

SCOTTISH LAW COMMISSION

DAMAGES FOR PSYCHIATRIC INJURY

DISCUSSION PAPER No. 120

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

NOVEMBER 2002

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DAMAGES FOR PSYCHIATRIC ILLNESS

1. The Association of Personal Injury Lawyers (APIL) was formed in 1990 and represents around 5000 solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured victims. We currently have 111 members in Scotland who, in all likelihood, act for the majority of personal injury victims in the jurisdiction. The aims of the association are:
 - To promote full and prompt compensation for all types of personal injury;
 - To improve access to our legal system by all means including education, the exchange of information and the enhancement of law reform;
 - To promote health and safety;
 - To alert the public to dangers in society such as harmful products and dangerous drugs;
 - To provide a communication network exchanging views formally and informally.

2. APIL welcomes this opportunity to comment on liability and damages in respect of psychiatric illness. In summary, APIL considers that legislation should be introduced to address the various anomalies in this area of law, which currently lead to unfairness. This would include the current shock requirement. More specifically, liability for psychiatric illness suffered by primary victims should be determined according to normal delictual principles. In relation to secondary victims, APIL believes that liability should be extended and the current arbitrary requirements removed or modified. We would refute arguments that any such extension would 'open the floodgates' to a large number of claims. Finally, we agree with the Scottish Law Commission's provisional recommendations in relation to rescuers.

LEGISLATING IN RESPECT OF DAMAGES FOR PSYCHIATRIC ILLNESS

3. As we have noted above and outlined in more detail below, APIL considers that there are serious defects in the present law on psychiatric illness and, as recommended by the Law Commission for England and Wales, legislation should be introduced to address these. Legislative codification of the whole of the law on negligently inflicted psychiatric illness would not, however, be appropriate and the law should essentially be allowed to develop by judicial decision-making. In summary, legislation should supplement and compliment, rather than replace, the common law in this area.

THE NATURE OF THE INJURY AND THE NEED FOR SHOCK

Mental Distress and Psychiatric Illness

4. The Scottish Law Commission suggests that it should continue to be the position that no compensation may be claimed for mere mental distress. APIL agrees that the law should continue to differentiate between initial transient mental distress and psychiatric injury. Whilst ‘mere mental distress’ alone should not be sufficient to surmount a claim for personal injury compensation, damages for mental distress associated with a personal injury should continue to be awarded within the head of general damages for pain and suffering. In addition, as recommended by the Law Commission for England and Wales, aggravated damages should continue to be available to compensate for mental distress caused by the manner or motive with which a wrong is committed.

Defining the Compensatable Category

5. The Scottish Law Commission seeks views on how the compensatable category should be defined. We would be nervous about defining the compensatable category within legislation, as this could lead to injustice at a later date. Psychiatric injury can be difficult to diagnose and establish and it would be unfair if defenders could evade responsibility for injury through legal arguments on statutory construction. We appreciate, however, that any legislation will need to refer to psychiatric injury but we do not agree that “a significantly disabling psychiatric injury”, as suggested, would be appropriate. This would appear to exclude less serious instances of psychiatric injury, which are still deserving of compensation. Provided a victim can establish that he has suffered a psychiatric injury, he should be entitled to claim compensation. The seriousness of the injury should go to the question of quantum and not the question of liability. For this reason, we believe that the legislation should refer to a “recognisable psychiatric illness”, as recommended by the Law Commission for England and Wales. This is the judicial terminology currently used to denote more than mental distress and the term need not be defined in the legislation.

The Shock Requirement

6. APIL wholeheartedly agrees with the Scottish Law Commission that a victim should be able to claim damages despite the fact that psychiatric injury is not induced by shock. The requirement is based on an outdated conception of how psychiatric illness occurs and draws an unjustifiable distinction between victims whose injuries arise as a result of an event or a process. We agree with all of the Scottish Law Commission’s arguments on this point, as expressed in paragraph 2.11, but in particular:

- The shock requirement renders some forms of psychiatric illness, such as post-traumatic stress disorder, more readily compensatable than other psychiatric illnesses, such as depression. The suffering involved in each can be equally severe and equally causally connected with the wrongdoer's negligence;
- The full extent of the physical injuries of the immediate victim may become apparent to the pursuer only over a period of time;
- The requirement excludes those whom society may feel most worthy of legal support, such as the person worn down by the long-term caring of an injured relative.

PRIMARY VICTIMS

The Duty of Care

7. APIL considers that liability for psychiatric illness suffered by primary victims should be determined according to normal delictual principles. We agree with the Scottish Law Commission's narrow proposition that a duty of care not to cause psychiatric injury should arise when it is reasonably foreseeable that the pursuer will sustain psychiatric injury as a result of the defender's conduct, but we believe that the general principle should go further. A duty of care not to cause psychiatric injury should also arise when it is reasonably foreseeable that the pursuer will sustain physical injury. In summary, APIL supports the House of Lords decision in Page v Smith and submits that a duty of care should arise when it is reasonably foreseeable that the pursuer will sustain personal injury, i.e. physical or psychiatric injury, as a consequence of the defender's conduct.

8. The Scottish Law Commission suggests the following principles:

- The pursuer should not have to be within the area of potential physical harm before a duty of care to prevent psychiatric injury can arise;
- A duty of care to prevent psychiatric injury should not be breached if in the circumstances of the case some kind of psychiatric injury to the pursuer was not reasonably foreseeable as a probable consequence of the defender's negligence;
- Where there has been a breach of a duty of care not to cause the pursuer physical harm, i.e. the pursuer has in fact sustained physical injury, the pursuer should continue to be able to recover damages for unforeseeable psychiatric injury; otherwise damages should be recovered only if some kind of psychiatric injury was foreseeable as a probable consequence of the defender's negligence;
- Where the defender owes the pursuer a duty of care not to damage the pursuer's property, the pursuer should be able to recover damages for psychiatric injury arising from damage to the property provided that psychiatric injury to the pursuer was reasonably foreseeable as a probable consequence of the defender's negligence.

APIL supports all of the above principles, except where it is stated "as a **probable** consequence of the defender's negligence" (emphasis added). A defender should only have to foresee the possibility of injury. This is the case in respect of physical injury and there is no reason why psychiatric injury should be any different.

9. In determining whether psychiatric injury is reasonably foreseeable, APIL does not agree that the pursuer should be regarded as a person of reasonable fortitude

unless the defender has knowledge of the pursuer's unusual susceptibility to psychiatric injury. As noted in paragraph 4.11 of the consultation paper, the normal fortitude rule does not currently apply to a primary victim and we see no reason for a change in the law in this respect. In addition, there is no requirement of reasonable fortitude as a condition precedent to a duty not to cause physical injury to a primary victim and APIL submits that there is no logic or good reason why the rule should be different in relation to psychiatric injury. APIL agrees with the Law Commission for England and Wales, which stated:

“In applying the test of reasonable foreseeability of psychiatric illness, the court must clearly adopt some objective standard, without which the test would have no content. However...we suggest that to use ‘reasonable fortitude’ as a means of restricting the potential number of claims for psychiatric illness would be to adopt a blunt and arbitrary control device. As Lord Ackner commented in Page, ‘normal fortitude’ is an ‘imprecise phrase’. Any attempt to fix upon criteria of what constituted such fortitude would be very difficult. We therefore think that allowing the defendant to assume that the [pursuer] is a person of ‘customary phlegm’ is best interpreted as meaning nothing more than that, in deciding whether psychiatric illness was reasonably foreseeable (and analogously to reasonable foreseeability in physical injury cases), one can take into account the robustness of the population at large to psychiatric illness.”

SECONDARY VICTIMS

10. APIL agrees with the Scottish Law Commission that a person should continue to be entitled to claim damages for psychiatric injury suffered as a result of another individual's personal injury or death. There is no reason why secondary victims should be excluded. We further agree that secondary victims should continue to be entitled to full compensation, as all other victims of personal injury are, and so no statutory limit should be set for the amount of damages.

11. For some time APIL has been concerned about the arbitrary restrictions placed on potential psychiatric illness claims of ‘secondary’ victims. Whilst we believe that current restrictions relating to the secondary victim’s proximity in time and space and to the secondary victim’s close ties to the primary victim should be removed, we do believe that they have a role to play in psychiatric illness claims.
12. In summary, once the reasonable foreseeability test is satisfied, the next question should be – was the secondary victim proximate in time and space to the distressing event or events? If he was, provided the secondary victim can satisfy rules relating to causation and remoteness, the claim should be successful. If the secondary victim was not proximate in time or space, he should only be able to claim, however, if he had a close tie of love and affection with the primary victim.
13. We disagree, therefore, with the Scottish Law Commission’s provisional recommendation that it should continue to be a requirement for a claim for psychiatric injury suffered as a result of another person’s death or personal injury that the pursuer had a close tie of love and affection with that person. We think that such a blanket rule is unfair and would still prevent the pursuit of meritorious claims. It is unfair that someone who witnesses a horrific accident and suffers severe psychiatric illness as a result should be unable to claim because they had no close tie of love and affection with the primary victim. Work colleagues, for example, may have very close relationships and yet not be able to establish a “close tie of love and affection”.
14. We do not believe that adopting the approach outlined in paragraph 12 above would lead to an opening of the floodgates. Under normal tort principles it will still be necessary for the pursuer to prove that he has suffered an injury, that such an injury was reasonably foreseeable in the circumstances and establish causation. This would be sufficient to weed out unmeritorious claims. Perceptions about the

number of claims that may be pursued if the restrictions are relaxed should not be influenced by mass disasters. Most accidents occur on a much smaller scale.

15. In determining who has a close tie of love and affection with the primary victim, APIL supports the Law Commission for England and Wales' recommendation that legislation should lay down a fixed list of relationships where a close tie of love and affection shall be deemed to exist, while allowing a pursuer outside the list to prove that a close tie of love and affection existed. This latter point is very important. The fixed list of relationships where a close tie of love and affection is deemed to exist should consist of:

- Spouse
- Parent
- Child
- Brother or sister
- Cohabitant.

RESCUERS

16. APIL agrees with the Scottish Law Commission that a claim for damages should be competent by a person who assists at the site of an accident in the immediate aftermath and suffers psychiatric injury as a result of being closely involved with dead or injured victims, whether or not that person:

- (a) was in any actual or apprehended physical danger, or
- (b) had a close tie of love and affection with any of the victims.

We do not think, however, that it would be helpful to lay down a definition of rescue or rescuers within legislation. Being prescriptive could lead to the prevention of recovery in worthy cases. The methods and nature of rescue

operations are so diverse and subject to such continuous development and refinement, that a fixed definition will inevitably lead to unfair exclusions.

17. We further agree that there should not be a different rule for members of the rescue services who assist at an accident as part of their duties of employment. APIL agrees that to distinguish between professional and ordinary rescuers is false. It is difficult, for example, to draw lines of distinction between full time and paid rescuers and unpaid, yet fully trained volunteers.

18. To attempt to draw artificial lines between 'professional' and 'ordinary' rescuers is to invite difficulties of interpretation. Those in emergency services are not especially mentally strong, nor should society expect them to be so. To impose a different fortitude requirement on professional rescuers would also create an evidential nightmare for medical experts and the judiciary alike. The courts would be expected to apply a test that would be impossible to define objectively, leaving the judges to make their own subjective assessment of what 'reasonable fortitude' for a professional rescuer would comprise.