First, an employer can be liable in delict for reasonably foreseeable psychiatric injury suffered by an employee as a result of stress during a period of employment.³⁰ In *Hatton v Sutherland*³¹ Hale LJ said that the threshold question was whether a harmful reaction to the pressure of the workplace was reasonably foreseeable in relation to the individual employee concerned. Foreseeability depended on what the employer knew or ought to have known about the employee. Important factors in assessing foreseeability included the nature and extent of the work being done by the employee, whether the employer put the employee under unreasonable pressure and whether other workers doing the same job had suffered injury to their health. Moreover, an employer is usually entitled to assume that the employee can withstand the normal pressures of the job unless the employer knew of some particular problem or vulnerability. This guidance was recently approved by the House of Lords in *Barber v Somerset County Council*.³²

²⁵ *Ibid* at 496-497.

²⁶ *Ibid* at 509.

²⁷ *Ibid* at 479-480.

²⁸ *Ibid* at 504.

²⁹ See, for example, para 2.21 below.

³⁰ As such, it is already an exception to the general rule that reparation is only available for psychiatric injury caused by shock. See para 2.4 above. Stress at work cases are sometimes brought under the Protection from Harassment Act 1997 or as a breach of the implied contractual term of mutual trust and confidence between employer and employee; *Eastwood v Magnox Electric Plc* [2002] EWCA Civ 463.

³¹ [2002] 2 All ER 1, followed in *Stevenson v East Dunbartonshire Council* 2003 SLT 97 and *Taplin v Fife Council* 2003 SLT 653. See also A Bowen, "Earmuffs and Non-slip Flooring for the Soul: Negligence and Occupational Stress" 2002 SLT(News) 81, and N J Mullany, "Containing Claims for Workplace Mental Illness" (2002) 118 LQR 373.

³² [2004] 1 WLR 1089. A conjoined appeal involving, among others, *Hatton v Sutherland*.

2.11 A second category of cases in which damages have been awarded to persons who were not in physical danger embraces those who were, or thought themselves to have been, involuntarily responsible for the death or injury of others. In *Salter v UB Frozen and Chilled Foods Ltd*³³ the pursuer was driving a hoist in the cage of which two of his colleagues were standing to carry out a stocktaking. The hoist jerked forward for some unexplained reason and one of the stocktakers was killed when he hit his head on a roof beam. Following *Dooley v Cammell Laird*,³⁴ it was held that Mr Salter was a primary victim as he had been actively involved in the accident (but not responsible for it), even though he had not been within the range of foreseeable physical injury. Another case that possibly belongs in this category is *W v Essex County Council*.³⁵ The plaintiffs had agreed to become foster parents on the express understanding that any foster child would have no history of having sexually abused other children. In spite of an assurance to this effect, the social work department sent them a 15 year old boy whom they knew had sexually abused children. The boy abused the plaintiffs' four children and on discovering this the plaintiffs felt guilt and remorse at having indirectly injured their children. Once again a duty of care not to cause psychiatric injury was imposed simply on the basis of the reasonably foreseeable psychiatric injury to the pursuers.

2.12 Third, in *McLoughlin v Jones*³⁶ the plaintiff suffered a nervous breakdown after having been wrongfully imprisoned. He argued that his conviction had been the consequence of his solicitor's negligence in preparing his defence. The Court of Appeal held that in these circumstances the plaintiff should be treated as a primary victim even although he had not been in physical danger while in prison.³⁷ It was enough that psychiatric injury was reasonably foreseeable as a result of the defendant's negligence. Similarly, in *A v Essex County Council*³⁸ adoptive parents were awarded damages for psychiatric injuries caused to them by looking after their adopted son. The council, through whom the adoption was arranged, negligently failed to warn them that the boy was extremely disturbed and potentially violent. Further, parents of children whose organs were retained after removal during post-mortem examinations have been regarded as primary victims. There was a relationship of trust between the parents and the doctors, so that mental harm was foreseeable if children's organs were retained without their parents' consent.³⁹

2.13 Fourth, claims for psychiatric injury arising out of the receipt of distressing news have been allowed. In *Allin v City and Hackney Health Authority*⁴⁰ a mother was awarded damages for post traumatic stress syndrome caused by her being told (falsely) that her newborn baby had died. Claims may also arise where distressing but true information is imparted in an insensitive manner. For example, in *AB v Tameside and Glossop Health Authority*⁴¹ the authority on learning that one of its health workers was HIV positive had

³³ 2003 SLT 1011.

³⁴ [1951] 1 Lloyd's Rep 271.

³⁵ [2001] 2 AC 592.

³⁶ [2002] QB 1312, also known as *McLoughlin v Grovers*.

³⁷ However, Hale LJ considered (*ibid* at 1329, para 57) that, "Loss of liberty is just as much an interference in bodily integrity as is loss of a limb": she was therefore prepared to consider the case as analogous with *Page v Smith*.

³⁸ [2003] EWCA Civ 1848.

³⁹ *AB v Leeds Teaching Hospital NHS Trust* [2004] EWHC 644 (QB).

⁴⁰ [1996] 7 Med LR 167, see also *Farrell v Avon Health Authority* [2001] Lloyd's Rep Med 458 where a father was falsely informed of the death of his child and had been given a corpse of another baby to hold when he came to the hospital.

⁴¹ [1997] 8 Med LR 91. See also N J Mullany, "Liability for Careless Communication of Traumatic Information" (1998) 114 LQR 380.

posted letters to former patients warning them that there was a very slight risk of infection. The Court of Appeal allowed the authority's appeal on the ground that the information had been given in a reasonable way. The existence of a duty of care was not in issue as this had been conceded by the authority.

Need for foreseeability

2.14 Before the decision of the House of Lords in *Page v Smith*,⁴² there were two ways in which a pursuer could recover for psychiatric injury. The first was if the wrongdoer breached the duty of care to prevent psychiatric injury. This duty of care arose only when psychiatric injury to a person of ordinary fortitude was reasonably foreseeable. The second was as a consequence of a breach of a duty to prevent physical injury. Since the pursuer had been physically injured, he or she could also recover for any psychiatric injury, whether or not it was reasonably foreseeable, on analogy with the thin skull rule.⁴³ In these circumstances, psychiatric injury was not regarded as too remote a head of loss. This remoteness of damages rule has recently been re-affirmed by the House of Lords in *Simmons v British Steel Plc*.⁴⁴

2.15 In *Page v Smith*⁴⁵ the plaintiff was involved in a minor road traffic accident. He escaped physical injury but suffered an unforeseeable recurrence of a psychiatric illness. The House of Lords by a majority found for the plaintiff. In Lord Lloyd's opinion, when the plaintiff was in the area of risk of potential physical harm no distinction should be made between physical and mental injury.⁴⁶ If the wrongdoer could reasonably foresee that his conduct would expose the pursuer to *personal* injury, be it physical or mental, a duty of care arose not to harm the pursuer. Liability for mental illness would then be incurred if the duty was breached even although the pursuer was not physically injured and the mental illness suffered by the pursuer was not reasonably foreseeable in the circumstances. Lord Lloyd justified this conclusion on the basis that the wrongdoer must take his victim as he finds him: an egg shell personality being equated with an egg shell skull. It follows that the requirement of ordinary fortitude does not apply to primary victims. In the course of their speeches in *Page v Smith*, both Lord Browne-Wilkinson and Lord Lloyd⁴⁷ maintained that a distinction should no longer be made between physical and psychiatric injury.

2.16 The decision in *Page v Smith* has proved controversial.⁴⁸ It departs from conventional delictual theory by which the thin skull rule operates only after there has been a breach of the duty of care to prevent physical harm, ie the pursuer has been physically

⁴² [1996] AC 155.

⁴³ The wrongdoer must take his victim as he finds him, see *Bourhill v Young* 1942 SC(HL) 78, Lord Wright at 92 and *McKillen v Barclay Curle & Co Ltd* 1967 SLT 41, the Lord President (Clyde) at 42. Thus if the victim sustains a minor injury but because of his physical condition this has major consequences for him, then the wrongdoer is liable for these major consequences, even though they were unforeseen by the wrongdoer.

⁴⁴ 2004 SLT 595.

⁴⁵ [1996] AC 155.

⁴⁶ *Ibid* at 197. See also Lord Browne-Wilkinson at 180-181.

⁴⁷ *Ibid* at 197.

⁴⁸ See, for example, T K Feng, "Nervous Shock to Primary Victims" (1995) SJLS 649; C A Hopkins, "A New Twist to Nervous Shock" (1995) 54 CLJ 491; N J Mullany, "Psychiatric damage in the House of Lords - Fourth time unlucky: Page v Smith" (1995) 3 Journal of Law and Medicine 112; A Sprince, "Page v Smith - being 'primary' colours House of Lords' judgment" (1995) 11 PN 124; P R Handford, "A New Chapter in the Foresight Saga: Psychiatric Damage in the House of Lords" (1996) 4 Tort L Rev 5; F McManus, "Nervous Shock - Back to Square One?" (1996) Jur Rev 159; F A Trindade, "Nervous Shock and Negligent Conduct" (1996) 112 LQR 22. F A Trindade and P Cane, *The Law of Torts in Australia* (3rd edn, 1999) 362. But see B McDonald and J Swanton, "Foreseeability in relation to negligent infliction of nervous shock" (1995) 69 ALJ 945.

injured. It equates physical injury with mental injury, but only for those who were within the zone of potential *physical* danger, so in fact retaining a distinction between the two types of injury. Moreover, it can be argued that there is and should be a difference between physical harm and mental harm. People are expected to put up with some degree of mental harm in the form of stress and anxiety as part of everyday life, but this is not so for physical injuries.

Rescuers

2.17 It is difficult to fit rescuers into the normal categories of primary and secondary victims. In *Chadwick v British Railways Board*⁴⁹ damages were successfully claimed for psychiatric injuries suffered by Mr Chadwick. He lived near the scene of a horrific railway accident and had spent several hours in and under the wreckage helping to rescue and comfort the victims. In *Frost v Chief Constable of South Yorkshire Police*⁵⁰ the House of Lords was divided on the position of the police rescuers who had not been in any physical danger or reasonably apprehended physical danger. Lord Steyn said that a rescuer "must at least satisfy the threshold requirement that he objectively exposed himself to danger or reasonably believed that he was doing so" but that the psychiatric condition need not have been caused by the rescuer's perception of personal danger to himself.⁵¹ Lord Hoffman said that rescuers were not to be regarded as primary victims unless they were within the range of foreseeable physical injury, but if they were then, on the basis of *Page v Smith*, they could recover even if they suffered only a psychiatric injury.⁵² Lord Browne-Wilkinson simply concurred with these two speeches. Lord Griffiths dissented on this point as he thought that it was reasonably foreseeable that a person who helped with the immediate aftermath of a horrific incident would suffer psychiatric injury and that it was artificial to impose a requirement of (apprehended) physical danger.⁵³ Lord Goff, who also dissented, said that involvement with the aftermath of an accident should be sufficient to bring a rescuer within the category of a primary victim without having to have been within the range of foreseeable physical injury.⁵⁴

2.18 The present position of rescuers is therefore uncertain. The requirement, if it exists, that they were in physical danger or feared for their own safety seems hard to justify. Rescuers may sustain serious mental harm simply from what they see and hear in the aftermath of an incident. As a matter of policy they should not have to meet the additional requirement of a close relationship with the dead or injured victims applicable to normal secondary victims

Ordinary fortitude

2.19 The requirement of ordinary fortitude or customary phlegm stems from the case of *Bourhill v Young*⁵⁵ in which a woman who heard the noise of a nearby fatal road accident between a car and a motor cycle and saw blood on the road after the motorcyclist's body had been removed, failed to recover damages for her nervous shock and subsequent still-birth of the child she was carrying. She had not been in any physical danger nor had she

⁴⁹ [1967] 1 WLR 912.

⁵⁰ [1999] 2 AC 455.

⁵¹ *Ibid* at 499.

⁵² *Ibid* at 509.

⁵³ *Ibid* at 464-465.

⁵⁴ *Ibid* at 486.

⁵⁵ 1942 SC(HL) 78.

seen the accident happen. It was held that in deciding whether an injury was foreseeable, the unusual susceptibility of the victim is not to be taken into account. As Lord Porter said:⁵⁶

“The driver of a car or vehicle, even though careless, is entitled to assume that the ordinary frequenter of the streets has sufficient fortitude to endure such incidents as may from time to time be expected to occur in them, including the noise of a collision and the sight of injury to others, and is not to be considered negligent to one who does not possess the customary phlegm.”

In *Page v Smith*⁵⁷ it was decided that the requirement of ordinary fortitude did not apply to primary victims: however, it was held that it continued to apply to secondary victims.

2.20 If reasonable foreseeability of mental harm should be a condition of liability⁵⁸ then, unless the wrongdoer knew of the victim's particular susceptibility, this implies some assumption about the mental robustness of ordinary people. This assumption should apply to all victims, not just secondary victims. Even then, the form that this assumption currently takes - the concept of ordinary fortitude - is open to criticism. First, there is a wide range of susceptibility to mental harm amongst the general population. Thus ordinary fortitude is difficult to assess. Secondly, if ordinary fortitude is equated with average fortitude nobody would be entitled to claim in relation to a particular incident. Those with more than ordinary fortitude would not have developed a mental disorder, while those with less than ordinary fortitude who had developed a mental disorder would be held to the standard of their more robust fellows who had not suffered. Thirdly, the less severe the mental injuries a victim sustains, the greater the chances of damages being awarded. This is because ordinary people are more likely to sustain a minor rather than a major mental disorder in relation to a particular incident. In short, ordinary fortitude is a legal concept used to limit liability but which has little evidential basis and which operates in an unsatisfactory way.

Conditions for damages to be due to secondary victims

2.21 Under the present law a secondary victim may claim damages for a psychiatric injury if it arose out of an incident for which the defender was responsible and the secondary victim satisfies the three criteria set out by Lord Oliver in *Alcock v Chief Constable of South Yorkshire Police*.⁵⁹ These criteria may be summarised as follows:

- (a) there must be a close tie of love and affection between the secondary victim and the injured person;
- (b) the secondary victim must have been present at the accident or at its immediate aftermath; and
- (c) the secondary victim's psychiatric injury must have been caused by direct perception (ie through his or her own unaided senses) of the accident or its immediate aftermath.

⁵⁶ At 98.

⁵⁷ [1996] AC 155, Lord Lloyd at 197.

⁵⁸ Unless the harm was inflicted intentionally.

⁵⁹ [1992] 1 AC 310 at 411.

2.22 A close tie is currently presumed to exist in relation to a parent, a child, a spouse and possibly also a fiancé(e).⁶⁰ Other pursuers (relatives or close friends) have to show that such a tie exists.⁶¹ Being a close colleague and socialising after work for many years was regarded as insufficient in *Robertson v Forth Road Bridge Joint Board*.⁶² The need for a close tie of love and affection resulted in the refusal of damages to a road worker who suffered psychiatric injuries after seeing a burnt-out car with bodies in it while cordoning off that section of the road.⁶³

2.23 The second and third *Alcock* criteria, namely the pursuer's presence at the incident or its immediate aftermath and the perception of the incident or its immediate aftermath with his or her own unaided senses, give rise to difficulties. A mother who sees her child injured in a road accident for which the defender is delictually responsible will be entitled to compensation. However, another mother who is told of the horrific death of her child as the result of a similar accident but is too distraught or too far away to go to the scene of the accident or the hospital will be denied compensation. A particular difficulty is in deciding whether what the pursuer perceived constituted the immediate aftermath. In *Ravenscroft v Rederiaktiebølaget Transatlantic*⁶⁴ a young man was crushed by machinery while working. He died in hospital two hours later. His mother went there 20 minutes after his death. *Tranmore v T E Scudder Ltd*⁶⁵ also involved a fatal accident at work. The father was told hours afterwards and saw his son's body the next day. In *Taylorson v Shieldness Produce Ltd*⁶⁶ the father had a brief glimpse of his fatally injured son as he was transferred from the ambulance and was with him in intensive care after treatment. *Taylor v Somerset Health Authority*⁶⁷ concerned a woman who went to hospital within 20 minutes of being told that her husband had suffered a heart attack. When she arrived she was told he was dead and saw the body. All of these claims for damages for psychiatric injury failed as the courts held that the claimants had not been at the scene of the incident or its immediate aftermath. On the other hand, in *Galli-Atkinson v Segha*⁶⁸ a mother was successful in her claim for damages for psychiatric injury when she went out looking for her daughter who had failed to return home from a ballet lesson, saw the scene of the accident about an hour after it had occurred and was taken to the hospital where she saw her daughter's terribly injured body in the mortuary. This was regarded as being part of the immediate aftermath.

2.24 Thus the present law appears ungenerous towards those whose psychiatric injuries arise as a consequence of their witnessing or learning of the death or injury of another person. The second and third *Alcock* criteria (presence at the incident or its immediate aftermath and perception of it with own unaided senses) are difficult to justify except as a blunt way of restricting liability. As shown in the previous paragraph, they result in arguably anomalous and harsh decisions.

⁶⁰ *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, Lord Keith at 397; see also *Currie v Wardrop* 1927 SC 538.

⁶¹ *McCarthy v Chief Constable of South Yorkshire Police* (unreported) 11 Dec 1996, half-brother.

⁶² 1995 SC 364, the Lord President (Hope) at 368 and 370.

⁶³ *Keen v Tayside Contracts* 2003 SLT 500.

⁶⁴ [1992] 2 All ER 470 (note).

⁶⁵ Court of Appeal, 28 April 1998 (unreported).

⁶⁶ [1994] PIQR P329.

⁶⁷ [1993] 4 Med LR 34.

⁶⁸ [2003] EWCA Civ 697.

Primary victim responsible for own injuries

2.25 In *Greatorex v Greatorex*⁶⁹ a young man was involved in a car accident caused by his own careless driving (he had been drinking). His father, a fire officer, was called to the scene where he witnessed his son's injuries and as a consequence suffered from severe post-traumatic stress disorder. He sued his son for psychiatric injury. The father met the requirements necessary for a successful "secondary victim" claim. He was suffering from a recognised psychiatric illness, had a close tie of love and affection with the primary victim, had been present at the immediate aftermath of the accident and his psychiatric injury was caused by direct perception of his son's injuries. Nevertheless, his action was dismissed on policy grounds. Cazalet J considered that to allow this claim would be to "create a significant further limitation upon an individual's freedom of action".⁷⁰ This would indeed be the case if individuals are to be held liable for self-inflicted injuries arising out of suicide attempts or participation in dangerous activities. He was also of the opinion that it would be potentially productive of acute family strife. This last reason seems unconvincing. Close relatives can already sue each other in delict but tend not to do so unless the wrongdoer is insured. Litigation between family members also arises in relation to contracts, financial provision on divorce and child-care.

⁶⁹ [2000] 4 All ER 769.

⁷⁰ *Ibid* at 783. The decision has been criticised by P Handford "Psychiatric Damage where the Defendant is the Immediate Victim" (2001) 117 LQR 397.

Part 3 Recommendations for Reform

Introduction

3.1 It has been judicially recognised that the law on delictual liability for psychiatric injury does not rest on principled reasoning. As Lord Hoffmann said in *Frost v Chief Constable of South Yorkshire Police*,¹ "No one can pretend that the existing law, which your Lordships have to accept, is founded upon principle". Instead, the law consists of unprincipled rules some of which appear generous to primary victims² but most of which have evolved to limit potential liability to secondary victims.³ The application of these rules has become mechanical and is often difficult to defend in terms of corrective or distributive justice. It has even been contended that the law of negligence took a wrong turning in allowing reparation for psychiatric injury.⁴ Nevertheless, while we did not consult directly on this issue, none of our consultees suggested that mental harm should cease to be a reparable interest in Scots law.

3.2 We take the view that there is a need to simplify and rationalise the law: to replace the existing rules with a principled yet flexible regime which does not extend liability unduly. Senior members of the judiciary have recognised that such a task cannot be left to the courts.⁵ However, such an exercise is extremely difficult. While we believe that persons should prima facie be liable to make reparation for any mental harm which was a reasonably foreseeable consequence of their wrongful conduct, nevertheless we recognise that such a principle could be over-inclusive. In particular, it would enable persons to sue for damages who had merely observed or learned of the defender's conduct and any harm it had caused third parties. But simply to deny title to sue whenever the pursuer is not directly involved is over-exclusive as justice demands that certain claims, for example those of the parents of an injured person, should not be dismissed at the outset. To find a proper balance has not been easy if the law is not to become overly complex and the underlying general principles obscured. Nevertheless, we think that such a balance can be found so that the law can be rationalised without any great increase in the scope of potential liability.

A new statutory scheme

3.3 We propose that the common law rules relating to delictual liability for causing mental harm should be abolished and replaced with a statutory obligation to make reparation. The anomalies and the idiosyncrasies of the current law will thereby be removed. The new statutory regime will attempt to equate delictual liability for mental harm with liability for physical harm but with important restrictions where the mental harm has been caused indirectly. Among the common law rules which would be abolished are:

¹ [1999] 2 AC 455 at 511.

² As in *Page v Smith* [1996] AC 155 discussed at paras 2.15-2.16 above.

³ In particular the *Alcock* criteria discussed at paras 2.21-2.24 above.

⁴ J Stapleton, "In Restriction of Tort" in P Birks (ed) *The Frontiers of Liability*, vol 2 at 95.

⁵ See, for example, Lord Steyn and Lord Hoffmann in *Frost v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 at 500 and 511 respectively.

- (i) the need for a "nervous shock" before there can be liability;
- (ii) the classification as such of persons into primary and secondary victims. As we have seen,⁶ one of the major difficulties of the current law is that the criteria to establish whether a person is a primary victim are not certain;
- (iii) the rule in *Page v Smith*⁷ that a defender is liable for the unforeseeable mental harm caused to a primary victim even though the primary victim has not sustained any foreseeable physical harm;
- (iv) the *Alcock* criteria⁸ which must be satisfied before a duty of care arises to prevent a secondary victim sustaining mental harm; and
- (v) that for the purpose of determining whether or not there has been a breach of duty a secondary victim is assumed to be a person of ordinary fortitude unless the defender has knowledge of the pursuer's unusual susceptibility to psychiatric harm.⁹

3.4 We therefore recommend that:

1. **The common law rules which apply only to reparation for mental harm including the rules on liability for "nervous shock" should be replaced by a statutory obligation to make reparation for wrongfully caused mental harm.**

(Draft Bill, sections 1 (1) and 1 (2))

Remoteness of damages

3.5 It is only the rules which deal exclusively with liability for mental harm which we recommend should be abolished. Accordingly, the common law rules under which damages for mental harm can be recovered where the mental harm was caused by another type of harm for which the defender was delictually liable will remain. These are often known as the rules on remoteness of damages. For example, if in breach of a duty of care, the defender causes physical harm to the pursuer who sustains mental harm as a consequence of his physical injuries, the defender is liable to pay damages for the mental harm whether it was foreseeable or not. This is a result of the thin skull rule which applies in the context of wrongfully caused physical harm and which was reaffirmed by the House of Lords in *Simmons v British Steel Plc.*¹⁰ The only limitation is that the physical injuries suffered by the pursuer must have materially contributed to the mental harm.¹¹ While it may seem unprincipled that a defender can be liable for unforeseeable mental harm whenever the pursuer has sustained some foreseeable - albeit trivial - physical harm, this is clearly the effect of the existing remoteness rules in relation to physical injury. We have taken the view that it would be inappropriate to consider reform of the remoteness rules in relation to

⁶ Paras 2.6-2.13 above.

⁷ [1996] AC 155.

⁸ Paras 2.21-2.24 above.

⁹ See, for example, paras 2.19-2.20 above.

¹⁰ 2004 SLT 595.

¹¹ *Ibid.*

physical injury in a project which is only concerned with delictual liability for causing mental harm.

3.6 In *Attia v British Gas Plc*¹² the owner of a house sustained mental harm from witnessing the destruction of the property as a consequence of the defendant's negligence. The Court of Appeal held that compensation for mental harm could be recovered provided it was a reasonably foreseeable consequence of the damage to the property. Here the mental harm must be reasonably foreseeable as the thin skull rule does not apply outwith personal injury cases. Again, this remoteness rule in relation to delictual liability for damage to property is not affected by our recommendations. Similarly, we do not intend to affect the existing law on solatium under which a victim of physical injury, property damage or defamation can obtain compensation for hurt feelings including mental harm. Moreover, the right of a person to seek damages for non-patrimonial loss arising from the death of a relative¹³ is not affected by our proposals unless the non-patrimonial loss amounts to a medically recognised mental disorder. In such circumstances, damages for mental harm would be recovered only if there were statutory liability under our proposed legislation. Consequently, we recommend that:

- 2. The legislation abolishing the common law rules relating to delictual liability for mental harm should make clear that the abolition does not affect:**
 - (a) the right to obtain damages for mental harm resulting from any other type of harm to the claimant for which there is delictual liability; or**
 - (b) the right to obtain damages for distress, anxiety, grief or sorrow where the claim is made by a relative of a deceased person under section 1(4)(a) or (b) of the Damages (Scotland) Act 1976.**

(Draft Bill, section 6)

Mental harm: intentional and unintentional

3.7 In our Discussion Paper we asked whether liability should be restricted to significantly disabling psychiatric injuries.¹⁴ The majority of consultees considered that "significantly disabling" was too high a threshold to be crossed before there could be liability. On the other hand, there was support for our proposal in the Discussion Paper that no compensation should be payable for mere mental distress.¹⁵ Since then we have become satisfied that a distinction should be drawn between the situation where mental harm is caused deliberately by the defender and where it has arisen as a result of his unintentional but wrongful conduct, for example negligence. In the case of intentional wrongdoing, we now think that the defender should normally be liable for the harm he intended to cause: this should include distress, anxiety, grief, anger etc, whether or not this amounts to a medically recognised mental disorder. We believe that a person who deliberately causes mental harm, for example by subjecting the victim to sustained mental cruelty, should make reparation for any harm so caused to the pursuer's mental state, mental functioning or mental well-being.

¹² [1988] QB 304.

¹³ Under the Damages (Scotland) Act 1976, s1(4)(a) or (b).

¹⁴ Proposal 1(2), para 2.9.

¹⁵ Proposal 1(1), para 2.9.

This would be consistent with the approach generally taken in relation to intentional delicts, for example fraud,¹⁶ where the defender is usually liable for all the harm directly arising from the wrongful conduct. It also reflects society's abhorrence of such conduct. On the other hand, where mental harm is not caused intentionally, we agree with the majority of our consultees that there should be no liability to make reparation unless the mental harm amounts to a medically recognised mental disorder. We think that this distinction between liability for intentional and non-intentional conduct is consonant with the different ways that the two types of wrongful conduct are treated under the general law of delict. That said, it should be remembered that a medically recognised mental disorder covers a wide range of mental conditions including psychological as well as psychiatric disorders. Whether or not the pursuer has sustained such a disorder will have to be established by medical evidence.

3.8 Mental well-being is notoriously difficult to define: similarly, the concept of mental or psychiatric injury is also elusive. In these circumstances, we have decided to use "mental harm" as a generic term in this Report and Draft Bill. The concept of mental harm - rather than psychiatric or psychological illness - seems likely to be more widely understood by persons who do not have a knowledge of medical science. Moreover, paradigmatic of the law on delict is the obligation to make reparation for wrongfully causing physical harm to person or property. It therefore seems appropriate to talk of an obligation to make reparation for wrongfully causing mental harm rather than psychiatric injury. As a generic term, mental harm has been given a wide meaning in our Draft Bill. It means any harm to a person's mental state, mental functioning or well-being whether or not the harm amounts to a medically recognised mental disorder. Rather than limit liability by restricting claims to certain kinds of psychiatric illnesses or mental disorders, we consider that any restrictions on liability should, so far as it is practicable, be expressly and clearly articulated in legal rules; for example, we are proposing that there shall be no liability where the pursuer can be expected to endure mental harm without reparation because it results from the normal stresses or vicissitudes of life or bereavement or other losses of a type which a person can reasonably expect to suffer in the course of life.

3.9 As we said,¹⁷ when a person causes mental harm unintentionally, there should be no liability unless the mental harm amounts to a medically recognised mental disorder. It is intended that the concept should include psychological as well as psychiatric disorders. We appreciate that such a disorder is unlikely to be established without medical evidence but have been advised that the term "mental disorder" is used throughout the medical profession and – more importantly – has an agreed meaning. Accordingly, in cases of unintentionally caused harm, the pursuer's claim will not fail at the outset provided the harm suffered is a medically recognised mental disorder: but, of course, the pursuer may be unable to satisfy the other conditions which we recommend should apply before there is liability in such circumstances.

¹⁶ *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254; *Barry v Sutherland* 2002 SLT 413.

¹⁷ Para 3.7 above.

3.10 We therefore recommend that:

3. (a) **For the purpose of the statutory liability to make reparation for mental harm, mental harm should mean any harm to a person's mental state, mental functioning or well-being whether or not it amounts to a medically recognised mental disorder.**

(Draft Bill, section 7(c))

- (b) **Where the mental harm is caused unintentionally there should be no statutory liability to make reparation unless the mental harm amounts to a medically recognised mental disorder.**

(Draft Bill, section 4(1)(a))

Relationship of the new scheme to rules of delict

3.11 (a) **Common law rules** As already mentioned, we have taken the view that the common law rules should be replaced by a statutory obligation to make reparation for causing mental harm. In order to allow the courts sufficient flexibility to reach principled decisions on the facts and circumstances of particular cases, we consider that the statutory obligation should be closely related to the principles which govern delictual liability for physical harm. These principles are well known to lawyers who practise in the field: accordingly, the reform of the law will involve concepts with which they are already familiar. We therefore recommend that, subject to certain important restrictions discussed later in this Part, the principles and rules of the law of delict which apply to reparation for physical harm should apply also to the statutory obligation to make reparation for mental harm.

3.12 This means that a person will be liable to make reparation for mental harm which he has wrongfully caused to another person, ie as a consequence of the defender's culpa or fault. At common law, fault includes intentional wrongful conduct. Thus a defender will be liable for causing mental harm when she intended to harm the pursuer in this way. This could be done directly or indirectly. For example:

- (a) A subjects B to harassment with the intention of causing her distress ie mental harm. A is liable to make reparation for B's mental harm because he intended to cause her mental harm as a consequence of the harassment.
- (b) A subjects B to harassment with the intention of causing C, B's mother, distress ie mental harm. A is liable to make reparation for C's mental harm because he intended to cause her mental harm as a consequence of the harassment of B.

Where the defender does not intend to harm the victim, he may be liable if he causes her mental harm by unintentional but wrongful conduct. The most common example of such conduct is, of course, where A causes mental harm to B as a consequence of A's carelessness. As the harm was caused unintentionally, there will be no liability unless the mental harm amounts to a medically recognised mental disorder. If so, then under our proposals, A will be liable to make reparation to B for mental harm provided his careless

conduct amounted to negligence under the rules which determine negligent conduct for the purpose of reparation for physical harm. Accordingly, the pursuer will have to establish the existence of a duty of care to prevent mental harm, a breach of that duty as a consequence of the defender's failure to take reasonable care, and a sufficient causative link between the breach and the mental disorder sustained by the pursuer. The law on remoteness of damages would apply in the same way: so, for example, if the pursuer sustained mental harm which was more serious than was reasonably foreseeable, damages would be based on the more serious mental harm as a result of the application of the thin skull rule. The pursuer may also be met by any common law defence which would be open to the defender in a claim for damages for physical harm. This would include the defence of *volenti non fit injuria* (ie where the pursuer consented to run the risk of mental harm), contributory negligence or the defence that the pursuer was participating in a criminal activity at the time he sustained the harm. Similarly, the doctrine of vicarious liability would apply in cases of mental harm in exactly the same way as a case of physical harm.

3.13 (b) Statutory rules We also propose that any enactment which applies to reparation for physical harm caused to a person applies in the same way to reparation for mental harm. First, this means that where the standard of care for liability is stipulated by statute, that standard will also apply where the pursuer has sustained mental as opposed to physical harm. Thus, for example, where a person suffers mental harm as a consequence of dangers which are due to the state of the defender's premises, the standard of care expected of the defender will be determined by the Occupiers' Liability (Scotland) Act 1960. This is particularly important where the enactment provides for strict liability. So for example, if a pursuer sustains mental harm as a result of the behaviour of an animal or a defective product, the defender's liability remains strict: there is no need to prove fault.¹⁸ But although the standard of care is determined by such statutes, there will only be liability to make reparation for mental harm if the statutory criteria which we propose are satisfied. Accordingly, the draft Bill expressly stipulates that liability for mental harm under existing or future statutes will be subject to its provisions.¹⁹

3.14 Later we recommend that where mental harm is caused unintentionally there is no liability unless it was reasonably foreseeable in the circumstances that the victim would suffer a mental disorder as a consequence of D's conduct.²⁰ So for example, this restriction would apply to claims under Part 1 of the Consumer Protection Act 1987 when such mental harm was caused by a defective product. Thus:

- (a) P sustains a mental disorder when his car goes off the road because the brakes fail as a result of a design defect. P's action will fail unless he can show that it was reasonably foreseeable that he would sustain such mental harm as a consequence of the defective product. It is submitted that P's mental disorder is reasonably foreseeable. Therefore D is liable without proof of fault as liability is strict under Part 1 of the Consumer Protection Act 1987.

¹⁸ Under the Animals (Scotland) Act 1987 and Part 1 of the Consumer Protection Act 1987 respectively.

¹⁹ Draft Bill, s 2 "Subject to the following provisions of this Act". This reflects the position under the current law where liability for mental harm under s 76 of the Civil Aviation Act 1982 has been held to be subject to the common law restrictions on liability to secondary victims; *Glen v Korean Airlines* [2003] 3 All ER 621.

²⁰ Recommendation 6 at para 3.44.

- (b) P sustains a mental disorder because his television breaks down and he misses his favourite programme. P's action will fail unless he can show that it was reasonably foreseeable that he would sustain such mental harm as a consequence of the defective product. It is submitted that P's mental disorder is not reasonably foreseeable. Therefore D is not liable even though liability is strict under Part 1 of the Consumer Protection Act 1987.

Similarly, there would be a defence to any claim under Part 1 of the Consumer Protection Act 1987 if the mental harm sustained by the pursuer as a consequence of a defective product was of such a type that a person in the position of the victim could reasonably be expected to endure it without reparation - a general restriction on liability which we discuss later.²¹

3.15 Second, where the victim is not directly involved in an incident resulting from the defender's wrongful conduct, we think that in general there should be no liability to pay compensation for mental harm caused by witnessing or learning of that incident. However, the victim may be able to sue if he was closely related to a person who was killed or injured as a consequence of the defender's conduct and it was reasonably foreseeable that the pursuer would suffer a mental disorder.²² This restriction (and the gateway) would also apply to liability for mental harm arising by statute. For example, the restriction would apply to claims under the Animals (Scotland) Act 1987 when mental harm has been caused by an animal. Thus:

- (a) From the safety of his house, a man sees his next door neighbour's child being savaged by the neighbour's dog. As a consequence, he sustains mental harm. Even though liability is strict under the Animals (Scotland) Act 1987, he is unable to sue as he was not directly involved in the incident.
- (b) From the safety of her house, a mother sees her own child being savaged by her neighbour's dog. As a consequence, she sustains a mental disorder. Although she was not directly involved in the incident, there is a gateway as she is related to the child who was injured in the incident. There can be liability for mental harm if it was reasonably foreseeable that a mother would suffer mental harm by witnessing her child being savaged by her neighbour's dog. It is submitted that it is. Consequently, she can obtain compensation under the Animals (Scotland) Act 1987 without establishing fault as a keeper's statutory liability for harm caused by an animal is strict.

Where a statute was not intended to apply to reparation for mental harm,²³ then the exclusion will not be affected by our proposals. Nor would our proposals apply where a statute was clearly intended to apply to physical harm in a different way from mental harm.

3.16 Finally, statutory rules for determining liability to make reparation for physical harm will apply to claims for damages in relation to mental harm. So for example, the damages recoverable for mental harm will be reduced on the grounds of the pursuer's contributory negligence under the Law Reform (Contributory Negligence) Act 1945 and any claim will be

²¹ See paras 3.18-3.30 below.

²² See paras 3.45-3.53 below.

²³ See, for example, the Carriage by Air Act 1961, *King v Bristow Helicopters Ltd* 2002 SC (HL) 59.

subject to the rules of limitation in respect of personal injuries under the Prescription and Limitation (Scotland) Act 1973.

3.17 Accordingly we recommend that:

4. **(a) In determining whether a person is under a statutory obligation to make reparation for mental harm, the common law rules of delict which apply to reparation for physical harm should also apply to reparation for mental harm.**

(Draft Bill, section 2(a))

- (b) In determining whether a person is under such an obligation, any enactment which applies to reparation for harm caused to a person should apply to reparation for mental harm in the same way as to reparation for physical harm, unless the contrary is provided in that enactment.**

(Draft Bill, section 2(b))

General restrictions on the new statutory obligation to make reparation

3.18 Although the proposed statutory obligation to make reparation for mental harm involves the application of the ordinary rules on delict which apply to reparation for physical harm, the law of reparation for mental harm cannot simply be equated with the law of reparation for physical harm. Mental harm is different from physical harm. In the latter case, potential liability can be kept within acceptable limits by the simple device of restricting the obligation to make reparation to such harm that the defender can reasonably foresee as likely to be suffered by a normal person as a consequence of the defender's wrongful conduct. In relation to mental harm, it is extremely difficult to ascertain what a normal person's reaction would be "given that people vary very much more in psychological resilience than in physical robustness".²⁴ Moreover, while a wrongful act may sometimes cause physical harm to a large number of people, in most cases potential liability is restricted because the number of people liable to be injured is usually limited as a result of the physical laws of inertia: for example, in an accident a carelessly driven car will come to a stop before injuring every person using the road. On the other hand, mental harm can be caused to thousands as a consequence of events in which they are not directly involved: for example, the broadcast on television of a gruesome incident. Consequently, reasonable foreseeability of mental harm cannot be the sole device to protect defenders from potential indeterminate liability. There have to be additional criteria which must be satisfied if liability is to be kept within acceptable bounds.

3.19 As we have seen, one of the figures that stalks the current law on delictual liability for mental harm is the person of ordinary fortitude.²⁵ This concept is used by the courts to restrict liability in relation to secondary victims by arguing that their psychiatric injury was not reasonably foreseeable because a person of ordinary fortitude would not have suffered it in

²⁴ T Weir, *Tort Law* (Oxford 2002) 49.

²⁵ See paras 2.19-2.20 above.

the circumstances of the particular case. In the Discussion Paper we asked²⁶ whether, when determining if the pursuer's psychiatric injury was reasonably foreseeable, she should be regarded as a person of ordinary fortitude unless the defender had knowledge of the pursuer's unusual susceptibility to psychiatric injury. A large majority of our consultees agreed that this should be the law in relation to both primary and secondary victims. However, when we attempted to use the proposed rule in various hypothetical situations we began to realise its limitations. First, if ordinary fortitude means average fortitude then no one would be able to recover for mental harm because the majority of people do not suffer mental disorder as a consequence of wrongful conduct. Secondly, as we pointed out in the previous paragraph, people vary greatly in their susceptibility to mental harm so that ordinary fortitude is difficult to ascertain. These reasons alone make its application difficult.

3.20 Moreover, the concept of a person of ordinary fortitude is in effect a judicial construct which is used to enable a court to make a value judgment on whether it is in the general interests of society that a person in the position of the defender should be compelled to compensate a person in the position of the pursuer in the circumstances of a particular case. The factors underlying the decision include the nature of the mental harm sustained by the pursuer, the frequency of the occurrence which caused the harm, the "status" of the pursuer at the time he sustained the injury and whether reparation for the pursuer's mental harm is commensurate with the degree of the defender's fault. The question whether a person of ordinary fortitude would have succumbed to a mental disorder in the circumstances attempts to bring an element of objectivity to the reasoning. Nevertheless, there is little doubt that its application is policy driven.

3.21 For these reasons we do not think that it should be used as a fundamental principle on which to base recommendations for reform. Instead, we have taken the view that these policy issues should be addressed transparently. We are therefore recommending that there should be a general restriction on the right to obtain reparation when the mental harm sustained by the pursuer is of such a type that a person in the position of the pursuer could reasonably be expected to endure it without seeking reparation. The idea is that there are situations where society expects people to experience mental harm without being able to pursue an action for reparation, even though the mental harm may have been sustained as a consequence of a wrongful act. Ultimately, the court must determine whether or not the restriction applies in a particular case: but we think that there are two particular situations where the restriction should operate and they are specifically mentioned in the Draft Bill.

3.22 **(a) Vicissitudes of life** The first is where the mental harm results from the normal stresses or vicissitudes of life or the life that the victim leads. It is an ordinary part of human experience to encounter events that will detrimentally affect a person's mental well-being: anger, fright, worry, fear, anxiety, loss of confidence and low self esteem are common reactions to the normal stresses and vicissitudes of life, some of which are caused by the wrongful conduct of others.

3.23 Such mental harm is commonly experienced in the context of inter-personal relationships. For example, when a couple breaks up, each party can expect to be the subject of hurtful remarks by the other. Even if these remarks amount to verbal injury, it is thought that damages for any mental harm incurred would not be available as such harm is

²⁶ Proposal 3(6), para 3.36.

often experienced on the breakdown of a relationship. Contrast this situation with that of a woman who has been subjected to systematic mental torture by her partner over a period of years: here an action would lie since such abuse goes far beyond the normal stresses and vicissitudes of life.

3.24 Again, such mental harm often arises in the employment environment. Consider the following examples:

- (a) An employer is irritated with an employee and shouts abuse at her. As a result the employee is emotionally upset for a few days. While upset, the employee is suffering harm to her mental well-being and under the proposed definition the emotional upset would constitute mental harm. Prima facie she is entitled to reparation as the employer's wrongful conduct was intentionally to upset her. However, it is thought that the restriction would apply. Society expects that its members should be sufficiently thick skinned to put up with one isolated instance of verbal abuse as opposed to a sustained campaign of abuse. Accordingly, her claim would fail as the mental harm she sustained resulted from the normal stresses or vicissitudes of life.
- (b) An employer is irritated by an employee and shouts abuse at her. As a result the employee sustains a nervous breakdown as a consequence of an unusual susceptibility to psychiatric injury. She cannot work for three months because of the breakdown. During her breakdown, the employee is suffering from mental harm. Prima facie she is entitled to reparation as the employer's wrongful conduct was intentionally to upset her. It does not matter that the mental harm sustained by the employee was greater than that intended by the employer, as applying the thin skull remoteness test, the defender must take his victim as he finds her and, as the wrongful act was intentional, he is liable for all the mental harm arising from the wrong even if its extent was unforeseeable.²⁷ Nevertheless it could be argued that the claim would fail because one incident of verbal abuse from an employer is a normal stress or vicissitude of life and that any mental harm arising therefrom should be endured without compensation.

3.25 This restriction will be important in situations where reparation is sought for stress-related mental harm, particularly harm caused by stress at work. Persons who have responsible jobs are expected to accommodate the stress inherent in their work and can reasonably be expected to endure any resultant mental harm without seeking reparation. Similarly, there are professions, the armed forces, firemen and the police for example, which involve exposure to personal danger and participation in horrifying situations. Once again society expects that members of such professions should be able to accommodate the stresses inherent in their work and that any resultant mental harm should be endured without seeking reparation, though it might entitle the victim to an occupational pension on the grounds of ill health. It is important to emphasise that the restriction applies only in relation to mental harm caused by the normal stresses or vicissitudes of the type of life the pursuer leads. It is not intended to be a blanket prohibition on members of such professions to seek reparation. They will be able to do so when the mental harm is a consequence of an event

²⁷ As under the current law, *Essa v Laing Ltd* [2004] EWCA Civ 2.

that goes well beyond what can usually be expected to occur in the ordinary course of their jobs. Thus, while a police officer might be expected to put up with seeing a corpse at a car crash, she might not be expected to remain unaffected by the sight of the corpses of children massacred by a frenzied killer.

3.26 Of course, the normal stresses and vicissitudes of life or of the type of life which a person leads go beyond the inter-personal and employment spheres. If for example a student suffered from depression as a result of failing an exam, no action would lie even if it is shown on review that the examiner was careless in adding up the marks and the candidate had therefore passed: failing an exam is one of the ordinary stresses and vicissitudes of life. The restriction would also cover situations where a person receives a "fright" as a result of a prank by friends or seeing a play or film. Similarly, persons who engage in dangerous pastimes should not be able to seek reparation for mental harm arising from the risks inherent in the sport or recreation. So for example, persons who engage in combative sports where their opponents deliberately try to frighten them "to put them off their game" would be unable to sue if they sustained mental harm as a consequence of such behaviour. It is a normal vicissitude of the sport in which they were engaged.

3.27 **(b) Bereavements and other losses** The second situation where we think that a person can be expected to endure mental harm without seeking reparation is when it results from bereavements or other losses of a type which a person can reasonably expect to suffer in the course of his or her life. In the case of death, it is reasonably foreseeable that the relatives of the deceased may suffer grief and distress, misery and depression. But even where this amounts to mental harm, there is a community expectation that such harm should be endured without compensation where it arises solely because a person who was dear to them has been killed. The law already allows a member of the deceased's immediate family to seek reparation for non-patrimonial loss under the Damages (Scotland) Act 1976²⁸ and we see no reason why a person who suffers mental harm merely because of the death of a relative should recover any compensation beyond that which would have been awarded for distress, anxiety, grief and sorrow under the 1976 Act.²⁹

3.28 It must be emphasised that the restriction applies only when the mental harm arises from the bereavement itself: the pain that we all can expect to suffer when a close relative or friend dies. Where in a particular case there are circumstances beyond the mere fact of death, it will be open to the pursuer to argue that the restriction should not apply as the bereavement is not one that persons can reasonably expect to suffer in the course of their lives. Consider the following examples:

- (a) A is killed in a car accident as a consequence of a driver's negligence. A's mother is informed of his death. She suffers a nervous breakdown because of her grief at her son's death. She is restricted to her claim for non-patrimonial loss under the 1976 Act even if her nervous breakdown is a medically recognised mental disorder. The restriction applies as the mental harm is caused solely by the death of her son, a loss of a kind which a mother could reasonably expect to suffer during her life.

²⁸ S 1(4) (a) and (b).

²⁹ Cf *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 198 ALR 100 where the High Court of Australia held that an employer owed a duty of care to the parents of an employee to prevent them suffering mental harm as a consequence of the employee's death.

- (b) A is killed in a car accident as a consequence of a driver's negligence. A's mother is present at the accident and directly sees her son being killed. She suffers a nervous breakdown because of her grief at her son's death. While she may claim for non-patrimonial loss under the 1976 Act, she may have an additional claim for reparation if the nervous breakdown is a recognised mental disorder. This is because the mental harm does not arise merely from the bereavement but the fact that she saw her son being killed: it is not a type of loss which a mother can reasonably expect to suffer during her life. Accordingly, the restriction does not apply.
- (c) A is injured in a car accident as a consequence of a driver's negligence. A's injuries trigger a pre-cancerous growth. His mother nurses him through a long and painful illness. A dies. His mother suffers a nervous breakdown. While she may claim for non-patrimonial loss under the 1976 Act, she may have an additional claim if the nervous breakdown is a recognised mental disorder. This is because the mental harm does not arise merely from the bereavement but from the fact that she saw her son's injuries and nursed him through a long and painful illness: it is not a type of loss which a person can reasonably expect to suffer during her life. Accordingly, the restriction does not apply.
- (d) A is kidnapped, tortured and killed. His mother suffers a nervous breakdown particularly when she contemplates the nature of her child's death. While she may claim for non-patrimonial loss under the 1976 Act, she may have an additional claim if the nervous breakdown is a recognised mental disorder. This is because the mental harm does not arise merely from the bereavement but also from the horrific circumstances of her child's death: it is not a type of loss which a person can reasonably expect to suffer during her life. Accordingly, the restriction does not apply.

3.29 The restriction is not confined to human bereavement. It includes, for example, the injury as opposed to death of a relative or friend. Another type of loss would be the death or injury of an animal, such as a pet. Persons are expected to withstand such losses. There could, of course, be exceptional circumstances where the loss is not of a type that persons can reasonably expect to suffer in the course of their lives; for example, if a pet is malevolently poisoned. The position is similar in respect of damage to other property such as a motor car: unless there are exceptional circumstances, such as the property being an heirloom, or an unpublished manuscript, the restriction will apply. However, it should be noted that when a claim is made *by an owner* in respect of the destruction of his or her property, under the remoteness rules, he may be able to recover for mental harm if that was reasonably foreseeable.³⁰ Technically, the restriction does not apply in this situation.³¹

³⁰ See para 3.6 above.

³¹ Of course, it will only be in exceptional circumstances that such mental harm would be reasonably foreseeable: therefore, in practice, the outcome will be the same as if the restriction did apply.

3.30 We therefore recommend that:

5. (a) **There should be a general restriction on the statutory obligation to make reparation for wrongfully caused mental harm if the mental harm is of such a nature that a person in the position of the victim could reasonably be expected to endure it without seeking reparation.**

(Draft Bill, section 3(1))

(b) **A person should reasonably be expected to endure mental harm without seeking reparation if, for example, it results from:**

- (i) **the normal stresses or vicissitudes of life or of the type of life which that person leads; or**
- (ii) **bereavements or losses of a type which persons can reasonably expect to suffer in the course of their lives.**

(Draft Bill, section 3(2))

Further restrictions where mental harm is caused unintentionally

3.31 (a) **Harm amounts to a mental disorder** We have defined mental harm widely,³² because we think that a person who deliberately causes mental harm should be obliged to make reparation for all the harm so caused. On the other hand, where mental harm was caused unintentionally we have recommended that there should be an obligation to make reparation only if the mental harm amounted to a recognised medical disorder.³³

3.32 (b) **Foreseeability** The general principle of delictual liability for unintentionally caused physical harm is that the defender is liable when it was reasonably foreseeable that the pursuer would sustain such harm if the defender did not take reasonable care. We have recommended that unless there is provision to the contrary, the common law rules on delict which apply to reparation for physical harm apply to the statutory obligation to make reparation for mental harm.³⁴ Accordingly, we consider that the reasonable foreseeability test should apply in relation to unintentionally caused mental harm although there will be no liability unless the reasonably foreseeable mental harm amounts to a medically recognised mental disorder.

3.33 This formulation of liability for unintentional wrongdoing is familiar to lawyers as the criterion for the imposition of a duty of care to prevent physical harm, ie it is the test for liability in negligence for causing physical harm by failing to take reasonable care. However, we think that it would be helpful to consider several issues that are important when the test is used in the context of mental as opposed to physical harm.

3.34 Although this provision is primarily concerned with negligence, it is intended to apply in all situations where the defender did not intend to cause the victim mental harm. In certain circumstances where it would be artificial to classify the defender's conduct as merely

³² Recommendation 3(a) at para 3.10.

³³ Recommendation 3(b) at para 3.10.

³⁴ Recommendation 4(a) and paras 3.11-3.12 above.

negligent there should yet be liability though the wrongdoer's intention did not include causing mental harm. Consider the following examples:

- (a) A attempts to assault B. B escapes without any physical harm. B then suffers mental harm as a consequence of the attempted assault. Although A did not intend to cause B mental harm, A should nevertheless be liable to B if at the time of the attempted assault it was reasonably foreseeable that B might suffer mental harm which amounts to a mental disorder. This would depend on the nature of the attempted assault, for example a punch swung in a pub would probably not be sufficient to render such mental harm reasonably foreseeable, but when the attempt involves a significant degree of violence reasonable foreseeability would be readily inferred.³⁵
- (b) A murders B. B's parents suffer mental harm as a consequence of B's death. A did not kill B with the intention of causing mental harm to B's parents. A will only be liable to B's parents if at the time he killed B it was reasonably foreseeable that the victim's parents might suffer mental harm which amounts to a medically recognised mental disorder as a consequence of their child's death. Again it is thought that it is reasonably foreseeable that the parents of a murder victim might suffer such mental harm as a consequence of their child's death.

3.35 It is important to appreciate that the test is whether the defender could reasonably foresee that the pursuer would sustain mental harm of a kind that amounts to a mental disorder. It is not necessary to foresee that the victim would suffer a particular medically recognised mental disorder. The point is that a reasonable person can foresee situations in which a person is likely to suffer such mental harm even though he cannot diagnose the type of disorder that the victim would suffer. In other words, the foreseeability criterion will be satisfied provided the kind or kinds of mental harm that can reasonably be foreseen is in fact recognised by the medical profession as a mental disorder.

3.36 The test whether the defender could foresee or reasonably be expected to have foreseen mental harm amounting to a mental disorder is objective. In other words, the issue is whether a reasonable person in the position of the defender could have foreseen that the pursuer was at risk of such mental harm. So for example, if the defender did not in fact know that the pursuer had an unusual susceptibility to mental harm, then the test will be applied on the basis that he knew of that susceptibility only if a reasonable person in his position would have known that the pursuer was particularly vulnerable. Thus an employer could be liable for mental harm caused to an employee by keeping her in a stressful post if she had been off sick on several occasions during her employment and a reasonable employer would have concluded from her absences that the employee was particularly vulnerable so that it was reasonably foreseeable that she might suffer mental harm if she was not moved to a less stressful job. Conversely, if the defender has actual knowledge of an employee's vulnerability which a reasonable person would not have known, the test of foreseeability will be applied in the light of the defender's actual knowledge, viz would a

³⁵ Of course, if B was physically assaulted and suffers mental harm as a consequence of the physical harm he has sustained, under the thin skull rule he could obtain damages for the mental harm whether or not it was foreseeable. But if it was held that an attempted assault was a complete assault for the purposes of the law of delict then this result would follow even in the absence of physical contact.

reasonable person with the defender's actual knowledge have foreseen that the pursuer was at risk?

3.37 As in the general law of negligence, the question whether the defender could reasonably foresee that the pursuer is at risk of such mental harm must be determined on the facts and circumstances of each case. We have already seen³⁶ that in addition to what the defender in fact knows, for the purpose of the test he will be deemed to be in possession of any facts that a reasonable person in his position would know. Moreover, the question is whether it was reasonably foreseeable that a person in the position of the victim was at risk. To some extent this aspect of the test is carried out with the benefit of hindsight. What this means is, for example, that a defender cannot escape liability by arguing that he did not in fact know at the time he injured a child in a road accident that the person in the car with the child was the child's mother or that a passer-by who went to the child's rescue was the child's father.

3.38 Whether or not mental harm amounting to a medically recognised mental disorder was reasonably foreseeable, will ultimately depend on the facts of the particular case. Nevertheless, there are situations where reasonable foreseeability of such mental harm will be readily inferred. The paradigmatic case is where the pursuer is within the area of risk of foreseeable physical harm. If the foreseeable physical harm is not insignificant, generally it will also be reasonably foreseeable that the pursuer may be likely to suffer mental harm even if he manages to escape physical injury. However, where the possible physical harm is insignificant, mental harm might not be foreseeable and, unlike the current position,³⁷ no liability will lie under our recommendations if unforeseeable mental harm but no physical harm is sustained. Nevertheless, when a duty of care to prevent physical injury is breached and the victim suffers physical harm, if (as a consequence) a mental disorder is also sustained then under our scheme³⁸ the thin skull rule will still enable damages to be recovered for the mental harm, even though it was unforeseeable.

3.39 An employer will often be liable to an employee where it is reasonably foreseeable that an employee may sustain mental harm as a consequence of a breach of the employer's general duty to take reasonable care for the safety of his workforce. This can arise when the employee is put at risk of significant physical harm. But it might also arise where for example, through his employer's negligence, the employee is responsible for the death of a fellow employee³⁹ or has reasonable grounds to believe that he has injured fellow workers.⁴⁰ Where the employee sustains mental harm as a consequence of stress at work, it is unlikely that such harm would be reasonably foreseeable unless the employee had informed the employer that he was suffering from such pressure or there was evidence, for example absences from work due to illness, from which a reasonable employer would infer that the employee had an unusual susceptibility to psychiatric injury.⁴¹

3.40 Where there is a fiduciary relationship or an analogous relationship of trust between the pursuer and defender, then it may be reasonably foreseeable that the pursuer may

³⁶ Para 3.36 above.

³⁷ *Page v Smith* [1996] AC 155; *Donachie v Chief Constable of Greater Manchester Police* [2004] EWCA Civ 405; *Simmons v British Steel Plc* 2004 SLT 595.

³⁸ See Recommendation 2(a) and paras 3.5-3.6 above.

³⁹ Cf *Salter v UB Frozen & Chilled Foods Ltd* 2003 SLT 1011.

⁴⁰ Cf *Dooley v Cammell Laird & Co Ltd* [1951] 1 Lloyd's Rep 271.

⁴¹ Cf *Barber v Somerset County Council* [2004] 1 WLR 1089.

sustain mental harm if that trust is broken by the defender's failure to carry out his responsibilities. So for example, mental harm to foster parents was held to be reasonably foreseeable when a local authority, contrary to their express wishes, sent a child with a history of abusing others to be their foster child, who then proceeded to abuse their own children.⁴² Similarly, it was held that a solicitor could reasonably foresee that a client was likely to suffer mental harm as a consequence of being wrongfully imprisoned as a result of the solicitor's negligence.⁴³ Indeed, it could be argued that there is also a relationship of trust between a doctor and the parents of any children who are his patients. Consequently, a doctor can reasonably foresee that if a child should die, the removal of the child's organs without the parents' permission might cause the parents to suffer mental harm.⁴⁴

3.41 As we have emphasised, at the end of the day the question whether or not a mental disorder suffered by the victim was reasonably foreseeable will turn on the facts and circumstances of the particular case. The more that the victim's reaction is disproportionate to the wrongfulness of the defender's conduct, the less likely that any ensuing mental harm will be reasonably foreseeable. Thus, for example, in the absence of actual knowledge of her particular susceptibility, mental harm to a woman was held not to be reasonably foreseeable when a policeman recorded her blood alcohol reading incorrectly on a traffic collision form. Although it was speedily rectified, the plaintiff had become obsessed with the mistake and the implication that she might have been a drunk driver.⁴⁵

3.42 On the other hand, when the pursuer's mental disorder is proportionate to the wrongfulness of the defender's conduct, the reasonable foreseeability test will more easily be satisfied. However, in these circumstances, the mental harm will be scrutinised to determine whether or not it is of such a nature that a person in the position of the victim could reasonably be expected to endure it without seeking reparation and, if so, the action would fail for that reason.⁴⁶

3.43 It should be reiterated that these provisions are not intended to affect the existing rules in relation to remoteness of damages when there has been a breach of a duty of care to prevent the pursuer suffering physical harm or damage to his property.⁴⁷

3.44 Accordingly we recommend that:

- 6. A person should be liable for causing mental harm unintentionally only if the harm amounts to a medically recognised mental disorder and the person foresaw, or could reasonably have foreseen, at the time of the act causing the harm, that the act was likely to cause a person in the position of the victim to suffer such harm.**

(Draft Bill, section 4(1)(b))

⁴² *W v Essex County Council* [2001] 2 AC 592.

⁴³ *McLoughlin v Jones* [2002] QB 1312, also known as *McLoughlin v Grovers*.

⁴⁴ *Cf AB v Leeds Teaching Hospital NHS Trust* [2004] EWHC 644 (QB).

⁴⁵ *Tame v New South Wales* (2002) 76 ALJR 1348.

⁴⁶ See Recommendation 5(b) and paras 3.22-3.29 above.

⁴⁷ See Recommendation 2(a) and paras 3.5-3.6 above.

Victim not directly involved in the incident

3.45 (a) **General** The law on delictual liability must attempt to keep the potential liability of a defender within manageable limits. This is considered to be a particularly acute problem in the context of delictual liability for mental harm. For example, P may suffer mental harm as a consequence of witnessing on television a terrible disaster at a sporting or other event caused by the negligence of D. There is a widely held view that reasonable foreseeability of mental harm to P is not a sufficiently exclusionary control device to prevent D facing potential indeterminate liability. In the current law this has led to the distinction between primary and secondary victims and the development of the *Alcock* criteria which must be satisfied before the latter can obtain damages: viz (i) a close tie of love and affection between the secondary and primary victim; (ii) the secondary victim must have been present at the accident or its immediate aftermath; and (iii) the secondary victim's injury must have been caused by direct perception of the accident or its immediate aftermath.

3.46 On consultation, while it was generally accepted that the *Alcock* criteria were too restrictive, a majority of consultees considered that reasonable foreseeability alone was not sufficient to prevent a defender's potential liability extending too widely should the *Alcock* criteria be abandoned. We accept this concern.

3.47 We are dealing with the situation where a person suffers a mental disorder as a consequence of witnessing or learning of an act or event caused by the defender which it is distressing to learn about or witness. (For the purposes of the current discussion it is assumed that there is no relationship between the victim and any person injured or killed in the incident).⁴⁸ The classic situation is where a pedestrian observes a road accident or its immediate aftermath. Unless the pedestrian was within the area of potential physical harm, under the current law *prima facie* there is no liability to the pedestrian for any mental harm caused by his seeing the accident.⁴⁹ Similarly, if a person watches a news broadcast on TV which contains horrific photographs of a terrorist attack, there is no liability. Often what is observed or learned will involve the death or injury of others but this is not necessary for the principle of non-liability to apply. If a person suffers mental harm by watching an explosion, the principle will apply whether or not anyone was injured by the blast. The point is that the mental harm is caused merely by witnessing or learning about an incident in which he or she was not directly involved: under the current law,⁵⁰ *prima facie* there is no liability unless the victim was at risk of physical harm from the incident ie was a primary victim.

3.48 There is another situation where the current principle of non-liability applies. This is where a person suffers mental harm as a consequence of witnessing or learning of the death or injury or illness of another. Here the person does not observe or gain knowledge of the act or event that caused the harm, but witnesses or learns of the harm itself. Consider the following examples:

- (a) As a consequence of C's negligence, B ingests dangerous substances while employed by C. An illness presents five years later. B dies after a long and painful illness having been nursed by A. A sustains a mental disorder as a result of seeing B's illness and death. Since A was not at risk of physical

⁴⁸ See paras 3.54-3.55 below for where there is such a relationship.

⁴⁹ *Bourhill v Young* 1942 SC (HL) 78.

⁵⁰ *Ibid.*

harm, prima facie there is no liability for the mental harm A sustained by witnessing the physical harm caused to B as a consequence of C's negligence.

- (b) Similarly, there would be no liability to A if A sustains a mental disorder from witnessing mental harm suffered by B as a result of C's negligence.
- (c) For the same reason, there would be no liability if A suffered a mental disorder from learning that B had been financially ruined as a consequence of C's fraudulent misrepresentations.

Accordingly, for the purpose of the doctrine of non-liability, we are concerned both with witnessing or learning of an act or event that is distressing in itself, for example a road accident, and the distress caused by witnessing or learning of the harm - whether physical or mental or economic - caused to others as a result of wrongful conduct.

3.49 We have taken the view that where mental harm is caused by witnessing or learning of a distressing event or harm caused to others by a wrongful act, it is sound policy that *in general* the victim should not be able to claim damages against the wrongdoer. It would be unacceptable both in social and economic terms if a wrongdoer was potentially liable to anyone who sustained mental harm merely by observing or learning of wrongful conduct and any effect that that wrongful conduct might have on third parties. While many potential actions on such grounds might fail on the basis that the pursuer's mental harm is of such a nature that a person in the position of the pursuer could reasonably be expected to endure it without seeking reparation,⁵¹ we think that the law should be clear that such claims are not admissible unless other requirements are met. It is important to appreciate the scope of this restriction. It is wide in the sense that it prima facie excludes liability whenever the mental harm is caused simply by witnessing or learning of wrongful conduct where the victim is not directly involved. Where the claimant is directly involved, the restriction does not apply and liability will depend on whether the other criteria are satisfied.⁵² Consider the following examples:

- (a) A doctor examines a patient. As a consequence of his negligence, the doctor tells the patient that he has terminal cancer. The patient suffers mental harm as a result of contemplating an early death. It is discovered that the diagnosis is wrong and in giving such a diagnosis the doctor was professionally negligent. The restriction does not apply as the patient was directly involved in the incident. Accordingly, the doctor will be liable if the mental harm was a medically recognised mental disorder and the reasonable foreseeability criterion was satisfied.
- (b) A doctor examines a patient. He negligently makes the diagnosis, conveyed to the patient, that the patient has terminal cancer. The patient tells a third party of his terminal illness. The latter suffers mental harm as he contemplates the patient's early death. It is discovered that the diagnosis is wrong and that the patient will live. The restriction applies as the cause of the third party's mental harm was learning of the diagnosis, "an incident" in which

⁵¹ See Recommendation 5 and paras 3.22-3.29 above.

⁵² See Recommendation 6, para 3.44.

he was not directly involved. Accordingly, the third party's claim against the doctor will fail even if the mental harm was a medically recognised mental disorder and mental harm to the third party was reasonably foreseeable in the circumstances.

3.50 Therefore subject to the exceptions in Recommendations 8 to 10 below, we recommend that:

7. **(a) Where a victim suffers a mental disorder by witnessing or learning of an incident in which he or she was not directly involved, as a general rule there should be no liability on the wrongdoer to make reparation.**

(Draft Bill, section 4(1)(c))

- (b) An incident for these purposes includes:**

- (i) any act or event which can cause distress to a person witnessing or learning of it; and**
- (ii) the harm caused to persons, other than the person suffering the mental disorder, as a result of the wrongful conduct.**

(Draft Bill, sections 4 (1) (c) and (3))

- (c) For these purposes the act or event may be caused intentionally or otherwise and may or may not have caused physical or mental harm.**

(Draft Bill, section 4(3))

3.51 Because of the wide scope of the restriction, there are cases where justice demands that persons should be able to recover compensation for mental harm sustained by witnessing or learning of an incident in which they were not directly involved. In the Discussion Paper, we proposed that exceptions should be made for rescuers and people who have a close relationship with a person who was killed or harmed in an incident.⁵³ A large majority of our consultees agreed. Accordingly we have decided that there should be two exceptions to the principle of non-liability where the victim has not been directly involved in an incident. We therefore propose that there should be two statutory gateways by which the restriction can be circumvented. It must always be remembered that merely because a victim can pass through a gateway does not in itself guarantee success since the other two restrictions on liability for unintentionally caused mental harm must then be satisfied, viz that the mental harm was a medically recognised mental disorder and that such mental harm was reasonably foreseeable in the circumstances.

3.52 **(b) Rescuers** The first proposed gateway is that the victim was a rescuer in relation to the incident. Traditionally, the law has encouraged acts of altruism by relaxing in the case of rescuers rules which would otherwise defeat their claims for reparation, for example the

⁵³ Proposals 5 and 8 at paras 4.13 and 4.34.

volens defence. However, in *Frost v Chief Constable of South Yorkshire Police*⁵⁴ the House of Lords held that there was no duty to prevent rescuers from sustaining mental harm unless they had been at risk of significant physical harm during the rescue operations. This decision was clearly taken as a matter of policy as their Lordships considered that as a matter of distributive justice it would be unacceptable if relatives of those killed or injured in the Hillsborough disaster could not recover for mental harm when professional rescuers could.⁵⁵ It is our view that this rule is too restrictive. We think that a rescuer who sustains mental harm from what he experiences during a rescue operation should not be barred from recovery merely because he was not at risk of physical harm. Instead, his status as rescuer is a gateway which will allow him to claim reparation provided he can show that the mental harm sustained was a medically recognised mental disorder and that it was reasonably foreseeable that a person in the position of the victim would suffer such mental harm in the particular circumstances of the case. Thus, for example, it is more likely that it would be reasonably foreseeable that a rescuer would suffer mental harm when there has been a horrendous accident or children have been murdered or mutilated than if a pet was run over by a car and the victim tried to rescue the animal. Moreover, even if these criteria are satisfied, the claim might fail on the basis that the mental harm was a normal vicissitude of the victim's type of life and therefore should be endured without reparation.⁵⁶ It should be noted that a rescuer includes the rescuer of property as well as persons.⁵⁷

3.53 The courts will be able to decide whether or not a person should be treated as a rescuer for these purposes.⁵⁸ Accordingly, we think that there is no need to have a statutory definition of rescuer in the statute. We therefore recommend that:

8. The restriction on suing for reparation where the victim has sustained a mental disorder by witnessing or learning of an incident should not apply if the victim was acting as a rescuer in relation to the incident.

(Draft Bill, section 4(2)(a))

3.54 **(c) Persons in a close relationship** The second proposed gateway is that at the time of the incident the victim had a close relationship with a person injured or killed or at risk of being killed or injured in the incident. As we have seen,⁵⁹ if, for example, A sustains a mental disorder as a consequence of witnessing an accident in which B is injured as a result of the negligence of C, A is unable to seek reparation because he was not directly involved in the accident. The result is the same if A suffers a mental disorder as a result of witnessing the harm caused to B as a consequence of C's negligence. In the Discussion Paper we thought that there were cases where a victim should be able to succeed even when all the *Alcock* criteria could not be satisfied, for example where the victim had not actually been present at the accident (or its immediate aftermath) in which a relative had been killed or injured.⁶⁰ Almost all consultees agreed that one circumstance in which reparation would be justified was where there was a close relationship between the person

⁵⁴ [1999] 2 AC 455.

⁵⁵ Under our recommendations the Hillsborough relatives might have been able to sue.

⁵⁶ Recommendation 5(b), para 3.30 above.

⁵⁷ *Malcolm v Dickson* 1951 SC 542.

⁵⁸ See for example, *Haynes v Harwood* [1935] 1 KB 146; *Ward v T E Hopkins & Son Ltd* [1959] 3 All ER 225; *Videan v British Transport Commission* [1963] 2 QB 650; *Flannigan v British Dyewood Co Ltd* 1969 SLT 223 approved in *Ogwo v Taylor* [1988] AC 431.

⁵⁹ See paras 3.45-3.50 above.

⁶⁰ Proposal 4 at para 4.8.

killed or injured and the third party who suffered a mental disorder. We accept the force of this argument. We have therefore taken the view that the second gateway should be available when there is a close relationship between the pursuer and a person killed or injured in the incident. On consultation, it was also felt that a pursuer should be entitled to establish that there were in fact sufficient ties between them to amount to such a relationship: in other words, that the persons who can use the gateway should not be restricted to a statutory list of relatives. The onus would lie on the pursuer to establish such a relationship. Accordingly, we favour a definition which is wider than that of immediate members of a family. In particular, we would not wish to exclude relationships which have developed as a consequence of professional as well as social intercourse as, for example, a teacher–pupil relationship. It could also include employees who had worked together over many years and had become very close friends, with strong ties of affection. Therefore we recommend that:

9. (a) **The restriction on suing for reparation where the victim has sustained mental harm by witnessing or learning of an incident should not apply if, at the time of the incident, the victim had a close relationship with a person injured or killed, or at risk of being killed or injured, in the incident.**

(Draft Bill, section 4(2)(b))

- (b) **For this purpose, a close relationship means the type of relationship which exists between persons bound to each other by strong ties of affection, loyalty or personal responsibility.**

(Draft Bill, section 5(1))

3.55 In our Discussion Paper we asked whether there should be a presumption that such a relationship exists between certain persons.⁶¹ There was much support among consultees for a list of persons who would be presumed to have a close relationship unless the presumption could be rebutted by proof that they in fact did not have such a relationship. There was also strong support that such a list should reflect the persons who are entitled to sue under the Damages (Scotland) Act 1976 for non-patrimonial loss arising from the death of a relative as revised in our Report on *Title to Sue for Non-Patrimonial Loss*⁶² in order better to reflect the nature of the family in contemporary Scotland. We agree that this revised list is appropriate for this purpose. Thus it would be presumed that there was a close relationship between the following:

- (a) spouses;
- (b) cohabitants whether of the same or different sexes;
- (c) parents and children;
- (d) persons who have been accepted by other persons as a children of their family, for example step-parents and step-children;

⁶¹ Proposal 6 at para 4.21.

⁶² Scot Law Com No 187 (2002).

- (e) grandparents and grandchildren;
- (f) brothers and sisters;
- (g) persons who have the characteristics of siblings as they have been brought up together in the same household.

Accordingly we recommend that:

- 10. (a) The following persons should be presumed to have a close relationship for this purpose: spouses, cohabitants of the same or different sexes, parents and children, persons who have been accepted by other persons as children of their family, grandparents and grandchildren, siblings and persons who have the characteristics of siblings as they have been brought up together in the same household.**

(Draft Bill, section 5 (2))

- (b) This presumption may be rebutted by evidence that the persons in question did not in fact have a close relationship with each other at the relevant time.**

(Draft Bill, section 5 (3))

3.56 **(d) Illustrative examples** It is important to appreciate the scope of this gateway. All that it does is to prevent the victim's claim from failing at the outset because he was not directly involved in the defender's wrongful conduct. Because he had a close relationship with a person injured or killed in the incident, the person who has suffered mental harm from witnessing or learning of the incident is entitled to pass through the gateway in order to prove that the defender is liable because (a) the mental harm sustained is a medically recognised mental disorder and (b) that it was reasonably foreseeable that the defender's conduct was likely to cause such a disorder to a person in the position of the victim. But it should be emphasised that the reasonable foreseeability criterion is not satisfied merely because the victim is entitled to pass through the gateway.

3.57 It is generally accepted that when A witnesses or learns of the death or injury of B as a consequence of the wrongful conduct of C, prima facie it is not reasonably foreseeable that A will suffer mental harm unless A was at risk of physical harm.⁶³ The crucial question is whether mental harm to A is automatically foreseeable merely because there is a close relationship between A and B. While grief and sorrow may readily be anticipated on the death of a relative or friend and deep concern or upset if a friend or relative is injured, a medically recognised mental disorder is not automatically reasonably foreseeable as a consequence of the injury or death of such a person caused by the defender's wrongful conduct.⁶⁴ In our view additional factors are necessary. These would include, for example, the victim's presence at the incident, her direct perception of it, the nature of the incident, the extent of the relative or friend's injuries and the quality of their relationship. Moreover, even where the mental disorder is reasonably foreseeable it must be remembered that the mental

⁶³ *Bourhill v Young* 1942 SC (HL) 78.

⁶⁴ In this we are differing from the approach taken by the High Court of Australia in *Gifford v Strang Patrick Stevedoring* (2003) 198 ALR 100.

harm may be of such a nature that a person in the position of the victim could reasonably be expected to endure it without seeking reparation and that the claim would fail for that reason.⁶⁵

3.58 Accordingly, in the same way as we considered that in itself the death of a friend or relative was a bereavement of a type which a person can reasonably expect to suffer in the course of her life,⁶⁶ so we think that it is not reasonably foreseeable that the death of a person will in itself cause others to suffer a mental disorder even if they had a close relationship with the deceased. Where they are members of the deceased's immediate family, damages can be awarded under the Damages (Scotland) Act 1976 for non-patrimonial loss including distress, anxiety, grief or sorrow.⁶⁷ But before a medically recognised mental disorder is reasonably foreseeable and therefore reparable, there would have to be factors in addition to the death.

3.59 Consider the following examples:

- (a) A is informed that his wife has been killed in a car crash caused by the driver's negligence. As a result A suffers a mental disorder. Although A has sustained mental harm as a consequence of learning of an incident in which he was not directly involved, since he had a close relationship with the person killed in the incident, A can pass through the second gateway and avoid that restriction. However, A's claim will fail as it is not reasonably foreseeable that by merely being informed of his wife's death that A would suffer a medically recognised mental disorder. Even if the mental harm was reasonably foreseeable, A would be met by the general restriction that the mental harm resulted from a bereavement of a type that a person can reasonably expect to suffer in the course of his life: consequently the mental harm was of such a nature that a person in the position of A could reasonably be expected to endure it without seeking reparation.
- (b) A is informed that his wife has been killed. She had been kidnapped by B who had tortured and raped her before strangling her. As a result A suffers a mental disorder. Although A has sustained a mental disorder by having been informed of an incident in which he was not directly involved, since he had a close relationship with a person killed in the incident, A can pass through the second gateway and avoid that restriction. However, given the horrendous nature of his wife's death it is thought that it is reasonably foreseeable that her husband would suffer a medically recognised mental disorder when informed how his wife died. Moreover, the general restriction would seem to be inapplicable as it could not be said that A's bereavement and loss was of a type that a person should reasonably expect to experience in the course of his life.
- (c) A mother is informed that her son has been killed in a car crash caused by the negligence of the driver. As a result she suffers a mental disorder. Although she has sustained mental harm as a consequence of learning of an

⁶⁵ See paras 3.18-3.30 above.

⁶⁶ Recommendation 5(b) and paras 3.27-3.30 above.

⁶⁷ S 1(4)(a) and (b).

incident in which she was not directly involved, since she had a close relationship with the person killed in the incident, she can pass through the second gateway and avoid that restriction. However, it is submitted that the mother's claim will fail as it is not reasonably foreseeable that by merely being informed of her child's death a woman would suffer a medically recognised mental disorder. Even if the mental harm was reasonably foreseeable, she would be met by the general restriction that the mental harm resulted from a bereavement of a type that a person can reasonably be expected to suffer in the course of her life: consequently, the mental harm was of such a nature that a person in the position of the pursuer could reasonably be expected to endure it without seeking reparation.

- (d) A mother is informed that her son has been injured in a car crash caused by the negligence of the driver. She rushes to the hospital where she sees her son's injuries. She attends the hospital regularly until her son recovers. She suffers a mental disorder as a consequence of witnessing her son's ordeal. Although the mother has sustained mental harm as a consequence of witnessing an incident in which she was not directly involved, since she has a close relationship with the person injured in the incident, she can pass through the second gateway and avoid that restriction. Before her claim can succeed she must establish that it was reasonably foreseeable that she would suffer a medically recognised mental disorder as a consequence of witnessing her child's injuries in the hospital. This might depend on how serious the child's injuries were, how soon she saw her child after the accident and how long it took before the child recovered. Even if the mental harm was reasonably foreseeable, it would remain open to argue that her claim should fail as a consequence of the general restriction that the mental harm was of such a nature that a person in the position of the pursuer could reasonably be expected to endure it without seeing reparation.
- (e) A is a schoolteacher. She is a devoted teacher and her pupils are devoted to her. She is killed in a car crash as a consequence of the driver's negligence. One of her pupils suffers a mental disorder when she learns of A's death. Although the pupil has sustained such mental harm as a consequence of learning of an incident in which she was not directly involved, she may be able to argue that she had a close relationship with A who had been killed in the incident and thereby pass through the second gateway and avoid that restriction. However, it is submitted that the pupil's claim will fail as it is not reasonably foreseeable that merely by being informed of her teacher's death a pupil will suffer a medically recognised mental disorder. Even if that mental harm was reasonably foreseeable, she would be met by the general restriction that it resulted from a bereavement of a type that a person can reasonably expect to suffer in the course of her life: consequently, the mental harm was of such a nature that a person in the position of the pursuer could reasonably be expected to endure it without seeking reparation.
- (f) A is a schoolteacher. She is a devoted teacher and her pupils are devoted to her. One of her pupils is killed in a car crash caused by the driver's negligence. She suffers a mental disorder when she learns of the pupil's

death. It is thought that her claim would fail for the same reasons as the pursuer's claim failed in the preceding example.

- (g) A is a schoolteacher. She is devoted to her pupils and her pupils are devoted to her. She organises a trip for her pupils and hires a bus so that they can visit a castle. She does not travel in the bus but follows the bus in her car. The roof of the bus is removed when the bus attempts to go under a low bridge. Some of the pupils are decapitated; others die in agony before they can be rescued. As a result, she suffers a mental disorder. Although A has sustained mental harm as a consequence of witnessing an incident in which she was not directly involved, since she had a close relationship with persons killed in the incident, she can pass through the second gateway and avoid that restriction. Because she saw the terrible fate of her pupils and had been responsible for organising the trip, it is submitted that it is reasonably foreseeable that someone in A's position would suffer a medically recognised mental disorder. Moreover, it is thought that the general restriction would not be applicable as it cannot be said that A's bereavement and loss was of a type that a person could reasonably expect to suffer in the course of her life.
- (h) A, a doctor, examines a patient. As a consequence of his negligence, A tells the patient that he has terminal cancer. The patient tells his wife that he is terminally ill. She suffers a mental disorder as she contemplates her husband's early death. It is discovered that the diagnosis is wrong and that the patient will live. Although she has sustained mental harm as a consequence of witnessing an incident in which she was not directly involved, since she was the wife of the person who was wrongly diagnosed, she can pass through the second gateway and avoid that restriction. However it is submitted that her claim will fail as it is not reasonably foreseeable that by being informed of her husband's mistaken diagnosis, a wife would suffer a medically recognised mental disorder.

These examples illustrate how a person who has not been directly involved in an incident will only succeed in a claim for mental harm if:

- he can pass through the second gateway;
- the mental harm was a medically recognised mental disorder;
- such mental harm was reasonably foreseeable; and
- the general restriction does not apply.

3.60 The gateway applies when there is a close relationship between the claimant and someone killed or injured in the incident. On consultation⁶⁸ it was accepted that for this purpose the latter's injuries should include mental as well as physical harm. It should also be noticed that it is sufficient that the person was *at risk* of being injured or killed in the incident: there is no need for him in fact to have been killed or injured before the gateway can be used. Of course where a person has not been injured or killed, it will be more difficult

⁶⁸ Discussion Paper, Proposal 9, para 4.37.

for the claimant to establish that it was reasonably foreseeable that he would sustain a medically recognised mental disorder in the particular circumstances of the case.

Liability where immediate victims are responsible for their own injuries

3.61 Where the second gateway is relevant, the question has arisen whether the claimant should be met by any defences available against the person who was killed or injured in the incident and with whom the pursuer had a close relationship. For example, if A suffers a mental disorder as a consequence of witnessing the death of her son which was caused by B's negligence, should B be entitled to plead in an action by A that her son was contributorily or wholly negligent thus reducing or extinguishing A's damages for mental harm? Under the current law it is not settled whether such defences would be available in a claim for damages by a secondary victim. Nevertheless, in our Discussion Paper we suggested that if the law were to be reformed any such defence should be available.⁶⁹ However, consultees were divided.

3.62 We have found this a difficult matter. On the one hand, why should the defender be a hundred per cent liable for mental harm as a result of an incident in which the pursuer's relative or friend was partly to blame? On the other hand, unlike the claim of the deceased's relative under the Damages (Scotland) Act 1976, the right to seek reparation for mental harm under the current law is not a dependent claim, ie it is not derivative from a wrong suffered by a third party but is a breach of a duty of care owed by the defender directly to the victim. Therefore, as a matter of principle, the conduct of the third party vis-à-vis the defender should be irrelevant.

3.63 Under our proposals, the pursuer's close relationship with the person killed or injured in the incident merely opens the second gateway so that he can by-pass the restriction that generally there is no liability if the pursuer is not directly involved in the defender's wrongful conduct. However, before the defender is liable the pursuer must show that in the circumstances of the case, it was reasonably foreseeable that the pursuer would sustain a medically recognised mental disorder as a consequence of the defender's conduct. While the parties' close relationship will be a relevant factor, as we have emphasised it will not in itself be sufficient to establish reasonable foreseeability of mental disorder as opposed to grief, anxiety, distress or sorrow: other factors will have to be present. In other words, as under the current law, the pursuer who has to rely on the second gateway nevertheless has an independent right to reparation for mental harm on the ground that it was reasonably foreseeable that he would sustain a mental disorder as a consequence of the defender's wrongful conduct. Accordingly, in the end, we have taken the view that any defences available against a person killed or injured in the incident should not be available in a claim for damages by a person who has suffered mental harm as a consequence of witnessing or learning of the incident.

3.64 In our Discussion Paper we asked whether there should be a bar when the death or injuries of the person killed or injured in an incident were caused wholly or partly by his own fault.⁷⁰ For example, A suffers mental harm when she discovers that her son, B, has killed himself and her granddaughter, C. Under our proposals A could use the second gateway and sue B's estate if she can establish that it was reasonably foreseeable that she would

⁶⁹ Discussion Paper, Proposal 10(1), para 5.20.

⁷⁰ Discussion Paper, Proposal 10(2), para 5.20.

sustain a medically recognised mental disorder as a result of B's conduct in killing himself and C. Similarly, if A suffers mental harm when she witnesses the injuries sustained by her son in a climbing accident caused by his own carelessness, she may use the second gateway and sue if the reasonable foreseeability criterion is satisfied. In England, it has been held that it is contrary to public policy to allow such actions under the current law as it will often involve litigation between members of the same family as well as infringing a person's freedom to engage in dangerous sports and recreations.⁷¹

3.65 A large majority of our consultees considered that there was no need for such a bar in Scots law. We agree. It has long been settled that members of the same family may sue each other in delict in respect of physical harm.⁷² We do not see why reparation for mental harm should be treated differently. If it was thought that those engaged in high risk activities might have difficulty in obtaining insurance cover as a consequence of potential delictual liability to members of their family for causing them mental harm, it should be remembered that an insurer can contract out of covering such liability. The point to be emphasised is that even where the second gateway has been utilised because of family relationships, there is no automatic liability. The pursuer must establish that a medically recognised mental disorder was reasonably foreseeable and even then it is open to the defender to argue that the mental harm sustained by the pursuer was of such a nature that a person in the position of the pursuer could reasonably be expected to endure it without seeking reparation. Applying those principles to the examples in the previous paragraph, it is thought that A would succeed in the first but fail in the second where the general restrictions on liability would operate.

⁷¹ *Greator v Greator* 2000 1 WLR 1970 and see para 2.25 above.

⁷² *Young v Rankin* 1934 SC 499.

Part 4 List of Recommendations

1. The common law rules which apply only to reparation for mental harm including the rules on liability for "nervous shock" should be replaced by a statutory obligation to make reparation for wrongfully caused mental harm.

(Paragraph 3.4)
2. The legislation abolishing the common law rules relating to delictual liability for mental harm should make clear that the abolition does not affect:
 - (a) the right to obtain damages for mental harm resulting from any other type of harm to the claimant for which there is delictual liability; or
 - (b) the right to obtain damages for distress, anxiety, grief or sorrow where the claim is made by a relative of a deceased person under section 1(4)(a) or (b) of the Damages (Scotland) Act 1976.

(Paragraph 3.6)
3.
 - (a) For the purpose of the statutory liability to make reparation for mental harm, mental harm should mean any harm to a person's mental state, mental functioning or well-being whether or not it amounts to a medically recognised mental disorder.
 - (b) Where the mental harm is caused unintentionally there should be no statutory liability to make reparation unless the mental harm amounts to a medically recognised mental disorder.

(Paragraph 3.10)
4.
 - (a) In determining whether a person is under a statutory obligation to make reparation for mental harm, the common law rules of delict which apply to reparation for physical harm should also apply to reparation for mental harm;
 - (b) In determining whether a person is under such an obligation, any enactment which applies to reparation for harm caused to a person should apply to reparation for mental harm in the same way as to reparation for physical harm, unless the contrary is provided in that enactment.

(Paragraph 3.17)
5.
 - (a) There should be a general restriction on the statutory obligation to make reparation for wrongfully caused mental harm if the mental harm is of such a nature that a person in the position of the victim could reasonably be expected to endure it without seeking reparation.

(b) A person should reasonably be expected to endure mental harm without seeking reparation if, for example, it results from:

- (i) the normal stresses or vicissitudes of life or of the type of life which that person leads; or
- (ii) bereavements or losses of a type which persons can reasonably expect to suffer in the course of their lives.

(Paragraph 3.30)

6. A person should be liable for causing mental harm unintentionally only if the harm amounts to a medically recognised mental disorder and the person foresaw, or could reasonably have foreseen, at the time of the act causing the harm, that the act was likely to cause a person in the position of the victim to suffer such harm.

(Paragraph 3.44)

7. (a) Where a victim suffers a mental disorder by witnessing or learning of an incident in which he or she was not directly involved, as a general rule there should be no liability on the wrongdoer to make reparation.

(b) An incident for these purposes includes:

- (i) any act or event which can cause distress to a person witnessing or learning of it; and
- (ii) the harm caused to persons, other than the person suffering the mental disorder, as a result of the wrongful conduct

(c) For these purposes the act or event may be caused intentionally or otherwise and may or may not have caused physical or mental harm.

(Paragraph 3.50)

8. The restriction on suing for reparation where the victim has sustained a mental disorder by witnessing or learning of an incident should not apply if the victim was acting as a rescuer in relation to the incident.

(Paragraph 3.53)

9. (a) The restriction on suing for reparation where the victim has sustained mental harm by witnessing or learning of an incident should not apply if, at the time of the incident, the victim had a close relationship with a person injured or killed, or at risk of being killed or injured, in the incident.

(b) For this purpose, a close relationship means the type of relationship which exists between persons bound to each other by strong ties of affection, loyalty or personal responsibility.

(Paragraph 3.54)

10. (a) The following persons should be presumed to have a close relationship for this purpose: spouses, cohabitants of the same or different sexes, parents and children, persons who have been accepted by other persons as children of their family, grandparents and grandchildren, siblings and persons who have the characteristics of siblings as they have been brought up together in the same household.
- (b) This presumption may be rebutted by evidence that the persons in question did not in fact have a close relationship with each other at the relevant time.

(Paragraph 3.55)

Appendix A

Draft Reparation for Mental Harm (Scotland) Bill with Explanatory Notes

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Reparation for Mental Harm (Scotland) Bill

[DRAFT]

An Act of the Scottish Parliament to make provision on delictual liability to make reparation for mental harm.

PART 1 MAIN RULES

1 General rule on liability

- (1) A person who causes mental harm to another person is liable to make reparation in accordance with the provisions of this Act.
- (2) The common law rules on delict which apply only to reparation for mental harm to a person (including the rules on liability for nervous shock) are abolished.

NOTE

Subsection (1) sets out the basic rule that a wrongdoer is delictually liable for mental harm that he or she causes to another person.

Subsection (2) abolishes all the common law rules of the law on delict that relate *only* to mental harm, wiping the slate clean for the new rules set out in this Bill. General rules of the law on delict, ie rules which also apply to delictual claims that do not concern mental harm, are not abolished but are retained. Section 6 makes it clear that this subsection does not abolish the common law rules relating to recovery of damages for: (a) mental harm which results from some other type of harm, or (b) non-patrimonial loss under section 1(4) of the Damages (Scotland) Act 1976. See comments on section 6. The phrase "(including the rules on liability for nervous shock)" is added because claims for mental harm have in the past been referred to as claims for nervous shock. In more modern cases they have been framed in terms of a recognised psychiatric injury or disorder, but these terms fall within the scope of mental harm as defined in section 7(c).

2 Application of ordinary rules on delict

Subject to the following provisions of this Act—

- (a) the common law rules on delict (including the rule that a person can consent to run the risk of harm in such a way as to lose the right to reparation) which apply to reparation for physical harm to a person apply also to reparation for mental harm; and

- (b) any enactment which applies to reparation for harm caused to a person applies to reparation for mental harm in the same way as to reparation for physical harm, unless the terms of the enactment indicate that it was intended to apply only to physical harm or was intended to apply to physical harm and mental harm in different ways.

NOTE

Section 2 provides that, subject to the other provisions of the Bill, the rules that apply to delictual liability for physical harm also apply to liability for mental harm. This is intended to make rules relating to causation, remoteness of damages, vicarious liability, establishing a breach of duty, defences, etc, applicable to claims for reparation for mental harm.

Paragraph (a) relates to common law rules while paragraph (b) relates to rules set out in legislation, such as the Law Reform (Contributory Negligence) Act 1945. The common law defence of *volenti non fit injuria*, ie the rule that "a person can consent to run the risk of harm in such a way as to lose the right to reparation", is expressly mentioned because it is not possible to contract out of statutory liability in such a way unless the statute so provides. The phrase "physical harm to a person" excludes physical harm done to property.

Paragraph (b) provides that any enactment (primary or secondary legislation) which applies to reparation for harm caused to a person applies to mental harm in the same way as it applies to physical harm to a person unless the contrary is provided in that enactment, either expressly or by implication. Examples of legislation that contain provisions to the contrary are the Carriage by Air Act 1961 and the Criminal Injuries Compensation Scheme 2001. The Carriage by Air Act 1961 has been held by the House of Lords in *King v Bristow Helicopters Ltd* 2002 SC(HL) 59 to exclude claims for pure mental injury, and the Criminal Injuries Compensation Scheme 2001 limits claims for compensation for mental injury by those who witness the death or injury of others using the "Alcock criteria", see paragraph 2.21 above.

The phrase "subject to the following provisions of this Act" is intended to make clear that the common law rules of liability for physical harm and any relevant statutory provisions are subject to the restrictions in sections 3 and 4 when applied in claims for reparation for mental harm.

3 General restriction on liability

- (1) A person is not liable for causing mental harm, whether intentionally or otherwise, if the harm is of such a type that a person in the position of the victim could reasonably be expected to endure it without seeking reparation.
- (2) A person can reasonably be expected to endure mental harm without seeking reparation if, for example, it results from—
 - (a) the normal stresses or vicissitudes of life or of the type of life which that person leads; or
 - (b) bereavements or losses of a type which a person can reasonably expect to suffer in the course of his or her life.

NOTE

This section applies whether the harm was caused intentionally or otherwise, though if harm was inflicted intentionally then it would be less likely that a person would be expected to endure it without

seeking reparation. It sets out the general principle that people are expected to put up with certain types of mental harm without seeking reparation.

Subsection (2) illustrates what kinds of mental harm a person can reasonably be expected to endure without seeking reparation. It is not an exhaustive list as can be seen from the words "if, for example".

Paragraph (a)

It is a normal part of human experience to encounter events that will cause distress, fear or loss of confidence from time to time. People are expected to deal with various difficult circumstances and situations that may occur in life without seeking reparation unless there is some particular aggravating factor that makes it unreasonable for them to do so.

The phrase "or of the type of life which that person leads" is intended to limit claims for mental harm suffered as a result of incidents which that person is expected to deal with as part of his or her job. This will tend to limit claims by, for example, members of the police or fire service, soldiers, or people who have chosen high-pressure jobs. Another example would be those who engage in combative sports or other "dangerous" recreational activities.

Paragraph (b)

Only in special circumstances will a person be able to recover damages for mental harm induced by the death of a relative or close friend. Bereavement in itself is not enough because people are bound to suffer bereavements in the course of their lives. To claim damages for mental harm caused by bereavement there must be some additional aggravating factor, such as the death being of a particularly horrific nature. This does not prevent a claim under the Damages (Scotland) Act 1976 for non-patrimonial loss by a member of the deceased's immediate family, as is made clear by section 6. Other losses which a person may reasonably expect to suffer include destruction of property, death of a pet, injury to, or disablement of, a loved one or loss of money.

4 Other restrictions on liability where harm caused unintentionally

- (1) A person is liable for causing mental harm unintentionally only if—
 - (a) the harm amounts to a medically recognised mental disorder;
 - (b) the person foresaw, or could reasonably be expected to have foreseen, at the time of the act causing the harm that the act was likely to cause a person in the position of the victim to suffer harm of that kind; and
 - (c) in any case where the harm was caused to the victim by witnessing, or learning of –
 - (i) an incident in which the victim was not directly involved; or
 - (ii) the consequence of such an incident,subsection (2) is satisfied.
- (2) This subsection is satisfied only if the victim—
 - (a) was acting as a rescuer in relation to the incident; or
 - (b) had, at the time of witnessing or learning of the incident or its consequences, a close relationship with a person injured or killed, or at risk of being injured or killed, in the incident.

(3) In this section, "incident" includes any act or event, whether caused intentionally or otherwise and whether or not it causes physical harm.

NOTE

This section applies in all cases where mental harm is inflicted unintentionally (ie negligently or recklessly) on the victim. It sets out further criteria that a pursuer seeking damages for unintentionally caused mental harm must satisfy. Where A intends to cause harm only to B, but ends up causing harm to C instead or in addition, the liability of A to C would be restricted by this section. Suppose, for example, that A tortures a child. The child's parent who happens to be watching suffers mental harm, but A did not intend any harm to the parent. Although A's actions themselves might have been intentional, A did not in fact intend to cause harm to the parent. A's liability to the parent would be restricted by the provisions of this section. By contrast, A's liability to the child would only be restricted by section 3.

Subsection (1), paragraph (a)

First, the harm must amount to a medically recognised mental disorder. This does not change the substance of the current law.

Subsection (1), paragraph (b)

Secondly, the mental harm which constitutes the medically recognised mental disorder must have been a reasonably foreseeable consequence of the wrongdoer's acts. This changes the current law as set out in *Page v Smith* [1996] AC 155 whereby a victim can recover for unforeseeable mental harm provided physical harm was foreseeable, even if no physical harm was actually suffered. However, this provision does not affect the remoteness of damages rules preserved by section 6. Wrongdoers may therefore be liable under the thin skull rule for unforeseeable mental harm arising from other wrongfully caused physical harm.

Whether the wrongdoer could have been reasonably expected to foresee that his or her act was likely to cause the victim mental harm amounting to a medically recognised disorder is to be a question of fact. The court would need to look back to the wrongdoer's knowledge at the time of the act. It would take into account any prior knowledge the wrongdoer had that the victim was particularly vulnerable to mental disorder. For example, an employer might be liable for knowingly keeping in a highly stressful post an employee who had recently been off work with mental illness arising from the stress.

The phrase "harm of that kind" refers back to a medically recognised mental disorder in section 4(1)(a). Wrongdoers are not expected to be able to diagnose medically recognised mental disorders, but they are expected to be able to foresee when their conduct will cause mental harm of a kind amounting to a medically recognised mental disorder.

The phrase "person in the position of the victim" has been used rather than "victim" to make clear that it would not be necessary that the wrongdoer foresaw or was aware of the existence of the victim, or of the victim's proximity to the incident. Claims by unknown rescuers or unknown close relatives would be allowed. If, for example, a mother happened to be nearby the scene of her child's death and thus witnessed her child's body being taken away from the scene of an accident, the wrongdoer could not argue that he could not reasonably have foreseen that the mother would witness the incident. The issue is not what in fact the wrongdoer did foresee but what the wrongdoer would have foreseen if he or she had been aware of the existence of the victim.

Subsection (1) paragraph (c)

Thirdly, where a person suffers mental harm as a consequence of witnessing or learning of an incident in which he or she was not directly involved, or of the consequences of such an incident, further restrictions on liability are imposed. Unless the pursuer was acting as a rescuer, or had a close relationship with a person injured or killed or at risk of being injured or killed in the incident, he or she will not be able to recover.

The consequences of an incident may occur days or even years after the initial act or event. Mental harm suffered following identification of a relative's body days after the person's death would be a consequence of the wrongdoer's negligent driving resulting in the road accident and the relative's

death. Mental harm suffered by a wife after nursing her husband through a long and painful death from mesothelioma would be a consequence of the husband's exposure to asbestos fibres, however many years earlier the exposure occurred.

The Bill thus draws a distinction between those who sustain mental harm because of what directly happened to them and those whose harm flows from seeing or learning about an incident in which they were not directly involved or its consequences. Any person at risk of significant physical harm would be considered to be "directly involved" in the incident, as might persons who were involved in such a way as to feel personally responsible for it, even though they were not at fault, see paragraph 2.11 above.

Subsection (2), paragraph (a)

"Rescuer" is left undefined in the Bill, so that the courts can determine who is a "rescuer" in any particular case. There is no requirement in the Bill that a rescuer must have been at risk of some degree of physical harm in the incident.

Subsection (2), paragraph (b)

In order to avoid the general principle of non-liability when the pursuer was not directly involved in an incident the pursuer must have had a close relationship with the person injured or killed or at risk of being injured or killed in the incident at the time of witnessing or learning of the incident or its consequences. But, unlike the current law, in the close relationship situation, there is no need for there to have been temporal or physical proximity to the incident. Thus the second and third *Alcock* criteria (see paragraph 2.21 above) are abolished. "Close relationship" is defined in section 5, see the notes on that section.

Effect of section 4 subsection (2)

Even if the pursuer satisfies section 4(2)(a) or (b), that would not of itself entitle the pursuer to damages. It would merely open the gateway to section 4(1). The pursuer would still have to prove (i) that the mental harm amounts to a medically recognised mental disorder, and (ii) that harm of that kind could reasonably have been foreseen by the defender as a consequence of the act or omission. Furthermore, the general restriction in section 3 must not be applicable.

Conversely, unless section 4(2) (a) or (b) is satisfied, there is no delictual liability to pursuers who sustain a mental disorder from witnessing or learning of incidents in which they were neither directly involved nor in a close relationship with those who were killed or injured or at risk of being killed or injured, even if such mental harm to them was reasonably foreseeable in the circumstances. Thus mere bystanders to an accident, however horrific, would not be able to claim.

Subsection (3)

Section 4 as a whole applies only to unintentionally inflicted mental harm, but "incident" has been used instead of "accident" in order to cover intentional as well as non-intentional acts. Thus this section applies where a man sustains mental harm as a result of seeing his son deliberately injured. However it would not apply if by injuring the child the wrongdoer had deliberately intended to inflict mental harm on the father: in this case the father can sue the wrongdoer for intentionally causing mental harm.

It is not necessary that someone must have suffered physical harm in the incident in order to entitle another person not directly involved in the incident to claim for the mental harm caused by witnessing or learning of it. Those directly involved in the incident may sustain only mental harm as the words "whether or not it causes physical harm" make clear. Moreover, it is sufficient that they were at risk of death or injury: they do not have in fact to be killed or suffer injury before the provision applies.

PART 2
SUPPLEMENTARY RULES AND SAVINGS

5 Close relationship

- (1) For the purposes of this Act, a close relationship means the type of relationship which exists between persons bound to each other by strong ties of affection, loyalty or personal responsibility.
- (2) The following persons are presumed to have a close relationship with each other for the purposes of this Act—
 - (a) spouses;
 - (b) persons (whether of different sexes or of the same sex) who are not married to each other but who are living with each other in a relationship which has the characteristics of the relationship between husband and wife;
 - (c) parents and children;
 - (d) persons who are in a relationship which has the characteristics of the relationship between parent and child as a result of one of them having been accepted by the other as a member of his or her family;
 - (e) grandparents and grandchildren;
 - (f) siblings;
 - (g) persons who are in a relationship which has the characteristics of the relationship between siblings as a result of having been brought up together in the same household.
- (3) The presumption in subsection (2) may be rebutted by evidence that the persons in question did not have a close relationship with each other at the relevant time.

NOTE

Subsection (1) explains what "a close relationship" means. It is intended to be slightly wider than the "close tie of love and affection" as required by *Alcock* in claims by persons not directly involved in the incident under the present law. "Strong ties of affection" would cover close relatives and friends. A teacher or a nanny might have feelings of "personal responsibility" for a child in his or her care or class. A tie of "loyalty" might for example apply to employers and employees or members of the armed forces. However a tie of "loyalty" would probably not, by itself, be enough to constitute a close relationship, but would have to be mixed with some element of affection or personal responsibility. In determining who had a close relationship the court would look at the totality of the picture with these three elements in mind. It would be open to persons such as work colleagues, neighbours, friends and teachers and pupils to establish that they had a close relationship.

A close relationship is presumed between those family members (including cohabiting partners) listed in subsection (2) but this presumption may be rebutted. The substance of the list is the same as that recommended in our Report on *Title to Sue for Non- Patrimonial Loss* (Scot Law Com No. 187, 2002) to replace the class of immediate relatives currently set out in paragraphs (a) to (c) in Schedule 1 to the Damages (Scotland) Act 1976.

In subsection (3), "the relevant time" refers, in accordance with section 4(2)(b), to the time of witnessing or learning of the incident or its consequences.

The existence of a close relationship only opens the gateway to section 4(1). The pursuer still has to establish that he or she had a medically recognised mental disorder which was a reasonably foreseeable consequence of the defender's conduct.

6 Claims linked to other types of harm

Nothing in this Act prevents damages from being recovered for—

- (a) mental harm resulting from any other type of harm to the claimant for which there is delictual liability; or
- (b) distress, anxiety, grief or sorrow where the claim for damages is made by a relative of a deceased person under section 1(4)(a) or (b) of the Damages (Scotland) Act 1976 (c.13).

NOTE

Paragraph (a) makes it clear that damages currently available for mental harm as a head of damages in other claims, such as claims for damages for physical harm, property damage, defamation, patrimonial loss or breach of contract, will continue to be available under the rules of remoteness of damages. Such claims are not affected by section 3 of the Bill.

Paragraph (b) preserves claims for non-patrimonial losses (ie distress, anxiety, grief or sorrow) on the death of an immediate family member under section 1(4) of the Damages (Scotland) Act 1976. Where the non-patrimonial loss amounts to a mental disorder, however, the provisions of the Bill are intended to apply.

PART 3

INTERPRETATION AND FINAL PROVISIONS

7 Interpretation

In this Act, unless the context otherwise requires—

- (a) "act" includes omission;
- (b) "harm" includes any kind of loss, injury, damage or deleterious effect; and
- (c) "mental harm" means any harm to a person's mental state, mental functioning or mental well-being whether or not it amounts to a medically recognised mental disorder.

NOTE

Paragraph (b)

"Harm" is widely defined covering, for example, personal injury, damage to property and insult and any patrimonial loss caused by defamation. Its meaning in the Bill depends on the context. For example, "harm" in section 3(1) means mental harm, while "harm" in section 2(b) means personal injury, ie mental or physical harm.

Paragraph (c)

"Mental harm" includes medically recognised mental disorders and less severe harm. Mental harm includes psychiatric and psychological harm.

8 Short title, temporal application and commencement

- (1) This Act may be cited as the Reparation for Mental Harm (Scotland) Act 2004.
- (2) This Act applies only to mental harm occurring (or, in the case of continuing mental harm, first occurring) after the Act comes into force.
- (3) This Act comes into force at the end of the period of three months beginning with the date of Royal Assent.

NOTE

Subsection (2)

It may be that mental harm is the delayed effect of an incident which occurred before the legislation came into force. For example, a wife may suffer a medically recognised mental disorder after nursing her husband through a long and painful terminal illness such as mesothelioma. In such a case it would be irrelevant that the exposure to asbestos fibres had occurred before commencement. The crucial date is the date at which the mental harm occurred. In the case of a long period of nursing the mental harm may be continuing and so the relevant date would be the first occurrence of mental harm of a nature that would warrant a claim under this legislation. In the case of harm caused unintentionally this would be the onset of harm amounting to a medically recognised mental disorder.

The current law on reparation for mental harm will continue to apply to any claims where the mental harm occurred before commencement.

Subsection (3)

Little or no subordinate legislation seems necessary. There is therefore no need to delay the date of commencement to one appointed in regulations made by the Scottish Ministers. Three months is the standard "non-appointed day" commencement period.

Appendix B

List of those submitting comments on Discussion Paper No 120

Aberdeen University School of Law

Association of Chief Police Officers in Scotland

Association of Personal Injury Lawyers

Centre for Research into Law Reform, University of Glasgow

Dr John Crichton, The Orchard Hospital

Faculty of Advocates

Fire Brigades Union-Scotland

The Law Society of Scotland

Ms Lesley Lomax, School of Social Science and Law, Sheffield Hallam University

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Professor Rodger, University of Strathclyde

The Royal College of Psychiatrists, Scottish Division

Scottish Police Federation

The Society of Writers to H M Signet (view of a member)

Dr Helen Stirling, Department of Child and Family Clinical Psychology, Stirling

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Victim Support Scotland

Appendix C

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