
The Law Society of Scotland’s response

March 2013
Introduction

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

This response has been prepared on behalf of the Society by members of our Civil Justice Committee and our Obligations Committee ('the committees').

Consultation Questions

Chapter 2: Psychiatric Injury

Q2(a) do you agree that the 2004 report's summary of defects in the existing common law is a reasonably full and accurate one in today's circumstances?

No.

The Committees broadly agree that the common law of damages is well developed and is broadly understood by many practitioners. In particular the categorisation into primary and secondary victims provides a suitable framework for the operation of the law in this area

Q2(b) do you agree in principle that existing common law rules which apply only to reparation for mental harm should be replaced by a statutory obligation to make reparation for wrongfully caused mental harm?

No.

As stated the Committees do not agree that existing common law rules should be replaced by a statutory obligation to make reparation for wrongfully caused mental harm. This is subject to the exceptions stated below. In particular legislation should be limited to defining
a category of persons who have close ties of love and affection, and the position of “Samaritan rescuers” should be legislatively defined.

Q2(c) do you agree that the concept of ‘ordinary fortitude’ is unsatisfactory and, therefore, should no longer be a consideration in assessing whether a victim should be able to seek damages for his/her psychiatric injury?

No.

The Committees considered whether the test for “ordinary fortitude” should be extended to primary victims. The Committees agreed that there is no difference between “individual resilience” and “ordinary fortitude”. Whether it is labelled as “ordinary fortitude” or “individual resilience, the test has no place in deciding the law insofar as it relates to primary victims. Insofar as secondary victims are concerned, whilst the Committees accept that the term suffers from inexactitude, it is relatively well understood by practitioners and the courts, and causes little difficulty in practice.

Q2(d) do you agree that an appropriate balance between the right of an injured person to secure damages and the right of a defender to expect a certain level mental resilience in individuals would be achieved by the recommended focus on the stresses or vicissitudes of life or of the type of life that person leads?

No.

The Committees considered whether or not different standards should be applied to different professionals. The Committees agreed that sufficient control mechanisms already exist within the common law rules.

Q2(e) do you agree that, where physical harm is reasonably foreseeable but mental harm is not, and a victim sustains only the mental harm, the negligent party should not be held liable?
No.

The Committees noted that the current law on liability, as underscored by Page v Smith (1996) 1AC 155 provides that a person who sustains mental harm without physical harm may secure damages, even though only physical harm was a reasonably foreseeable outcome of the wrongdoing. A number of Committee members are experienced practitioners with considerable knowledge of this area of damages. These individuals do not consider that there is any practical difficulty with the current foreseeability test.

Q2(f) do you agree that there should be a general prohibition on obtaining damages for a mental disorder where the victim has sustained that injury as a result of witnessing or learning of an incident, without being involved directly in it?

Yes.

Q2(g) do you agree that it is appropriate to except rescuers from the general prohibition?

Yes.

Q2(h) do you agree that it is appropriate to except those in a close relationship with anyone killed, injured or imperilled by the incident from the general prohibition?

Yes.

Q2(i) do you agree that these two exceptions strike the appropriate balance between the right of an injured person to secure damages and the right of a defender?

Yes.

The Committees agree that, subject to specific exceptions, there should be a general prohibition on obtaining damages for a mental disorder where the victim has sustained that injury as a result of witnessing or learning of an incident.
The Committees agree that it is reasonable to except rescuers from the general prohibition.

The Committees consider that professional rescuers are acting in the course of their employment. If they are exposed to stress as a result of witnessing an incident then they will have a claim against their employer rather than against the wrongdoer. Controls can be introduced in relation to professional rescuers by their employers by applying appropriate selection standards and by providing training and counselling. Professional rescuers should be regarded as individuals with extra-ordinary fortitude.

In contrast a “good Samaritan” who steps in to assist, should not have to prove that they faced an imminent peril, just that there was a reasonable foreseeability that they would suffer psychiatric injury. They should be presumed to be someone of “ordinary fortitude”.

Q2(j) do you agree that other recommendations in the Commission’s report are appropriate?

No.

The Committees expressed reservations in respect of those in a “close relationship” with “strong ties of affection, loyalty or personal responsibility”. It also expressed reservation about the role of the “good Samaritans”. The Committees agreed that there should not be an attempt to supplant the common law with a new statutory framework.

Q2(k) do you agree that the proposed framework strikes the appropriate balance between both flexibility of approach and certainty of outcome?

No.

The Committees do not agree that the proposed balance is appropriate. As stated above the Committees agreed that there should not be an attempt to supplant the common law with a new statutory framework.
Legislation should be limited to provision for:

1. “Samaritan rescuers”.
2. Defining as a rebuttable presumption persons with close ties of love and affection to the injured or deceased person, along the lines of relatives with a claim for grief under the Damages (Scotland) Act 2011. Other persons who should recover under the legislation will be persons with strong personal, professional or societal relationships.

Q2(l) do you agree that it should not be possible for a bereaved relative to secure damages for psychiatric injury under section 4(3)(b) of the 2011 Act?

Yes.

The Committees agree that is should not be possible for a bereaved relative to secure damages for psychiatric injury under section 4(3) (b) of the 2011 Act. The alternative would be different treatment for different categories which would effectively create a league table for compensating grief.

Q2(m) what do you think the impact of implementing these proposals in full would be particularly in relation to the issues below?

Is it likely that more or fewer actions will be raised?
Is it likely that more or fewer cases come to court?
Is it likely that more or fewer cases will be settled out of court?
Is it likely that cases will require more or less preparation time?
Is it likely that cases will require more or less court time?
Is it likely that there will be more of fewer awards of damages?
Is it likely that awards of damages will be higher or lower?
Can you quantify the benefits for pursuers?
Can you quantify the benefits for defenders?
Can you quantify the drawbacks for pursuers?
Can you quantify the drawbacks for defenders?

The Committees agree that implementing these proposals in full would have the following impacts:

- More actions will be raised.
- More cases will come to court.
- Fewer cases will be settled out of court.
- Cases will require more preparation time.
- Cases will require more court time.
- There will be more awards of damages.
- The impact on the awards of damages will be neutral.
- The Committee cannot quantify the benefits or drawbacks to pursuers and defenders.
- This question cannot be answered until the courts interpret any new legislation.

Q2(n) do you consider that the proposals for the reform of damages for psychiatric injury will affect people, either positively or negatively with the following protected characteristics (age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race and religion or belief)?

The Committees are neutral on this question.

Chapter 3: Time-Bar

Q3(a) do you agree that – for all personal injuries, regardless of the nature and circumstances of the personal injury – even if it were lawful to do so, it would not be advisable to seek to revive prescribed claims (i.e. claims relating to events before September 1964)?

Yes.
The Committees agree that – for all personal injuries, regardless of the nature and circumstances of the personal injury it would not be advisable to seek to revive prescribed claims.

**Q3(b) do you agree that the standard limitation period should be raised to 5 years?**

No.

The Committees agree that a 3 year period is long enough for the standard limitation period. If the period were to be extended there could be evidential prejudice to both pursuers and defenders.

**Q3(c) do you agree that it is appropriate to have a single standard limitation period for all types of personal injury claim, instead of different periods for different types of injury?**

Yes.

The Committees agrees that it is appropriate to have a single standard limitation period for all types of personal injury claim. In particular the committee agreed any differential “could give rise to doubt and uncertainty in individual cases”.

The Committees also agreed that it is appropriate for the courts to exercise equitable discretion on whether or not older cases should be considered by the court. The Committees assume that such equitable discretion will be considered by the courts in relation to cases alleging child abuse.

**Q3(d) do you agree there should be a statutory, non-exhaustive list of matters relevant to determining whether it would be equitable for the courts to exercise discretion to allow an action to be brought outwith the limitation period?**

Yes.
The Committees agree there should be a statutory, non- exhaustive list of matters relevant to determining whether it would be equitable for the courts to exercise discretion to allow an action to be brought outwith the limitation period. The proposed non exhaustive list is satisfactory. The list should not however be inconsistent with section 19 A of the Prescription & Limitation (Scotland) Act 1973.

Q3(e) do you have views on potential options for reforms beyond those proposed by the Scottish Law Commission?

No.

The Committees have no views on other potential options for reform.

Q3(f) do you agree that it is in the interests of justice that there should be only one limitation period following the discovery of a harmful act, during which all claims for damages for associated injuries must be brought?

Yes.

Q3(g) do you consider that there should be any exceptions to this principle?

Yes.

The Committees agree that any exceptions should be part of the substantive law and the issue should not be left to the discretion of the Judges. Examples of exceptions should include disease cases and abuse cases.

Q3(h) how would you suggest that the difficulties and anomalies identified by the Scottish Law Commission (in their report at paragraphs 2.17 – 2.24) and the Court in Aitchison might be overcome?

As above the Committees would recommend a single limitation period of 3 years. However in industrial cases only with reference to the development of distinct conditions
e.g. pleural plaques; asbestosis; mesothelioma; deafness; tinnitus, the law should go back to the pre Aitchison position. So the principles enunciated in Aitchison would govern almost all factual situations. However there should be a specific legislative exception for the industrial disease cases. Effectively the law in that area would be put back to the distinctions which the courts and practitioners understood and practised following the case of Shuttleton, i.e. pleural plaques, asbestosis, mesothelioma etc. are all separate diseases with separate starting dates for the triennium.

It is not satisfactory that the substantive law should be so deficient in this area. Matters should not be left to judicial discretion. The Committee considered whether there was a "substantive law" solution to the historic child abuse cases, but the difficulties are insuperable. The matter must be left to the equitable discretion which we would hope would be more generously exercised under the proposed legislation.

Q3(i) do you consider that there is there a need to make provision for cases where it was known that the initial harm was actionable but where decisions not to litigate were taken in good faith in reliance on the rule in Carnegie before it was overturned by the Court in Aitchison.

No.

The Committees do not agree that there is a need to make provision for cases where the initial harm was actionable but where decisions not to litigate were taken in good faith.

Q3(j) what do you think the impact of implementing these proposals in full would be particularly in relation to the issues below?

   Is it likely that more or fewer actions will be raised?
   Is it likely that more or fewer cases come to court?
   Is it likely that more or fewer cases will be settled out of court?
   Is it likely that cases will require more or less preparation time?
   Is it likely that cases will require more or less court time?
Is it likely that there will be more of fewer awards of damages?
Is it likely that awards of damages will be higher or lower?
Can you quantify the benefits for pursuers?
Can you quantify the benefits for defenders?
Can you quantify the drawbacks for pursuers?
Can you quantify the drawbacks for defenders?

The Committees consider that the proposal will have the following impacts:

Fewer actions will be raised.
Fewer cases will come to court.
More cases will be settled out of court.
Cases will require less preparation time.
Cases will require less court time.
There will be more awards of damages.
The Committee are neutral on whether damages will be higher or lower.
The proposals will be of greater benefit to pursuers however these cannot be quantified by the Committee.

Q3(k) do you consider that the proposals for the reform of the law of limitation for personal injury actions will affect people, either positively or negatively, with the following protected characteristics (age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race and religion or belief)?

The Committees are unable to answer this question.

Chapter 4: The Wider Reform Agenda: Before and After

Q4(a) do you consider that the way in which the 2007 Act is working in practice is achieving its central aim of ensuring that a person dying of mesothelioma can secure damages without thereby preventing members of his/her immediate family making a future claim for damages for distress, grief and loss of society?
Yes.

The Committees are comprised of a large number of practitioners who have a wide range of experience in disease cases. These practitioners know of instances where awards are made during the lifetime of the deceased without preventing family members making a future claim for damages after his or her death.

Q4(b) do you consider that the way in which the 2007 Act is working in practice is having positive or negative impacts / side-effects?

Yes.

Positive Impacts:
The 2007 Act has elevated some categories of clients into a better situation than they would have been without the Act.

Q4(c) do you consider that the Scottish Government’s financial estimates were largely accurate, insofar as they forecast:

(i) the number of additional claims?
(ii) the average level of costs associated with those additional claims?
(iii) the overall financial implications of the 2007 Act?

The Committees do not have sufficient information to answer these questions.

Q4(d) do you consider that the way in which the 2009 Act is working in practice is achieving its central aim of ensuring that a person with pleural plaques (or one of the other specified asymptomatic asbestos-related conditions) may pursue an action of damages in the same way as a person with any other non-negligible personal injury?

Yes.
The Committees agree that the 2009 Act is working in practice to achieve its central aim of ensuring that a person with pleural plaques can pursue an action from damages in the same way as a person with any other non-negligible personal injury.

**Q4(e) do you consider that the way in which the 2009 Act is working in practice is having positive or negative impacts / side-effects?**

Yes.

**Positive Impacts:**
The 2009 Act allows Pursuers to make recoveries by creating a framework for agreement.

**Negative Impacts:**
The negative impact is that it has to be funded by Insurers.

**Q4(f) do you consider that the Scottish Government’s financial estimates were largely accurate, insofar as they forecast:**

(i) the number of claims?
(ii) the average level of costs associated with those claims?
(iii) the overall financial implications of the 2009 Act?

The Committees do not have sufficient information to provide an answer.

**Q4(g) do you consider that the way in which the 2011 Act is working in practice is achieving its central aim of bringing greater clarity and accuracy to Scots law so far as it relates to damages for fatal personal injuries, reducing requirements for potentially intrusive, protracted and costly investigations, and thereby facilitating the swift and fair settlement of claims?**

No Response.
Q4(h) do you consider that the way in which the 2011 Act is working in practice is having positive or negative impacts/side-effects?

Positive Impacts:
It is too early to say whether the impact is positive or negative. Generally damages have increased.

Q4(i) do you consider that the Scottish Government’s financial estimates were largely accurate, insofar as they forecast:

(i) the impact on the number of claims?
(ii) the level of award in respect of those claims?
(iii) the overall financial implications of the 2011 Act?

The Committees do not have sufficient information to answer this question.

Q4(j) do you consider that there would be merit in reviewing the existing approach to periodical payments, as currently set out in Scottish version of section 2 of the 1996 Act?

Yes.

The Committees agree that there should be a consultation of the existing approach to periodic payments.

Q4(k) do you consider that there would be merit in reviewing again (but this time, separately) the existing approach to interest on damages for personal injury?

Yes.

The Committees note that the judicial rate in England and Wales is very different to that in Scotland. This issue should be referred to the Civil Justice Council in light of current interest rates.
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