

**NORTH LANARKSHIRE COUNCIL**

**REPORT**

To: CORPORATE SERVICES COMMITTEE		Subject: CONSULTATION: CIVIL LAW OF DAMAGES - ISSUES IN PERSONAL INJURY
From: HEAD OF LEGAL SERVICES		
Date: 30 JANUARY 2013	Ref: AL LE CSN 0001/CH	

**1. PURPOSE OF REPORT**

- 1.1. The purpose of this report is to seek Committee approval for the Council's response to the Scottish Government's Consultation Paper on Civil Law of Damages: Issues in Personal Injury.
- 1.2. A copy of the Consultation Paper is in the Members' Library and further details are available at [www.scotland.gov.uk/Publications/2012/12/5980](http://www.scotland.gov.uk/Publications/2012/12/5980)
- 1.3 The closing date for responses to the consultation is 15 March 2013.

**2. BACKGROUND**

- 2.1.1 The Scottish Government has given a manifesto commitment to reform the law of damages. Damages for personal injury are the amount of money negotiated between pursuers and defenders, or awarded by the courts, to compensate the pursuer for the injury and loss suffered as a result of the wrongdoing of the defender. Awards of damages are not intended to penalise the defender. Their purpose is, as far as possible, to restore the victim or his/her family, to the position they would have been in had the wrongful harm not occurred.
- 2.1.3 If a civil action for damages for personal injury is to be successful evidence needs to show that on the balance of probabilities:
  - the injury and loss occurred as stated by pursuer;
  - there was a breach of a duty of care owed to a pursuer;
  - that breach of duty caused the person real harm;
  - that harm was reasonably foreseeable as a result of that breach; and
  - the person or entity that failed to fulfil the duty of care behaved deliberately or negligently.
- 2.1.4 It is also necessary for a civil action for damages to be brought within a defined period of the personal injury coming to light. This period, commonly called time bar, aims to strike an appropriate balance between the rights of individuals who may wish to make a claim for personal injury having a reasonable opportunity to do so and on the other hand, the protection of all individuals and organisations against open-ended civil liability.
- 2.1.5 The Consultation seeks views on the reform of the law on psychiatric injury, time bar and issues relating to the payment of damages.
- 2.1.6 A summary of the law in relation to each area is set out below.

## 2.2 PSYCHIATRIC INJURY

2.2.1 The existing law in this area is governed by common law; rules that have been developed by the courts over the past century. These rules are complex and widely considered to be in need of reform.

2.2.2 In July 2001, the Scottish Ministers invited the Scottish Law Commission to review the law and make appropriate recommendations for reform. The Commission's Report on *Damages for Psychiatric Injury* was published in August 2004. In addition, the issue of psychiatric injury which arises in relation to the wrongfully-caused death of a loved one was addressed in the Commission's Report on *Damages for Wrongful Death*, which was published in September 2008.

2.2.3 The 2004 Report identified the main defects in the present common law rules:

- Victims are divided into two categories, primary victims and secondary victims. Typically primary victims are those directly involved in the incident, while secondary victims are those who see or learn of others being killed or injured. The two categories have different rules for compensation, yet the boundary between them is unclear.
- While, in general, liability arises only if the injury to the victim is reasonably foreseeable by the wrongdoer, a primary victim may recover for an unforeseeable psychiatric injury if some physical injury was foreseeable but did not occur. The Commission concluded that this approach is unduly wide and recommended that for mental harm the wrongdoer should be liable only if he/she foresaw, or could reasonably have foreseen, that the act was likely to cause a person in the position of the victim to suffer such harm.
- For secondary victims at least, compensation is awarded only if they have suffered a 'shock,' the sudden appreciation by sight or sound of a horrifying event, and they meet the so-called Alcock criteria:-
  1. there is a close tie of love and affection between the secondary victim and the injured person;
  2. the secondary victim was present at the accident or at its immediate aftermath; and
  3. the secondary victim's psychiatric injury was caused by direct perception of the accident or its immediate aftermath.
- Additionally, secondary victims can recover only if their psychiatric injuries were foreseeable in a person of "ordinary fortitude" - a legal construct that is difficult to evaluate.
- Rescuers are treated as primary rather than secondary victims, however, they may well have to have feared for their own safety.

## 2.3 PSYCHIATRIC INJURY CAUSED BY WRONGFUL DEATH

2.3.1 The Damages (Scotland) Act 2011 provides that bereaved relatives may seek damages from the wrongdoer to compensate for the wrongful death of a relative. In some cases, however, the reaction of bereaved relatives to a wrongful death may go beyond 'normal' distress and involve the development of a psychiatric condition which represents an injury in itself.

2.3.2 In such cases, a question arises as to what extent, if any, a relative's claim under the 2011 Act may take account of such a psychiatric injury without having to demonstrate, as would

be required in other circumstances, that the wrongdoer owed a duty of care to the injured relative. There are inconsistent court decisions on this point which are relevant to the interpretation of the 2011 Act.

2.3.3 In its 2008 report, the Scottish Law Commission concluded that in such circumstances a relative should not be able to claim under the Damages (Scotland) Act 1976 as the Act's purpose was to provide damages for the relative's "grief and sorrow" caused by the victim's death; the emotions ordinarily experienced as a consequence of the death of a loved one. The Commission suggested that in cases involving a recognised psychiatric injury, damages should be sought under a separate heading and a pursuer would have to establish that the defender owed her/him a duty of care - independent from that owed to the deceased - to prevent the pursuer sustaining mental harm. This would only arise if the pursuer was a primary victim of the defender's wrongful conduct or the Alcock criteria were satisfied.

2.3.4 When the issue was considered by the Scottish Parliament's Justice Committee in 2010, during scrutiny of what became the 2011 Act, there was conflicting evidence. In its Stage 1 report, the Committee did not feel it would be appropriate for the Parliament to make a decisive choice between the conflicting court decisions before it has been possible to enact any wider reform of the law of damages for psychiatric injury. Consequently, the 2011 Act did not address this particular issue and the law was left essentially unchanged pending either a decisive court ruling on the matter or until the matter could be addressed by way of legislation.

## 2.4 TIME BAR

2.4.1 An action for damages in the civil courts for any form of personal injury must be raised within the timeframe set out in the Prescription and Limitation (Scotland) Act 1973. Prescription and limitation differ in form and concept but both have the effect of 'time-barring' a claim.

### 2.4.2 PRESCRIPTION

2.4.3 Prescription is the process of acquiring or losing rights/obligations as a result of the passage of time. Prescription may be both positive and negative. An example of the former would be enabling an individual who has possessed land openly, peaceably and without interruption for 10 years or more to obtain a good title to it. Negative prescription is a rule of substantive law, which entirely extinguishes rights and associated obligations. There is no judicial discretion to set aside prescription.

2.4.4 Prior to 26 September 1984, Scots law on personal injury provided that a right or obligation ceased to exist if a claim had not been made within 20 years. This means that if an individual suffered a personal injury prior to 26 September 1964, the law of prescription applies and they have no right to bring a claim. If however the personal injury occurred after 26 September 1964, the law of prescription does not apply and the individual may be able to bring a claim, subject to the law on limitation.

2.4.5 There has been discussion as to whether this rule should be abolished. The Law Commission recommended that it should not. The Commission also considered that a special category of claims in respect of personal injury resulting from institutional childhood abuse which were extinguished by negative prescription before 1984, and which would allow this category only to be revived, should not be created.

## 2.5 LIMITATION

2.5.1 Limitation differs from prescription in that it is a procedural rule rather than substantive law. In relation to personal injury actions there is a 3-year limitation period. This generally means that an individual has to begin any personal injury action within 3 years of the injury being sustained or within 3 years of the individual knowing that the injury has been sustained. Limitation is not absolute in the same way as prescription. The courts have some discretion

to allow an action to be commenced after the 3 year limitation has lapsed if they consider that it would be equitable to do so in terms of section 19A of the Prescription and Limitation (Scotland) Act 1973.

## **2.6 THE SUBSEQUENT EMERGENCE OF AN ADDITIONAL INJURY**

- 2.6.1 The Commission proposed that if a claim for sufficiently serious injury is not pursued timeously, the subsequent emergence of additional injury, even if distinct, should not give rise to a fresh date of knowledge and a further consequential limitation period for a claim for that additional injury.
- 2.6.2 It is important to recognise that the basic limitation period requires to be qualified to accommodate the different facts and circumstances of potential personal injury claims. For example, it is an established feature of the law that some allowance should be made for individuals who have been injured but who lack the knowledge or the ability to initiate a claim. This is because it would seem unjust if a potential pursuer with good grounds for a claim for damages for personal injury ran out of time because he/she either lacked knowledge of the injury or lacked the ability to act on that knowledge.
- 2.6.3 Currently, Scots law provides that unless and until an injured person has knowledge of severity of his/her injury and of the cause of the injury and the identity of the person responsible for wrongfully causing the injury, there is no expectation that he/she should act to make a claim and the limitation period does not begin to run. Without such provision, the limitation period would begin to run from the date that injury was inflicted and, for injuries which are latent and do not emerge until several years later (e.g. asbestos-related conditions and some psychiatric conditions), the injured party might become aware of the injury only after the limitation period had expired.

## **2.7 THE WIDER REFORM AGENDA**

- 2.7.1 In the past five years, three Acts of the Scottish Parliament have made significant provision in the area of damages for personal injury. The Consultation seeks views on the impact of the legislation. The Council does not propose to comment on this aspect of the paper.

## **2.8 FUTURE LEGISLATIVE REFORMS**

### **2.8.1 DISCOUNT RATE**

- 2.8.2 When there is an award of damages in respect of a personal injury claim, it is generally paid as a lump sum. The pursuer therefore receives, in one go, all the compensation for future loss of earnings etc, perhaps for many years into the future. As this sum may then be invested by the pursuer, who would consequently receive additional interest payments, there would be the prospect of the pursuer being over-compensated unless some countervailing mechanism is in place. The mechanism that is in place for this purpose is known as the 'discount rate' and is currently set at 2.5%. Scottish Ministers, jointly with the UK Government and the Department of Justice, Northern Ireland, are now reviewing the current 2.5% rate and will publish a response in due course.

### **2.9 PERIODICAL PAYMENTS**

- 2.9.1 Given that the pursuer's long-term future losses and needs can rarely be known with certainty, not only is there a risk that a lump sum award could underestimate the pursuer's future requirements but there is the possibility that an award could overestimate actual requirements and therefore unfairly penalise the defender. An alternative approach, which may help to mitigate such risks, is - through the mechanism of 'periodical payments' - to spread payments over an extended period. At present, where damages for personal injury are payable in Scotland, the courts may make an order for periodical payments, only with the consent of the parties involved.

### **3. PROPOSALS FROM THE CONSULTATION**

#### **PSYCHIATRIC INJURY**

- 3.1.1 The report concluded that the existing common law rules should be replaced by a new statutory scheme. It will no longer be necessary that the mental harm is induced by "shock." Victims will no longer be classed as primary or secondary. All victims will be expected to be resilient in the face of the ordinary "vicissitudes" of life, damages will only be available for mental harm caused by hearing of or witnessing an incident if the parties had a close relationship and there will be no liability for unintentional mental harm if it was not reasonably foreseeable, unless it arose from another type of harm e.g. a physical injury for which there is liability and the mental harm was not too remote.
- 3.1.2 As an alternative to providing that a defender is not liable if a person of "ordinary fortitude" could have coped with the event in question, the approach that was preferred by the Commission is to specify that there should be no liability if the mental harm is of such a nature that a person in the position of the victim could reasonably be expected to endure it without seeking reparation, where for example, it results from the normal stresses or 'vicissitudes' of life or of the type of life which that person leads or bereavements of a type which persons can reasonably expect to suffer in the course of their lives.
- 3.1.3 As well as protecting defenders against liability where psychiatric injury is not reasonably foreseeable, the law has traditionally also excluded liability where the injured person was somewhat removed from the wrongdoing and the resultant harm. The Commission suggested two exceptions to that restriction:-
1. where the victim was acting as a rescuer in relation to the incident.
  2. where the victim had a close relationship with a person injured or killed, or at risk of being killed or injured, in the incident.

#### **TIME BAR**

- 3.1.4 The Commission proposed that the time limit in which a claim must be raised should be extended for personal injury actions, from 3 years to of 5 years. A 5 year limited period already applies to actions for debt or damage to property.

#### **THE SUBSEQUENT EMERGENCE OF AN ADDITIONAL INJURY**

- 3.1.5 The Commission proposed that if a claim for sufficiently serious injury is not pursued timeously, the subsequent emergence of additional injury, even if distinct, should not give rise to a fresh date of knowledge and a further consequential limitation period for a claim for that additional injury. Views are sought on whether this approach is in the interests of justice.

#### **INTEREST ON DAMAGES/ PERIODICAL PAYMENTS**

- 3.1.6 The Commission proposed the creation of a statutory right to interest throughout the period from the date when the claimant loses the use of money to which he/she is entitled. It was also proposed that interest should run during the same period and at the same rate regardless of whether the claim is for payment of a contractual debt, a non-contractual debt or damages. The rate of interest would be set at a level which adequately compensates the claimant, rather than one which punishes the debtor for the late payment. Views are sought on whether there would be merit in reviewing the law relating to interest. Consultees are also asked whether the law relating periodical payments should be reviewed.

## 4. SUMMARY OF THE COUNCIL'S RESPONSE TO THE CONSULTATION PAPER

### PSYCHIATRIC INJURY

- 4.1.1 The Council recognises that the current common law system is unsatisfactory and would welcome reform in this area. Given the scope and nature of the proposed reforms, it is submitted that the introduction of a statutory framework whereupon the process of reform is open to public scrutiny is appropriate.
- 4.1.2 The Council recognises that the concept of ordinary fortitude is difficult to assess and should no longer be a consideration in assessing whether a victim should be able to seek damages.
- 4.1.3 The Council agrees that an appropriate balance between the right of an injured person to secure damages and the right of a defender to expect a certain level mental resilience in individuals would be achieved by the recommended focus on the stresses or vicissitudes of life or of the type of life that person leads.
- 4.1.4 The Council is of the view that the current approach which provides that a person who sustains mental harm without physical harm may secure damages is too wide and leave defenders open to claims from any number of pursuers.
- 4.1.5 The Council agrees that there should be a general prohibition on obtaining damages for a mental disorder where the victim has sustained that injury as a result of witnessing or learning of an incident, without being involved directly in it and that it is appropriate to except rescuers and those in a close relationship with the victim from the general prohibition on the basis that the class of person would require to satisfy the 'vicissitudes of life' criteria. The Council is of the view that these two exceptions strike the appropriate balance between the right of an injured person to secure damages and the right of a defender to be protected from unlimited liability.
- 4.1.6 It should not be possible for a bereaved relative to secure damages for psychiatric injury under section 4(3)(b) of the 2011 Act. The Council would agree with the approach taken by Temporary Judge F R MacDonald QC in *Ross v Pryde* and the requirement for the pursuer to establish that a breach of duty of care existed.
- 4.1.7 Views are sought on the likely impact of implementing the proposals. In first instance it is likely that the proposals would lead to a higher volume of claims and litigated cases, however, this would diminish as case law became established and would eventually lead to more certainty in this area of law and, as a result, fewer litigated cases.
- 4.1.8 The Council is not in a position to comment on the likely effects of the proposals on groups with protected characteristics.

### TIME BAR

- 4.1.9 It is agreed that for all personal injuries, regardless of the nature and circumstances of the personal injury - even if it were lawful to do so, it would not be advisable to seek to revive prescribed claims (i.e. claims relating to events before September 1964). The Council is of the view that the revival of prescribed claims would unfairly prejudice defenders on the basis that testamentary and documentary evidence of the defender's position at the time of the incident is unlikely to exist.
- 4.1.10 The Council does not agree that the standard limitation period should be raised to 5 years. The Council believes that it is for the courts to consider, on the evidence put before them, whether it is equitable to extend limitation period. Notwithstanding, this position, if the period of limitation is extended to 5 years for raising personal injury actions, it is suggested that s.19A of the 1973 Act should be repealed.

- 4.1.11 It is agreed that it is appropriate to have a single standard limitation period for all types of personal injury claim and that 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 out with the limitation period. The Council would be concerned if the 5 year limitation period is adopted given the extension of the potential period of liability.
- 4.1.12 No further views on potential options for reforms beyond those proposed by the Scottish Law Commission have been given by the Council.

#### **THE SUBSEQUENT EMERGENCE OF AN ADDITIONAL INJURY**

- 4.1.13 It is in the interests of justice that there should be only one limitation period following the discovery of a harmful act, during which all claims for damages for associated injuries must be brought. There should be no exceptions to this principle.
- 4.1.14 It is noted that the decision on whether or not to allow a claim falls within the discretionary ambit of section 19A of the 1973 Act and it is for the courts to strike a balance between the rights of the pursuer to litigate and the right of defenders to avoid open ended civil liability.

#### **INTEREST ON DAMAGES/PERIODICAL PAYMENTS**

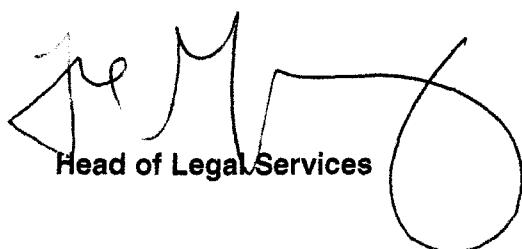
- 4.1.15 The Council is of the view that there would be merit in reviewing the existing approach.

### **5. CORPORATE CONSIDERATIONS**

- 5.1.1 In the first instance, it is likely that the proposals relating to psychiatric injury would lead to a higher volume of claims and litigated cases, however, this would diminish as case law became established.
- 5.1.2 It is likely that the extension of the 5 year limitation period would lead to a higher number of court actions and would expose the Council to greater risk in terms of defending claims. The proposals may have cost implications depending on services' record retention procedures.

### **6. RECOMMENDATIONS**

- 6.1.1 The Committee is asked to approve the report and the Council's draft response.



**Head of Legal Services**

For further information on this report please contact Careen Hendry, Principal Solicitor on 01698 302239.