Scottish Law Commission

Discussion Paper on Damages for Personal Injury

June 2022

A response by the Association of Personal Injury Lawyers

Introduction

APIL welcomes the opportunity to respond to the Scottish Law Commission's (SCL) consultation on damages for personal injury. We are supportive of the proposals throughout the SLC's paper, including amendments to the definition of "relative" in the 1982 Act, to reflect the realities of modern society. We strongly agree that section 2(4) of the Law Reform (Personal Injuries) Act 1948 should remain in force, and welcome reform of the law surrounding pleural plaques as a step in the right direction to address some of the outstanding issues relating to limitation.

Chapter 2

Q2) (a) Do you consider that the definition of "relative" in section 13(1) of the 1982 Act should be amended to include children/parents, grandchildren/grandparents, and siblings who are accepted as part of the family?

Yes, this change will bring this section in line with section 4 of the Damages (Scotland) Act 2011, and will provide fairness and consistency.

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

We believe that the definition of "relative" in the 1982 Act should be brought in line fully with that contained in the Damages (Scotland) Act 2011, which includes immediate relatives but also allows extended family such as ascendents/descendants (aside from parent/grandparent, child or grandchild); the niece or nephew; uncle or aunt or former spouse or civil partner, to claim for loss of financial support. We suggest that payment in respect of services would fall under loss of financial support, and there would be consistency if the same definition was adopted in the 1982 Act as that used in section 4.

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

Yes, the definition should be amended to include ex-partners, as we set out in question 2(b) this would bring consistency between the 1982 Act and the 2011 Act, which allows former spouses and civil partners to claim for loss of financial support. It would also reflect the reality of modern family life, including blended families and where even if people are no longer involved as partners, they may still be in each other's lives and helping each other. It must also be borne in mind that the reason for separation may very well be the burden of the injuries caused by the accident. In a Headway survey of brain injury survivors and their partners, 38 per cent reported that their relationship with their partner had broken down following the brain injury.

If a relationship has broken down as a result of the injuries suffered, the couple should not be further penalised, should the ex-partner remain to provide care to the injured person, by the fact that if they are no longer together as a couple.

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

Yes, we agree – claims should also be permitted in respect of necessary services provided gratuitously to an injured person by friends and neighbours, as this reflects modern life. As the consultation points out, 36 per cent of households are single person households. Not everyone lives near or with their family, and those people who rely on others who do not happen to be related to them, should not be penalised.

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

Yes, an individual who is not a family member should be regarded as providing services gratuitously if they provide them without having any contractual right to payment for their provision, and provide them otherwise than in the course of a business, profession or vocation. This is a pragmatic approach.

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

We believe that section 8 should be extended to claims in respect of necessary services provided gratuitously to an injured person by charities.

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

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

Q6) Should damages be recoverable in respect of gratuitous provision of services to an injured person where the person providing them is the defender?

We believe damages should be recoverable in respect of gratuitous provision of services to an injured person where the person providing them is the defender. If a person is insured for the risk of being involved in an accident, it does not seem right to distinguish when determining what can be claimed for under such insurance, between buying in services, and the defender providing the services themselves. If the defender is the person to provide the care to the injured person, they are likely going to be a close family member or friend, and as such are likely to provide better care than could be purchased, in any event. Provision of better care will help the injured person to recover more quickly, allowing them to return to work more quickly and to reduce the burden on the welfare system.

Q7) (a) Do you consider that section 9 of the 1982 Act should be extended so as to entitle the injured person to obtain damages for personal services which had been provided gratuitously by the injured person to a third party who is not his or her relative?

Yes, it should. It is foreseeable that people look after each other, regardless of whether they are related, therefore the loss or provision of those services is a foreseeable loss that should be permitted to be claimed for.

(b)

Yes they should.

Chapter 3

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

Some of our members have experienced the difficulties outlined in paragraph 3.20 of the discussion paper, relating to CRU certificates not specifying the components which make up an award of universal credit, and it therefore not being clear which benefits are deductible and which are not.

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

The components of Universal Credit should be defined so that it is clear which benefits are deductible and which are not.

Q9) Do you consider that benevolent payments, or payments from insurance policies which the injured person has wholly arranged and contributed to, should continue not to be deductible from an award of damages?

Yes.

Q10) (a) In the context of payments to injured employees arising from permanent health insurance and other similar schemes, do you consider that clarification or reform of section 10 of the Administration of Justice Act 1982 is required?

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

There should be clarification of section 10 of the Administration of Justice Act 1982, to ensure that pursuers are not left disadvantaged by payments from insurance schemes to which they have contributed, even indirectly as a result of their contract of employment, being deducted from their damages. We believe that the wording suggested by the Commission in their draft Bill, set out at paragraph 3.57 of the consultation document, should be included in the Act.

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

We suggest that as above, section 10 of the Act should be amended to include the Commission's recommendation at paragraph 3.57 of the consultation paper.

Q11) Do you agree with the proposition that section 2(4) of the 1948 Act should remain in force?

We strongly agree that section 2(4) should remain in force. The repeal of section 2(4) of the Law Reform (Personal Injuries) Act 1948 could have catastrophic consequences for both injured patients and the NHS. There are important reasons why a claimant should be able to

recover for private health care. Where the claim is against the NHS, claimants may not wish to obtain treatment from an NHS Trust which has already let them down – they may have no confidence in the treatment provided, and relationships with key NHS staff may have been damaged. In addition, claimants may fear or know that the NHS will be unable to meet their needs – for example, the National Institute of Clinical Excellence (NICE) may refuse a treatment for a patient who desperately needs it. The patient will then have to pay for the treatment privately.

Further, forcing a claimant to rely on NHS care, where treatment cannot be guaranteed to take place quickly, would have a serious impact on rehabilitation which needs to take place as soon as possible after the injury to achieve the optimum effect. The NHS can be notoriously slow to provide treatment, especially since the Covid-19 pandemic, and the consequential backlog of cases in the NHS. The sooner the patient can return to work, the greater the benefit to the claimant and the greater the likelihood that any loss of earnings claim will decrease.

Case study: importance of access to private treatment

> *One member reported of a 6 year old client (C) who sustained a brain injury, due to lack of oxygen at birth. C has four-limb cerebral palsy affecting gross and fine motor skills, speech and language issues, poor concentration with some behavioural problems and dyspraxia.*
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> *Before an admission of liability, which has allowed a care and rehabilitation package to be put in place, C and their family were reliant on NHS services for support; this was extremely limited. Despite a complex presentation, C did not have the benefit of a named paediatrician. Reviews were repeatedly conducted by locums who were unfamiliar with the history, making continuity of care very challenging. C did not receive regular occupational therapy, physiotherapy or speech and language therapy support. Input was limited to reviews that were sometimes once per year, and there were no opportunities for C to become familiar to individual therapists as it was not uncommon for them to leave their posts after a few months. Sessions were on an 'ad hoc' basis which meant there was a real risk that C's progress halted or regressed. Support and education to C's parents on how best to meet their needs was extremely limited.*
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> *Interim payments now fund a case manager, and therapy in the form of an occupational therapist, physiotherapist, and speech and language therapist. C now has a dedicated team who work together to meet a wide range of goals holistically. The therapists regularly meet in a multidisciplinary forum to monitor and build upon progress and independence skills. The parents are also supported in understanding their child's needs and how to respond to the various challenges that arise.*
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> *In addition to the hands on therapy, through private intervention, C has through the claim been able to fund a number of extremely important pieces of equipment such as a Lycra suit, bespoke wheelchair, bespoke orthotics and adapted seating. It is unlikely these would have obtained through NHS services.*
>
> *Finally, C has undergone EEG testing privately, which was not made available through the NHS. Possible seizure activity was identified which has led to further investigations for epilepsy. But for this private intervention the activity would not have been detected at an early stage.*

Q12) Do you consider that any further reform of the existing regime in relation to the costs of an injured person's medical treatment is necessary?

No.

Q13) Do you agree that the default position should be that the responsible person rather than the state should pay for the cost of care and accommodation provided to an injured person?

Yes, we agree. There is not a "state" fund for the injured person to draw on if the responsible person does not pay for the cost of care and accommodation that they now require. There is a postcode lottery of provision, with standards of care available varying widely across Scotland, depending on which local council the injured person falls under. The services for care and accommodation in more rural areas in particular are limited. There are also often arguments between the NHS and local authorities as to who will fund care in a particular situation, which can mean that said care is not forthcoming. For example, where a severely disabled child requires a high level of care to be able to attend a nursery, the level of care required may be such that the local authority says that the NHS should be the body to provide the care, but the NHS may disagree. It is not right that an injured person should have to rely on inconsistent state provision, instead of the responsible person paying for the cost of care that is required as a result of their negligence.

Q14) Do you agree that an injured person should be entitled to opt for private care and accommodation rather than rely on local authority provision?

We agree. Allowing an injured person to opt for private care and accommodation will assist local authorities in managing already stretched budgets for provision of care. It would not be feasible to require all injured people to rely on local authority provision, as there are simply not the funds available to support this. Further, those who have no choice but to rely on local authority provision should not have their access restricted due to budgetary constraints, caused because the local authority is also having to fund care for those people injured by the negligence of another. In those circumstances, the wrongdoer must be the one to pick up the bill.

Further, local authority provision is often not geared up to provide for the range of needs of those who are injured as a result of negligence – as highlighted in the case study provided above. For example, local authority care is largely set up for the elderly living in the community, or those who have long-term disabilities but who are able to live independently. Those who are injured through negligence do not necessarily or often slot into the services that are available under the local authority -for example, provision for those who are young and have a brain injury is often lacking, and it is difficult to access state funded services that are suited to their needs.

Q16) Do you favour all, some, or none of the following options?

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

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

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

There should not be a deduction from the pursuer's damages for local authority provision as there will be no control over the quality of this provision, and no accountability from the local authority to provide a certain level of quality for the money charged.

The starting point must be that if private provision is required, then this should be paid for by the wrong-doer, and then if local authority provision is required further down the line, the funds will be made available by the defender to make that provision in line with the particular local authority's processes.

There may be double recovery in some circumstances, which would be unavoidable, but we suggest that the balance should be that if there is an unavoidable risk of double recovery versus double loss, the risk should lie with the wrongdoer's insurer. There should not be a main focus on adapting the law to prevent double loss for the wrongdoer, at the expense of denying the injured person access to the correct services. This approach is in line with the direction of travel in cases such as *Swift v Carpenter*[1]. In *Swift,* Lord Justice Irwin stated "There are well established examples in the field of tort where a degree of overcompensation has proved unavoidable... If it were to prove impossible here to award a claimant full compensation without a degree of over-compensation, then it seems to me likely that the principle of fair and reasonable compensation for injury would be thought to take precedence."

Q17) Have you any other suggestions for reform in this area?

No, we do not.

Chapter 4

Q18) a) Do you agree that, with the exception of asbestos-related disease, there is no general need for reform of the law of provisional damages?

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

We agree.

Q19) Do you consider that there is a problem with the way provisional damages operate in cases involving asbestos related disease claims?

We do not consider that there is not a problem with the way that provisional damages operate in cases involving asbestos related disease claims. The issue that arises is caused by the law as it stands following the case of *Aitchison,* and this decision must be reversed.

Q20) If so do you favour:

We favour option (b). The law as it stands following *Aitchison* is extremely unfair. Many people choose not to claim compensation for pleural plaques, which is often symptomless, as they see no need to do so. As a result of *Aitchison,* a terminally ill mesothelioma victim will be prevented from receiving compensation for this devastating disease if he knew that he had symptomless pleural plaques but decided not to bring a claim when he became aware of them.

Many people will be unaware, as detailed in the Scottish Law Commission's paper, that they will need to bring a claim upon learning about the existence of the plaques, to preserve their ability to bring a further claim should their condition worsen in the future. As detailed in the

[1] [2020] EWCA Civ 1295

Scottish Law Commission's paper, their doctor may simply be unaware of the law surrounding this area, and the patient may not be properly directed to the right support such as Action on Asbestos. Some people may not even properly acknowledge that they have pleural plaques at the time they are told (if they are also given more serious diagnoses at the same time), and most will certainly not understand the importance of the diagnosis without further explanation. Even if they are aware, it is unlikely that they will consider the diagnosis as the subject of a negligence claim, given that pleural plaques are most often symptomless. We welcome that the Scottish Law Commission is looking at this issue again, and suggest the correct approach would be to maintain the three-year time bar for a diagnosis of pleural plaques, but to allow subsequent claims for asbestos related disease in the future, even if a claim is not brought for the plaques.

We acknowledge that this section of this particular paper is limited very specifically to limitation in relation to asbestos related disease. There are wider implications of Aitchison in other areas, e.g. industrial disease claims, which will need to be considered in due course – we will address these in our response to the Scottish Law Commission's 11th Programme of Law Reform.

Q22) Additionally, do you consider that the establishment of liability should be capable of being deferred, by agreement between the parties, to a later point should a subsequent more serious condition emerge?

No. In our experience, establishment of liability in asbestos cases is not usually an issue. It is also difficult to see how agreement between the parties would be satisfactory to the pursuer. It is unlikely in our view, that pursuers could be given the confidence that they could bring a claim at a later date without the defender challenging them on why they did not bring such a claim sooner.

We appreciate that the following is outside of the remit of the Scottish Law Commission's project, but for completeness wish to flag our wider concerns relating to the law of limitation. Again, we will raise these issues further in our response to the Scottish Law Commission's 11th Programme of Law Reform. Despite the Scottish Government agreeing to make changes to the law on limitation, following their 2012 consultation on a draft Bill on the Civil Law of Damages, such changes have yet to be introduced. We would urge the Scottish Government to bring forward a replacement of the "reasonably practicable" assessment in the date of knowledge test, with a more subjective assessment of whether or not the pursuer was "excusably aware". The Scottish Government must also follow through on its commitment to amend the 1973 Act to provide a detailed non-exhaustive list of factors for the courts to take into account when they decide whether to exercise discretion on whether limitation should be disapplied.

It is very disappointing that these changes have yet to be introduced. APIL firmly believes that the introduction of the proposed non-exhaustive list would help to offer protection to pursuers who are too often unfairly disenfranchised by the courts, which often attribute to them medical and legal knowledge that they simply do not possess. We strongly recommend, however, that the proposed wording around 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. We would also suggest that it should be made clear that there is no presumption in law either for or against the exercise of this discretion. We feel this is necessary, given the way in which the Scottish courts have interpreted the equitable discretion in the past. This has left many deserving

claimants without a route to redress, for example, in the case of *Cowan v Toffolo Jackson*[2]. In practice, the courts' attitude appears to be that the exercise of discretion is an exceptional indulgence to pursuers, which is simply not the case and should be made clear in legislation to avoid any prejudice against the claimant in the exercise of discretion.

Chapter 5

Q23) Are there any problems at present with the operation of section 13? If so, please describe them and give examples where possible

The critical issue with the system in Scotland at present is that it puts the pursuer's solicitor in a position of conflict – the solicitor is required to go to court and say that they do not trust the person who is instructing them (the child's parent) to look after the child's compensation. Instead, there should be a mandatory step for all cases where damages are awarded to a child, regardless of whether the case was settled in or out of court, and regardless of the value of the award. In cases of children's compensation, there should be approval by the court of the amount and protections put in place to ensure that the money is retained for the child until they reach majority.

Protection is required to ensure that the child is not undercompensated, and also that their money is properly protected for them until they are able to access it. Most parents will mean well, but will not have the knowledge and experience to invest the money properly, and even if well intentioned, parents may not make decisions which are in the best interests of the child, and which may mean that the child will have no money left for them when they reach 16.

It is particularly important that this protection is in place for children's compensation, regardless of the value of the award. Even a couple of thousands of pounds could have a huge impact on a child's life, and should not be permitted to be spent by the parents without very careful consideration and scrutiny by the courts. Any amount of money will be significant to the child who has been injured, otherwise it would not have been awarded in the first place. Indeed, it could even be argued that the smaller the award, the more important court approval and protection of the award is – a smaller sum of money may need to be more skilfully invested, and there may be a greater temptation to some to fritter it away on day-to-day expenses, rather than save it until the child turns 16.

Q24) If there are problems, how do you consider these might be resolved? Specifically, do you think the court should have regard to the same matters that it has to consider when determining an application under section 11(1) of the 1995 Act, or are there other or additional matters that the court should consider?

In cases involving children, all awards of damages should be approved by the court, regardless of value and regardless of whether the case settled pre-litigation or following a proof.

We suggest that where there is settlement for a child, the money should be held with the Accountant of Court until the child reaches 16. There could be discretion with the Accountant at Court to release money if they are satisfied that there is a good reason.

In cases of higher value where money is held in a personal injury trust, there should be a number of independent persons involved in the administration of the child's trust, and family

[2] 1998 SLT 1000

members should be in the minority. The must be consideration of how the trust will be managed on an ongoing basis.

Q25) Do you consider that it should be mandatory for the parents or a guardian to report to the Accountant of Court, especially where a child will be largely dependent upon an award of damages for the rest of their life? Or do you consider that the imposition of such a reporting requirement is a matter best left to the discretion of the court?

There should be a report to the Accountant of Court in every case, but we do not believe that this responsibility should rest solely with the parents or guardians. Where there is no trust in place, the parents or guardians should have professional help and support to fulfil the reporting requirement. As above, where a trust is in place, the majority of trustees should be professionals and not family members, to ensure proper and fair administration of the trust in the best interests of the child. In these cases, the report should be prepared by the professional trustees.

Q26) (a) Do you consider that a court should have a duty, when about to grant decree in a claim for damages for a child, to make inquiries about the future administration of any funds and property to be held for the child, and, if the court considers it necessary, to remit the case to the Accountant of Court for a report in terms of section 13?

Yes, we agree.

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

Yes, this duty should be expressed as either a Practice Note/Direction or in a Rule of Court, to provide structure and ensure compliance with this duty. It is sensible to have an overall structure and clear procedure in place.

Q27) Where the court orders an award of damages to be paid directly to the child, do you consider that the wide discretion afforded to the court remains appropriate, or ought this discretion be curtailed by requiring the court to consider factors such as the amount of the award and the capacity of the child?

We believe that all awards of damages should be held by the Accountant of Court until the child reaches 16, subject to exceptional circumstances. It is important that all awards, regardless of value, are protected for the child until they reach majority. Smaller awards are more likely to be unintentionally frittered away, leaving the child with no damages by the time they come of age, so the value of the award alone is not reason enough to pay the award directly to the child.

Q28) If you consider that the court ought to be required to take account of specific factors, are there any other factors, other than the amount of the award and the capacity of the child, that the court ought to have regard to?

As above, we believe that damages should not be paid directly to the child, but instead held by the Accountant of Court until the child reaches majority.

Q29) (a) Do you consider that section 13 allows the court to direct payment of damages into a trust?

There is uncertainty around this, and we suggest that the whole area of trust provision must be reviewed and clarified.

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

Different types of trust will be suitable in different circumstances.

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

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

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

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

Q30) Do you agree that the power to make an order that money be paid to the sheriff clerk should be retained meantime?

Q31) Do you consider that any other reform is necessary in this context? If so, what?

Q32) Do you consider that there is adequate provision to enable application to be made in court proceedings for an appropriate order relating to the management of sums already paid in respect of damages awarded to a child? If not, please give reasons or examples.

We do not believe that there is adequate provision at present to enable application to be made in court proceedings for management of sums already paid in respect of damages awarded to a child. The current process relies on the solicitor coming forward to voice concerns about the parent/guardian's ability to manage the fund. This puts the solicitor in a difficult position, as the parent/guardian will have been the one to instruct the solicitor in the first place.

Q33) What do you think might explain the low usage of the provisions that involve the Accountant of Court?

The fact that the onus is on the solicitor to raise concerns about the ability of parents or guardians to manage the child's funds is likely to be one factor to explain the low usage of provisions. A second factor will be that as there is low usage, there will be wide-spread uncertainty/under-confidence about how the provisions work, which will exacerbate the low take up.

Q34) What might increase use of these provisions?

We suggest that all damages for children, regardless of value and regardless of whether there was settlement pre-litigation or following proof, should be subject to approval and protections, whereby the money is held for the child until they reach 16.

Q35) Do you consider that there is a need for independent oversight when it is proposed to set up a trust for damages for personal injury awarded to a child?

Yes. As set out above, the majority of trustees should not be family members.

Q36) Should such oversight be necessary in all cases, or only in certain specific circumstances? If the latter, what type of circumstances?

Oversight should be necessary in all cases.

Q37) If oversight is necessary, should it be achieved by:

(a) Providing that a draft of the proposed trust deed be sent to the Accountant of Court for consideration and approval of its terms, including the suitability of the choice of trustees; and
(b) Such oversight by the Accountant of Court also being triggered by any significant change in circumstances such as where there is a substantial increase in the assets held in trust following a final settlement, or where there is a change of trustees; or
(c) Another process? If so, what?

We suggest oversight should be achieved by a mix of options (a) and (b). The choice of trustees must be scrutinised, and there must not be a majority of family members. There should also be oversight by the Accountant of Court where there is a significant change in the circumstances of the trust. Initial scrutiny about the choice of trustees would be pointless if the trustees were then free to remove certain trustees and select others without oversight once the trust was set up.

Q38) Are PITs the only type of trusts used for managing awards of damages to children or are there others?

We understand that PITs are the only type of trusts used for managing awards of damages to children.

- Ends –

Any queries in relation to this response should, in the first instance, be directed to:

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