

REPORT ON DAMAGES FOR PERSONAL INJURY

EXECUTIVE SUMMARY

Introduction

1. The Scottish Law Commission has published its recommendations for reform of the law on damages for personal injury focussing on four areas: damages for services; deductions from damages; provisional damages and asbestos-related disease; and management of children's awards of damages. The Commission's recommendations are set out in its Report on Damages for Personal Injury (Scot Law Com No. 266, 2024) ("the Report").
2. The draft Bill accompanying the Report extends to seven sections, which either amend or insert new provisions into the following Acts:
 - Prescription and Limitation (Scotland) Act 1973
 - Administration of Justice Act 1982
 - Children (Scotland) Act 1995

What is the current law?

3. The Administration of Justice Act 1982 introduced damages for "necessary" and "personal" services rendered to or by an injured person, and clarified which benefits and payments should be deductible when assessing an award of damages. It also introduced the concept of provisional damages, which allows an injured person to return to the court for further damages if their condition deteriorates. Significant social and legal changes have taken place since the 1982 Act, with numerous new statutes and case law providing principles that assist in the assessment of specific claims (for damages to children, for asbestos-related injuries, etc.)¹.

Problems with the current law

4. Various criticisms have been levelled at the current law, in particular:
 - The definition of the term "relative" does not adequately reflect modern family structures and should be broadened to cover more complex dynamics.
 - Awards of damages for services should extend beyond family members to include other persons who, due to shifting demographics, are often depended upon to provide necessary services following an injury.
 - There is an apparent conflict between Scottish and English authorities on whether (i) payments made to an injured employee under a Permanent Health Insurance scheme, and (ii) care costs incurred from private healthcare or accommodation should be deductible from an award of damages.
 - Persons who have suffered negligent exposure to asbestos are unfairly time-barred from raising an action for mesothelioma (or other asbestos related conditions) because of an earlier (unlitigated) diagnosis of pleural plaques.
 - Damages awarded to young children might require increased safeguards.

¹ Children (Scotland) Act 1995; Social Security (Recovery of Benefits) Act 1997; Civil Partnership Act 2004; Family Law (Scotland) Act 2006; Damages (Asbestos-related Conditions) (Scotland) Act 2009; Damages (Scotland) Act 2011; Marriage and Civil Partnership (Scotland) Act 2014; Civil Partnership (Scotland) Act 2021.

Reform recommendations

5. The Commission makes various recommendations for reform to address these criticisms including:

Chapter 2 – Damages for services

- The definition of “relative” and the class of persons who are eligible to claim damages should be determined by reference to contemporary family and social support structures. “Relative” should be extended to include certain persons accepted into the family and also ex-cohabitants. In addition to relatives, others who provide necessary services (e.g. friends and neighbours) should also be entitled to damages.

Chapter 3 – Deductions from damages

- Payments received by an injured person under a Permanent Health Insurance Scheme to which they have contributed financially (by direct payment, tax or NIC, or forfeiting some remuneration/earnings) should not be deductible from an award of damages.
- An injured person is entitled to opt for private medical treatment, care, accommodation, and equipment, rather than rely on NHS or local authority support.

Chapter 4 – Provisional damages and asbestos-related disease

- An asymptomatic condition such as pleural plaques will no longer result in a time-bar preventing recovery of damages for a later-developing symptomatic condition such as mesothelioma.

Chapter 5 – Management of children’s awards of damages

- Before making any award of damages to a child, the court should have a duty to inquire how the award will be invested, protected, and administered; and if appropriate, refer the case to the Accountant of Court for further attention. The draft Bill provides a non-exhaustive list of factors that should be taken into consideration, including the level of damages awarded and the future care needs of the child.
 - The court should have regard to (i) the welfare of the child, (ii) the “no order” principle, and (iii) the views of the child when considering how awards of damages made to a child should be managed.
6. The recommendations are intended to (i) modernise the law to better reflect 21st century Scotland, (ii) increase access to justice, (iii) remove unfairness in the current law, and (iv) facilitate and make more transparent the calculation and management of damages for personal injury.