Scottish Government

Civil Law of Damages: Issues in Personal Injury

A response by the Association of Personal Injury Lawyers

March 2013

The Association of Personal Injury Lawyers (APIL) was formed by pursuers' lawyers to represent the interests of personal injury victims. APIL is a not-for-profit organisation with more than 20 years' history working to help injured people gain the access to justice they need. APIL currently has around 4,600 members, 170 of whom are in Scotland. Membership comprises solicitors, advocates, legal executives and academics whose interest in personal injury work is predominantly on behalf of pursuers.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- to promote full and just compensation for all types of personal injury;
- to promote and develop expertise in the practice of personal injury law;
- to promote wider redress for personal injury in the legal system;
- to campaign for improvements in personal injury law;
- to promote safety and alert the public to hazards wherever they arise; and
- to provide a communication network for members

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PSYCHIATRIC INJURY

Introduction

The Scottish Law Commission Report is correct to say that there has been academic criticism of the current law, which has been described as a 'patchwork quilt'. While we accept that this may be the case, particularly following the decision in *Alcock*, the experience of our members who handle hundreds of psychiatric injury cases on a daily basis is that, in the main, the law works efficiently at present. In particular the categorisation of primary and secondary victims is an appropriate mechanism for enabling distributive justice to be done in an appropriate and proportionate manner.

There are exceptions to this, of course, specifically the position of rescuers as secondary victims of psychiatric injury, and the categories of people deemed to have close ties of love and affection. These are addressed later in our response.

Our concern is that some of the Commission's proposals will restrict the flexibility of the common law, which serves the vast majority of cases well at the moment. In attempting to introduce clarification by way of legislation, there is a real risk that the law becomes regimented and restrictive and will no longer be applicable to the kinds of cases dealt with by our members. Psychiatric injury can be difficult to diagnose and establish and it would be unfair for defenders to evade responsibility for injury through legal arguments relating to statutory construction.

In particular, statutory codification of liability for all mental harm along the lines suggested would still leave unresolved the following issues in almost every case:

1. **Reasonable foreseeability of psychiatric damage**

This is explored further in our answer to question 2(e).

2. **The meaning of 'individual resilience'**

On the face of it there seems little difference between 'individual resilience' and the concept of 'ordinary fortitude'. For reasons we explore in our answer to question 2(c) we believe the arbitrary nature of the concept of 'individual resilience' could create significant potential for satellite litigation.

3. **The meaning of "the ordinary vicissitudes of life"**

These are matters which pursuers at present are expected to endure in terms of the common law.

Among other unintended consequences of introducing wholesale statutory codification to this area of law, is the impact on related legislation. The Protection from Harassment Act 1997, for example, offers protection from mental harm (including harm short of psychiatric disorder) caused by harassment. A body of case law, including vicarious liability for mental harm caused by harassment has already been developed (see, for example, the case of *Majrowski v Guy's and St. Thomas' NHS Trust* [2007] A.C. 224). This legislation would, in all likelihood, need to be reviewed if all the Commission's recommendations were to be adopted throughout. It is difficult to see how the Act could survive the effect of Section 3(1) 'General Restriction on Liability' as proposed in the Commission's draft Bill of 2004, if this is carried forward unchanged following this consultation.

The courts themselves, working within the current legal framework, provide all the checks and balances required to ensure that only genuine cases succeed, without introducing restrictions which will make it unnecessarily difficult for genuine people to recover compensation.

An example is in the case of *Ormsby v Chief Constable Strathclyde Police*[1] in which a policewoman claimed substantial damages for psychiatric injuries following an incident in Govanhill, Glasgow, when she was called upon to assist with the enforcement of an eviction notice on residents who had occupied the local swimming baths, which were due to close.

The court had no difficulty awarding compensation for a physical injury sustained by Ms Ormsby during the incident, but dismissed her case for psychiatric injury (including post traumatic stress disorder, plus a depressive disorder, anxiety and agoraphobia) on the basis that the pursuer's evidence was neither credible nor reliable.

In the case of *Fraser v State Hospital Board* 2001 S.L.T 1051, which was a stress at work claim, Lord Carloway pointed out:

[1] *Ormsby v Chief Constable Strathclyde Police* [2008] CSOH 143

> "Managers often have to take decisions which will … have an adverse effect on employees in emotional terms. … However it is a considerable leap to go from the position whereby a manager knows or ought to anticipate that his decisions will cause an employee emotional upset in one form or another to a stage where he knows or ought to anticipate it will cause the employee to suffer psychiatric illness."

The courts using the existing common law have already developed a nuanced response to the difficulties of psychiatric injury, in ways which do not completely restrict deserving cases, and do not open the floodgates to the world at large through bystander claims.

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

We acknowledge, as outlined in our introduction, that there are some serious and outstanding issues which need to be addressed and which are dealt with in this consultation. We have fundamental concerns, however, about other identified 'defects' in the common law and about the unintended consequences of attempting to deal with them through a single comprehensive statute. Some legislation, however, will be required to address the concerns which we identify below.

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. While we understand the desire to codify in statute liability for all mental harm, we believe that to do so would risk losing the flexibility which can be essential, particularly in these types of case where psychiatric harm can vary so dramatically between individuals. Although there are clear areas where we believe the common law does need to be changed, there is no real mischief in the law in this area at the moment, and to introduce wholesale change by statute risks creating a system which is regimented to the point that it fails to deal with many of the types of case dealt with by our members.

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?

At present the 'ordinary fortitude' test does not apply to primary victims, but only to secondary victims. We agree that it should not apply to primary victims. The Commission's proposal, however, is to abolish the requirement for both primary and secondary victims, and to replace it with a concept of 'individual resilience'. This would introduce a wholly novel and unnecessary hurdle for primary victims.

We can agree that 'ordinary fortitude' lacks exactness but we do have considerable concerns about the concept of 'individual resilience', as set out in paragraph 2.11 of the consultation, and the proposal that a person should be expected to endure mental harm without receiving damages if the harm is caused by the 'normal stresses or vicissitudes of life'. We would caution against the introduction of any new arbitrary baseline measurement which could lead to the individuality of victims not being properly recognised by the courts.

In psychiatric injury, in particular, it is extremely important to note that a situation which has little or no effect on one person could be extremely damaging to another. It is clearly not feasible to legislate fairly for the entire spectrum of pursuers. The expectation that all victims should be 'resilient in the face of the ordinary 'vicissitudes' of life' leaves each pursuer vulnerable to whatever any particular judge deems to be 'resilient', and all judges will have different views about this, thereby generating unfairness where, in the experience of our members, there is currently no evidence of a problem.

The case of *Simmons v British Steel plc* in the House of Lords[2] illustrates this point. In this case the pursuer sustained injuries during the course of his employment at Clyde Bridge Steel Works and was awarded £3,000 in compensation for his injuries. When the case reached the House of Lords, however, it was found that, as a result of the accident, the pursuer experienced an exacerbation of a pre-existing skin condition and developed a severe depressive illness as a result of his injuries.

[2] *Simmons v British Steel plc* [2004] UKHL 20

It is entirely possible that another pursuer suffering Mr Simmons' physical injuries and receiving compensation for them, would have proven 'resilient' to his psychological situation. For Mr Simmons, however, the outcome was significantly more severe in terms of his subsequent psychiatric injury.

The concept of 'individual resilience' presents more difficulties than 'ordinary fortitude' which, according to paragraph 2.12 of the consultation, is believed by the Commission to provide 'an artificial and unsatisfactory mechanism for protecting defenders against claims from exceptionally vulnerable individuals'. The test of 'ordinary fortitude has at least, however, been tested in case law.

We therefore fundamentally oppose any proposal to replace 'ordinary fortitude' with a test of 'individual resilience'.

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 of 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?

We do not agree that this is an appropriate balance in relation to primary victims for reasons we set out in our answer to 2(c).

In relation to rescuers, in particular, there is often a fundamental misunderstanding of the impact of witnessing and dealing with trauma, a matter which has been examined in considerable detail by the English Law Commission.[3]

> "At one time it was thought that prior trauma would increase the resilience of an individual to subsequent traumas, thereby reducing the risk of PTSD with subsequent re-exposure. More recent research does not however appear to be consistent with this theory, but rather supports the stress sensitisation theory, which holds that exposures to repeated stress makes an individual more susceptible to the effects of stress".

[3] http://lawcommission.justice.gov.uk/docs/lc249_liability_for_psychiatric_illness.pdf. par 3.14, footnote 44.

The fact that people working in the emergency services do not, in fact, become inured to stress is clearly not new.

Recovery for the emergency services will be limited to those situations where negligence can be shown on the part of the wrongdoer, whether that is the employer or third party. No-one could claim that pay rates for emergency services reflect, for example, an acceptance of the risk of PTSD. The public distaste identified by the courts for compensation for professional rescuers in the Hillsborough tragedy reflected the deeply-felt unease that police officers might recover when close relatives could not. This should not be the position in future, if the Commission's proposals on close ties of love and affection are accepted.

The courts have already identified situations where rescuers can recover for physical injury caused by negligence (see the case of *Ogwo v Taylor* [1988] A.C 431 - the defendant who carelessly started a fire in his own house was held liable to firefighter who was physically injured). Where there is danger of physical injury the firefighter will recover as primary victim. Foreseeable psychiatric injury in secondary victim rescuer cases will still need to be proved on an individual case by case basis, which is entirely fair.

Q2 (e) Do you agree that, where physical harm is reasonably foreseeable but mental harm is not, and a victim sustains only mental harm, the negligent party should not be held liable?

No, we do not agree.

The Commission is particularly critical of the decision in *Page v Smith* and the finding that risk of, or actual, physical injury should be sufficient for a primary victim to recover damages for psychiatric injury.

It is worth noting here that, in general, practitioners welcomed this decision. As the English Law Commission (ELC) commented:

'They agreed with Lord Browne-Wilkinson, who pointed out the "dangers of the court seeking to draw hard and fast lines between physical illness and its causes on the one hand and psychiatric illness and its causes on the other" since recent developments in medical science "suggest a much closer relationship between physical and mental processes than had previously been thought"; and with Lord Lloyd who said that, "[n]othing will be gained by treating [physical and psychiatric injury] as different 'kinds' of personal injury, so as to require the application of different tests in law".'[4]

David Kemp QC, author of Kemp on Damages, the leading textbook in this area, said "I think that the present position as summarised by Lord Lloyd....is sensible and satisfactory."

We agree with Lord Lloyd that in light of current medical thinking, any "bright line" distinction between physical and psychiatric injury is impossible to justify. After *Page v Smith* a pursuer has to be physically injured or at risk of physical injury to recover, but he should recover if he suffers only psychiatric injury. According to *Clerk & Lindsell*[5] the Ministry of Justice decided against legislation following the ELC Report, saying on 9 July 2009:

> "The arguments in this sensitive and complex area are finely balanced. On balance the government continues to take the view that it is preferable for the courts to have the flexibility to continue to develop the law rather than attempt to impose a statutory solution."

The editors of *Clerk & Lindsell* state[6]:

> "Since the [ELC] Report there has been no legislation but the courts seem to have adopted a more flexible approach to the distinction between primary and secondary victims, and a less restrictive approach to secondary victims. In the light of this legislative reform seems unnecessary".

[4] http://lawcommission.justice.gov.uk/docs/lc249_liability_for_psychiatric_illness.pdf par 5.12

[5] *Clerk & Lindsell on Torts*, 20th Edition, 2010, chapter 8, p458, footnote 273

[6] Ibid, chapter 8, p457, par 61

It may be helpful at this stage to review the facts in *Page v Smith*. The claimant was driving his own motor vehicle at around 30mph, when the defendant emerged from a minor road and there was a collision. The claimant's car was written off, but he had no physical injuries. Within a few hours he suffered a recurrence of chronic fatigue syndrome which became significantly disabling. For the purposes of the case, chronic fatigue syndrome was treated as a non-physical but purely psychiatric injury. Quite apart from any other issues which the case decided, the two dissenting members of the House of Lords held that this psychiatric injury was not reasonably foreseeable. Lord Ackner on the other hand said that where a person was exposed to the danger of a high speed collision, in his view psychiatric injury was reasonably foreseeable. It was not a fantastic possibility. This was merely a side issue in the case discussion, but offers a sample illustration of the kind of arguments which will be made routinely in the event that the Scottish Law Commission's proposals on a requirement of reasonable foreseeability for psychiatric harm are accepted.

To overturn *Page v Smith* in order to satisfy a legal principle which applies to very few cases in any event would be disproportionate and unfair to those pursuers who need to rely on it.

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 directly involved in it?

Yes, we agree, for the reasons set out in the consultation.

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

Yes, we agree, for the reasons set out in the consultation.

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

Yes. We note and support, in particular, the comment in paragraph 2.26 of the consultation that the definition of 'close relationship' includes friends, neighbours or colleagues, provided it can be proven that they have such a relationship with the person in the incident. It would be unfair for someone who has witnessed a horrific accident and then suffers psychiatric illness not to be able to claim because they are not related to the victim.

In terms of a defined list of relatives, we suggest that the list should be the same as identified in section 14 (1) of the Damages (Scotland) Act 2011, to ensure fairness and consistency.

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.

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

Yes, as they are set out in the appendix to chapter 2 of the consultation.

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

Not in its entirety, for reasons we have set out in our previous answers.

PSYCHIATRIC INJURY CAUSED BY A WRONGFUL DEATH

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, we do agree. The introduction of psychiatric injury as a separate head of damage would generate greater intrusion into people's lives when they are particularly vulnerable, as the consultation itself suggests in paragraph 2.34. This is, in any event, unnecessary, as case law is now developing which takes into account the more specific details of bereaved relatives following a wrongful death, without the need to develop, in effect, a further 'league table' of grief.

The recent case of *McGee v RJK Building Services*[7] illustrates this point. In this case, Lord Drummond Young examined in detail the exceptionally close relationship between a grandson and his deceased grandfather, finding:

'The deceased encouraged Declan in a wide range of sporting activities, and took him to church, on excursions and on holidays. In evidence, Declan stated that the deceased was, in effect, his father, and was everything that he could have asked for. He had clearly been very badly affected by his grandfather's death, which occurred when he was about to go to university....I consider that the award in his favour should move into the level that is normally more appropriate for a child than a grandchild.'
In addition, many of the relatives of fatal victims, who might previously have recovered nothing because of the secondary victims rule, can now recover under the terms of the Damages (Scotland) Act 2011.

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

It is difficult to be specific in answer to this question but, in general terms, if *Page v Smith* is reversed, we believe there would be fewer claims from primary victims. On the other hand, if the test of 'individual resilience' is introduced, the prospect of significant satellite litigation is inevitable. The focus would change radically from proof of what actually happened to the pursuer, to how he *ought* to have reacted if he were a person of 'individual resilience'.

[7] *McGee v RJK Building Services* [2013] ScotCS CSOH_10

Psychiatric evidence from both sides would become a feature of almost every case, and any predictability which the law presently has would simply disappear.

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 (ie claims relating to events before September 1964)?

Yes, we agree.

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

While we have no inherent difficulty with a five-year limitation period, it is fair to say that the facts of a case rarely become any clearer with age, and we see no reason why the current limitation period of three years should be changed. There are no significant practical problems in investigating and commencing claims within the three-year limit. We also share the Government's concern, expressed in paragraph 3.20 of the consultation that a change to five years could cause unnecessary delay.

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 we do agree, for the reasons set out in the consultation.

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?

We welcome this recommendation as a remedy for the denial of compensation to many victims of industrial diseases due to the often draconian interpretation of the 'limitation' defence by many Scottish courts.

Industrial disease cases are clearly very different from (for example) traffic accidents because symptoms are often not apparent until many years after the injury has been caused. It can be impossible for a pursuer to have the necessary knowledge about the disease and its cause to satisfy the courts, and the result is that many cases fail due to the 'time bar'.

This situation heavily favours insurers and negligent employers, while punishing the most deserving and stoic pursuers, most of whom do not automatically think to rush to the doctor or to the courts to seek reparation for injuries caused by negligence.

It is worth noting here the issues raised in *Cartledge v Jopling Limited*[8] which is the agreed starting point for the law on limitation in industrial disease cases. In that case the claimant suffered from pneumoconiosis, caused by various breaches of duty which had ended around 1950. The condition was entirely symptomless for a number of years, although lung changes could have been detected by X-rays at that time. Writs issued in 1956 were held by the House of Lords to be time barred. The cause of action had accrued in 1950, even though the claimant could not reasonably have expected to realise it. The Law Lords were driven to this manifest injustice by the existing legislation, and the result was in the words of Lord Reid "wholly unreasonable".

He went on to say:

> "If this were a matter governed by the common law I would hold that a cause of action ought not to be held to accrue until either the injured party has discovered the injury, or it would be possible for him to discover it if he took such steps as were reasonable in the circumstances."

We believe the introduction of the proposed non-exhaustive list will help to offer protection to pursuers who are too often unfairly disenfranchised by the courts, which often attribute to them medical and legal knowledge they simply do not possess. We strongly recommend, however, that the introduction to the list should be changed from 'to which the courts may have regard' to 'to which the courts *shall* have regard' if there is to be real confidence that the courts will, in fact, take the list into consideration.

[8] *Cartledge v. Jopling Limited* [1963] 1 All ER 641

We have been considerably disappointed by the way in which the Scottish courts have interpreted the equitable discretion in the past. This door has been shut on many deserving claimants (see, for example *Cowan v Toffolo Jackson*[9], in relation to asbestosis; *Little v East Ayrshire Council*[10], in relation to deafness). In practice, the courts appear to think that the exercise of discretion involves an exceptional indulgence to pursuers. We refer to the cases included in the article by R. E. Conway, '*Time Out of Joint'*, which is attached. In light of this, and the need for the courts to be as neutral as possible, we recommend adding the following sentence to the end of recommendation 15 on judicial discretion: 'There is no presumption in law either for or against the exercise of this discretion.'

In relation to child abuse cases, we do recognise the difficulties which the law has to face in these cases in order to be fair to both pursuers and defenders. For the reasons stated below we believe that in very many cases the exercise of the equitable discretion will be the only way in which justice can be obtained. As Baroness Hale pointed out in A v Hoare[11] "...perpetrators have many ways, some subtle and some not so subtle, of making their victims keep quiet about what they have suffered. The abuse itself is the reason why so many victims do not come forward until years after the event."

An example of the effective application of judicial discretion is *CG v Glasgow City Council*[12]. In this case, the pursuer was abused between 1992 and 1995 while a pupil at Kerelaw Residential School. The case was brought in 2007, three years after the pursuer was contacted by police in relation to a criminal investigation of abuse alleged to have taken place at the school. In response to the defender's plea of time bar, the pursuer argued that, under a combination of section 17(2)(b) subsection three, and section 19A of the Act, the running of time could be delayed until she effectively became aware of the seriousness of her injuries, when interviewed by police in 2004. Although reliance on section 17(2)(b) was rejected, the proof was allowed under section 19A of the Act.

[9] *Cowan v Toffolo Jackson*, 1998 SLT 1000
[10] *Little v East Ayrshire Council*, 1998 SCLR 520
[11] *A v Hoare* 2008 UKHL 6, par 54
[12] *CG v Glasgow City Council* [2010] CSIH 69

In his opinion, Lord Eassie said:

> "Among the factors prompting us to that ultimate conclusion are, first, the obvious point that the very passage of time incurs the risk of further diminution of memory. Secondly, there is the desirability of the pursuer (who has already given evidence at a criminal trial of the two male staff members) not having to give repeated testimony. Thirdly, but importantly, we have regard to the state of the defenders' pleadings. In response to the pursuer's substantive averments, the defenders make only bald denials."

We do not agree that, in child abuse cases, all a defender should have to show is a real possibility of evidential prejudice. The test should be broadly whether there can be a fair trial. There will always be some evidential prejudice in a claim which is *prima facie* time barred. The 'real possibility' test of evidential prejudice in the common law is far too lenient to defenders in this area. It is to be hoped that the proposed amendments to Section 19A of the 1973 Act will lead to different interpretation.

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

No.

Q3 (f) Do you agree that it is in the interest 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?

No – furthermore, we believe this recommendation would have extremely serious consequences both for people with long-latency industrial disease, and victims of historic child abuse.

The best way to illustrate the problem raised by *Aitchison*, is in relation to pleural plaques and asbestos-related disease, specifically mesothelioma. In Scotland pleural plaques is a compensatable disease although, in the experience of our members, many people actively choose not to claim compensation for pleural plaques (which is often symptomless) as they see no need to do so.

Before *Aitchison*, the fact that an individual did not claim for pleural plaques would not preclude him from claiming for a more serious disease which can occur, typically, decades later. As a result of *Aitchison*, however, a terminally ill mesothelioma victim who claims compensation for this condition but who (having known about the presence of pleural plaques but failed to claim for it) will no longer be able to receive the help he desperately needs. He will, quite literally, die without receiving compensation.

The pleural plaques victim's other alternative is to claim for plaques, either settling on a provisional basis, pending the possibility of a further illness in the future, or settling on a full and final basis and risking undercompensation should a further illness occur.

There could also be a potential impact on individuals who come to suffer noise-induced hearing loss. For example, a 44-year-old man who worked as a pipefitter was negligently exposed to excessive noise levels, mainly in the mid-1980s, without adequate hearing protection. Medical evidence confirms that when tinnitus developed around 20 years later, it was likely to be caused by noise exposure. The man had been aware of increasing deafness but, as is typical in these cases, deafness caused by noise exposure develops slowly and becomes more noticeable with age.

Because of the gradual development of the deafness, most people affected do not consult doctors quickly, nor do they necessarily consider compensation. As a result of *Aitchison*, the man is now likely to be time-barred from claiming compensation for the tinnitus which, of course, is a very different proposition for the injured person, affecting his general way of life at what is, in this particular case, a relatively young age.

It is ironic in the extreme, and highly undesirable for society, that the effect of *Aitchison* will be to force people who would otherwise make a positive choice not to pursue compensation for what they consider to be minor injuries, into a position where they are forced to pursue compensation in the first instance to 'insure' themselves against more serious illness or disease which may arise from that original injury in the future.

Nor is this situation restricted to people working in heavy industry, as there are more and more reports of people contracting serious asbestos-related illnesses through washing the clothes of those who have been directly exposed to asbestos, and there are growing concerns about the impact on teachers and pupils from asbestos exposure in schools.

This development has not, of course, been lost on the insurance industry. An article in the *Daily Record*, 29 June 2012 reported an attempt, for example, to apply *Aitchison* retrospectively. In the article, which is appended to this response, the claimant reports that insurers have tried to avoid paying his mesothelioma claim because he was diagnosed with pleural plaques in 1996, but didn't claim for it. The situation was also raised in a report on the website of the defendant law firm Simpson & Marwick, noting 'this is a matter the courts are surely likely to revisit'. This report is also appended to this response.

We submit that the need to revisit this issue is urgent.

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

We believe, for purposes of certainty and clarity, that the decision in *Aitchison* should be overturned.

The impact on industrial disease cases, which were not, of course, considered in the case, clearly has the potential to be disastrous, for reasons we have already highlighted.

We do accept, of course, that in relation to cases of historic child abuse, there would still be cases which would not benefit from a reversal of *Aitchison*, for example cases where it could reasonably be argued that psychiatric injury could have been diagnosed at an early stage and, therefore, what may be perceived to be a 'distinct' injury is arguably not distinct at all. Victims in this type of situation will therefore need to rely heavily on the proposed amendments to section 19A in order to gain access to the courts. There will be a tranche of cases where a reversal of *Aitchison* might help. A typical scenario is years of repressions of symptoms by the victim, compounded with feelings of guilt, shame and complicity. One victim then breaks the silence, others come forward, and prosecutions may follow. The experience is re-lived, the person is re-precognosced, and perhaps cited to give evidence. This may well result in a separate and distinct psychiatric disorder. A reversal of *Aitchison* would help people in this situation.

Q3 (h) How would you suggest that the difficulties and anomalies identified by the Scottish Law Commission and the Court in Aitchison might be overcome?

We do not accept that Carnegie presents enough difficulties and anomalies to outweigh the fundamentally unjust and socially undesirable situation which has resulted from *Aitchison*, as discussed above.

Q3 (i) Do you consider there is 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 in by the Court in Aitchision?

Please see our answer to question 3(g).

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 etc)?

No.

RECENT LEGISLATIVE REFORM

General comment

We have asked individual APIL members for their views about the impact of the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007, and also about the Damages (Asbestos-related Conditions) (Scotland) Act 2009 and will forward any further input on this to the Government.

In terms of the questions relating to the Damages (Scotland) Act 2011, we believe it is too early for us to provide definitive answers at this time.

FUTURE LEGISLATIVE REFORM

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

APIL is currently developing its response to the most recent consultation on the discount rate. In relation to periodical payments, we do believe this is an area which should be reviewed

Yes. We agree that, at the moment, there is a lack of clarity in this area which needs to be addressed.