

RESPONSE FORM

DISCUSSION PAPER ON DAMAGES FOR PERSONAL INJURY

We hope that by using this form it will be easier for you to respond to the proposals or questions set out in the Discussion Paper. Respondents who wish to address only some of the questions and proposals may do so. The form reproduces the proposals/questions as summarised at the end of the paper and allows you to enter comments in a box after each one. At the end of the form, there is also space for any general comments you may have.

Please note that information about this Discussion Paper, including copies of responses, may be made available in terms of the Freedom of Information (Scotland) Act 2002. Any confidential response will be dealt with in accordance with the 2002 Act.

We may also (i) publish responses on our website (either in full or in some other way such as re-formatted or summarised); and (ii) attribute comments and publish a list of respondents' names.

In order to access any box for comments, press the shortcut key F11 and it will take you to the next box you wish to enter text into. If you are commenting on only a few of the proposals, continue using F11 until you arrive at the box you wish to access. To return to a previous box press Ctrl+Page Up or press Ctrl+Home to return to the beginning of the form.

Please save the completed response form to your own system as a Word document and send it as an email attachment to info@scotlawcom.gov.uk. Comments not on the response form may be submitted via said email address or by using the [general comments form](#) on our website. If you prefer you can send comments by post to the Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR.

Name: Dr Jonathan Ainslie (on behalf of the University of Aberdeen School of Law)
Organisation: University of Aberdeen School of Law
Address: Taylor Building High Street Aberdeen AB24 3UB
Email address: jonathan.ainslie@abdn.ac.uk

Summary of Questions

1. Do consultees have any comments on economic impact?

(Paragraph 1.18)

Comments on Question 1

We consider that the economic impact of any reforms introduced following this consultation mainly falls in two areas. The first relates to the incentives that act upon injured persons when arranging for personal services, particularly whether they engage professionals at commercial rates, or friends, neighbours or relatives on a gratuitous basis, as well as whether they choose to create a contractual agreement to regulate the provision of these services. The second relates to incentives which act upon injured persons when choosing where to obtain healthcare, care and accommodation, if such choices may have implications for an award of damages.

2. (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?

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

(Paragraph 2.20)

Comments on Question 2

We consider it to be instructive that para 38 of the 1978 Report directs itself to the “system of division of labour and pooling of income” which obtains in the family group, so that services rendered are “in practice a species of counterpart for the benefits which that member receives as a member of the family group”. While this rationale is referred to in the 1978 report specifically in connection with section 9 of the 1982 Act, we consider that the reference to division of labour and pooling of resources in the family group can be read in light of both section 8 and section 9.

It is therefore our view that the definition of “relative” in section 13(1) of the 1982 Act should comport as closely as possible to those individuals who are most likely to form part of a household unit in which labour is divided and income pooled across the members of the family group. It would also be beneficial if the definition of a “relative” were consistent across claims for wrongful death and claims in respect of services rendered to or by the injured person. We therefore consider that the definition of “relative” should be amended to include children/parents, grandchildren/grandparents, and siblings who are accepted as part of the family. We do not see any need for other categories of “relative” to be included in the definition at this time.

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

(Paragraph 2.32)

Comments on Question 3

Yes, we consider that the definition in s.13(1)(b) should be amended to include ex-partners, given that they will have previously formed a family unit with the injured person in which labour was divided.

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?

(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?

(Paragraph 2.44)

Comments on Question 4

We consider that there are powerful policy reasons to extend claims under section 8 of the 1982 Act to services provided gratuitously by individuals who are not family members. Just as a degree of reciprocal rendering of services generally obtains in the family unit, so it does, albeit to a lesser extent, in local communities where friends or neighbours take an interest in one another's wellbeing. This will be particularly true where more vulnerable members of the community who live alone, such as elderly persons, are concerned. We agree that social attitudes have moved on since the Commission stated in 1978 that "it is only within the family group that there is a demonstrable social need to allow recovery in respect of services rendered".

In our view, an injured person should not be placed at a disadvantage owing to a failure to enter into a contractual agreement with a person other than a relative who has rendered services. There is considerable artifice in requiring such agreements where they would not usually be created in the ordinary course of friendly or neighbourly behaviour. It would not generally occur even to a person who was reasonably vigilant and astute about their legal position to do so. We therefore consider that the formula for gratuitous services should be that an individual who is not a family member "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".

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?
- (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” an appropriate means of assessment or should a concept of reasonable notional costs be adopted? Or some other way of assessment?

(Paragraph 2.44)

Comments on Question 5

No, we do not consider that section 8 of the 1982 Act should be extended to claims in respect of bodies or organisations. There is a significant difference in policy terms between reciprocal services which may be rendered as an instance of friendly or neighbourly behaviour and those services which are made available on a general basis for public benefit by an organisation. Likewise the “moral obligation” felt by the executrices of the deceased in *Drake v Foster Wheeler Ltd* to provide recompense to an organisation which had provided services to the deceased, though it may have been strongly and sincerely felt, was of a qualitatively different character from the obligation that family members, friends or neighbours often feel to have regard for one another’s needs. We therefore consider that claims of this type are too far removed from the original policy rationale for section 8 and would introduce conflicting priorities to its interpretation.

If section 8 were to be extended to claims in respect of bodies or organisations, we consider that the attention of the court should be directed to the reasonable notional costs of care, having regard to the organisation’s mission and sources of income as well as the nature and extent of services provided.

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

(Paragraph 2.50)

Comments on Question 6

Yes, we consider that damages should be recoverable in respect of gratuitous provision of services to an injured person where the person providing them is the defender. Again, it is our view that the law should avoid encouraging individuals to enter into essentially artificial contractual agreements (that is to say, agreements which would not have been made in the ordinary course of their dealings with others) in order to buttress their position in any future action. The present rule barring recovery in respect of services rendered by the defender unless they have entered into a contractual agreement has the effect of encouraging such artificial devices.

We note that *Hunt v Severs* in the English law context was based on trust reasoning, i.e. that such damages would be recovered from and then held in trust for the same person. We consider that this reasoning did not take adequate account of the practical constraints facing injured persons who must secure services for their care. Often it will be less costly or more logistically appropriate for the defender to provide the necessary services than for professionals to be engaged at commercial rates.

7. (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?

(b) If so, should the injured person be under an obligation to account to such a third party for those damages ?

(Paragraph 2.61)

Comments on Question 7

Yes, we do consider that section 9 of the 1982 Act should be extended in this way. We consider that it is reasonably foreseeable in the context of ordinary friendly or neighbourly behaviour that certain non-relatives, especially vulnerable or elderly neighbours or friends, will suffer a loss as a consequence of the injured person no longer being able to provide personal services.

We do consider that it would be appropriate, in section 9 claims of this kind, for the injured person to be accountable to the relevant third party. Section 9(3)(b) would also require some adjustment for claims of this kind. Indeed it might be considered whether the construction of this paragraph remains appropriate even for section 9 claims in respect of relatives, given the social reality that many personal services, if not rendered by a relative, may be rendered either by friends, neighbours or professionals depending on the specific circumstances of the injured person, and that it is not unusual for the mixture of these various categories of service provider to change over time.

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

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

(Paragraph 3.21)

Comments on Question 8

No, we do not consider that there are any problems with the deductibility of social security benefits.

9. 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?

(Paragraph 3.35)

Comments on Question 9

Yes, we consider that benevolent payments and payments from insurance policies that the injured person has wholly arranged and contributed to should continue not to be deductible from an award of damages.

10. (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?
- (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?

(Paragraph 3.58)

Comments on Question 10

We consider that clarification of section 10 of the 1982 Act is required, to resolve any confusion which may arise from apparently conflicting attempts to achieve the same overarching policy objective in Scots and English law. We consider that s.10(a) should be amended to clarify that where an employee has contributed financially to permanent health insurance or a similar scheme, payments made under that scheme should not be deducted from an award of damages.

Further statutory clarification may be necessary on the forms in which financial contributions may take. As the range of available financial products evolves over time any reform to the 1982 Act should leave open the possibility of forms of financial contribution which are not presently contemplated.

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

(Paragraph 3.67)

Comments on Question 11

Yes, we agree that section 2(4) of the 1948 Act should remain in force. We would draw particular attention to the 1999 Report of the Law Commission of England and Wales, which stressed that an injured person should not be required to justify making one choice in relation to their healthcare over another. There may be significant differences between NHS healthcare services and private healthcare services beyond the former being free at the point of use, including differences in waiting times, convenience of facilities and patient autonomy over treatment options. We consider that section 2(4) is properly understood as preventing the responsible person from arguing that the injured person's choice not to use the NHS is a failure to mitigate their losses.

12. 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?

(Paragraph 3.72)

Comments on Question 12

Following the introduction of section 202 of the Health and Social Care (Community Health and Standards) Act 2003, we consider that no further reform of the existing regime in relation to the costs of an injured person's medical treatment is necessary.

13. 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?

(Paragraph 3.93)

Comments on Question 13

Yes, we 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.

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

(Paragraph 3.93)

Comments on Question 14

Yes, we agree that an injured person should be entitled to opt for private care and accommodation rather than rely on local authority provision. In our view it should always be considered reasonable for an injured person to choose private care and accommodation, including in those instances where local authorities would otherwise hold a statutory duty to make the same provisions, and injured persons should not be required in an action to justify their choices.

15. Do you have any other comments?

(Paragraph 3.93)

Comments on Question 15

We consider that it would improve the consistency and clarity of the law in this area if the principles applied to recovery for medical treatment and those applied to recovery for care and accommodation were brought so far as possible into line. This is particularly in light of broader policy and political shifts towards the integration of healthcare, social care and community care services.

16. 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.

(Paragraph 3.101)

Comments on Question 16

We generally favour a model where an injured person receives but does not pay for local authority care and accommodation, with an award of damages made to the local authority to cover the cost of providing it, over a model in which damages are awarded to the injured person in respect of any payments levied by the local authority. As noted in the Discussion Paper, this would bring the approach to care and accommodation broadly into line with the regime for medical treatment introduced by Part 3 of the Health and Social Care (Community Health and Standards) Act 2003.

We consider that where an injured person chooses private care and accommodation, robust procedures should be in place for the prevention of double recovery. This would help to undergird the autonomy of injured persons in selecting care and accommodation best suited to their circumstances. We express no view on the specific form of these procedures, although it is likely that the responsible person will need to be notified if an application for statutory care or accommodation is made.

17. Have you any other suggestions for reform in this area?

(Paragraph 3.101)

Comments on Question 17

We have no other comments on reform in this area.

18. (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?

(Paragraph 4.11)

Comments on Question 18

Yes, we agree that there is no general need for reform of the law of provisional damages.

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

(Paragraph 4.41)

Comments on Question 19

Yes, we consider that there are specific policy issues surrounding the nexus of the law on limitation as it stands following *Aitchison v Glasgow City* and the 2009 Act. While we consider that the equitable discretion under section 19(A) of the 1973 Act is sufficient for most cases where the time limit to raise proceedings has elapsed, we consider that it does not provide enough certainty and consistency in cases concerning asbestos-related diseases. This is due to the particular clinical features of these cases in which pleural plaques and other early-stage manifestations of disease are largely asymptomatic and patients may not fully appreciate their long term implications. The 2009 Act also reflects a policy objective of the Scottish Government to recognise the moral weight of the injuries suffered by workers who are exposed to asbestos. We consider that this policy objective is not served by the current operation of rules on limitation.

20. If so, do you favour:

- (a) providing that a diagnosis of pleural plaques would not, on the basis of time bar, preclude further action at any future time;
- (b) providing that a claim for asbestos-related pleural plaques (or pleural thickening or asbestosis) itself would become time-barred 3 years after diagnosis but that claims for any subsequent related disease such as mesothelioma would not be so time-barred;
- (c) creating a provision parallel to the Limitation (Childhood Abuse) (Scotland) Act 2017; or
- (d) another solution, and if so, what?

(Paragraph 4.41)

Comments on Question 20

We favour option (c).

21. Please give reasons for your choice in question 20.

(Paragraph 4.41)

Comments on Question 21

We consider that the Limitation (Childhood Abuse) (Scotland) Act 2017 has functioned well. In particular we consider that the discretion of the court under section 17(D) of the 1973 Act (as inserted by section 1 of the 2017 Act) not to allow an action to proceed if it is satisfied that it is not possible for a fair hearing to take place, or that the defender would be substantially prejudiced if the action were to proceed, strikes the right balance between the interests of pursuers and defenders in cases where abuse is often not disclosed until many years after the fact.

While we appreciate that asbestos-related disease involves very different factual situations from childhood abuse, it shares the characteristic that for reasons for which the pursuers are not at fault, actions are often not brought until many years after they become aware of their injury. We also consider that creating a parallel category of pursuer exempt from limitation will help to preserve the normal operation of provisional damages outside the special context of asbestos-related disease.

22. 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?

(Paragraph 4.41)

Comments on Question 22

Yes, we consider that the establishment of liability should be capable of being deferred by agreement of the parties.

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

(Paragraph 5.10)

Comments on Question 23

We are not presently aware of any difficulties in practice with the operation of section 13.

24. 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?

(Paragraph 5.10)

Comments on Question 24

We generally consider that the existing discretion of the court to make an order under section 13(1) "for the benefit of the child" is sufficient. We do consider however that where a child has suffered an injury, it may be beneficial for the court to seek out and have regard to the views of the child on the management of sums of money payable for their benefit, taking account of their age and maturity.

25. 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?

(Paragraph 5.22)

Comments on Question 25

We consider that the imposition of a reporting requirement should generally be left to the discretion of the court. However such reporting requirements appear to us to be good practice where large sums are involved and/or the child is likely to be dependent on an award of damages into adulthood.

26. (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?
- (b) If so, should such a duty be expressed in a Practice Note/Direction; in a Rule of Court; or in some other way?

(Paragraph 5.22)

Comments on Question 26

We do consider that the court should have a duty in these circumstances to make inquiries about the future administration of any funds or property to be held by the child, and if necessary to remit the case to the Accountant of Court. We consider that this duty is best expressed in a Rule of Court.

27. 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?

(Paragraph 5.27)

Comments on Question 27

We consider that the wide discretion of the court in these generally remains appropriate, although it would be good practice for the court to have regard to the child's age and stage of development.

28. 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?

(Paragraph 5.27)

Comments on Question 28

N/A

29. (a) Do you consider that section 13 allows the court to direct payment of damages into a trust?
- (b) If so, do you consider that such payments may be made into a bare trust or a substantive trust or both?
- (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 do 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?

(Paragraph 5.27)

Comments on Question 29

We consider that section 13 must be given effect to in a way which is compatible with article 1 of the First Protocol to the ECHR. It is therefore unlikely that section 13 would allow the court to direct payment of damages into a substantive trust. This is because any legitimate objective that might justify depriving a child of their possessions in this manner may equally be achieved by other means expressly provided for, such as a judicial factor (as cumbersome as those means may be). It may be that the court is allowed to use its discretion under section 13 to direct payment into a bare trust.

We do not consider that section 13 should permit transfer to persons other than those listed in section 13(2)(a) and (b).

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

(Paragraph 5.29)

Comments on Question 30

Yes, we agree that the power to make such orders should be retained while the impact of the ASPIC is assessed.

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

(Paragraph 5.29)

Comments on Question 31

We do not have any other proposals for reform in this area.

32. 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.

(Paragraph 5.34)

Comments on Question 32

Yes, we consider that there is adequate provision in these circumstances.

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

(Paragraph 5.46)

Comments on Question 33

We consider that the low usage of provisions involving the Accountant of Court in terms of section 9(3) is likely due to low awareness among those who hold property owned by or due to a child. The low number of referrals in terms of section 13(2)(b)(i) may simply be due to court preference for alternative orders, such as payment to a parent or guardian under section 13(2)(b)(ii).

34. What might increase use of these provisions?

(Paragraph 5.46)

Comments on Question 34

In our view this is largely an issue of awareness, particularly within the legal profession – that is to say, among those who provide advice to those who may hold property owned by or due to a child.

35. 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?

(Paragraph 5.62)

Comments on Question 35

Yes, we consider that independent oversight when it is proposed to set up trusts in these circumstances would be beneficial.

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

(Paragraph 5.62)

Comments on Question 36

We consider that it should be necessary in all cases, although it will be especially important where the proposed trust would have beneficiaries other than the child to whom damages have been awarded.

37. 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?

(Paragraph 5.62)

Comments on Question 37

We consider that the necessary oversight would be achieved by involving the Accountant of Court, both in the consideration and approval of the proposed trust deed and following a significant change in circumstances.

38. Are PITs the only type of trusts used for managing awards of damages to children or are there others? If you have experience of other types of trust being used could you give examples?

(Paragraph 5.62)

Comments on Question 38

We are not aware of other types of trusts being used to manage awards of damages to children.

39. Are there any other issues that arise in relation to the Accountant of Court or to the courts' management or to the courts' management and safeguarding of awards of damages to children? If so, please describe those issues and how they may be resolved.

(Paragraph 5.76)

Comments on Question 39

We are not aware of any other issues arising in relation to the Accountant of Court or to the courts' management and safeguarding of awards of damages to children.

General Comments

Thank you for taking the time to respond to this Discussion Paper. Your comments are appreciated and will be taken into consideration when preparing a report containing our final recommendations.