

## RESPONDENT INFORMATION FORM: CIVIL LAW OF DAMAGES: [ISSUES IN PERSONAL INJURY] A CONSULTATION PAPER

Please Note That This Form **Must** Be Returned With Your Response To Ensure That We Handle Your Response Appropriately

### 1. Name/Organisation

Organisation Name

Forum of Scottish Claims Managers

Title Mr  Ms  Mrs  Miss  Dr  *Please tick as appropriate*

Surname

Forename

### 2. Postal Address

C/O Alan Rogerson (Chairman)

139 West Regent Street

GLASGOW

Postcode G2 2SG

Phone 0141 301 3122

Email

Alan.Rogerson@Aviva.co.uk

### 3. Permissions

I am responding as...

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*Please tick as appropriate*

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

*Please tick as appropriate*  Yes

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

*Please tick ONE of the following boxes*

Yes, make my response, name and address all available

or

Yes, make my response available, but not my name and address

or

Yes, make my response and name available, but not my address

(c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

*Please tick as appropriate*  Yes

No

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

*Please tick as appropriate*  Yes  No

## ANNEX B. SUMMARY LIST OF QUESTIONS

B.01 This Annex summarises all the questions that appear in this consultation paper. Respondents should not feel obliged to answer all of them. However, the Scottish Government would appreciate all responses, whether from individuals or from organisations, with views on any or all of these matters.

B.02 Please explain and, where possible, provide evidence for each answer that you give.

### Chapter 2: Psychiatric Injury

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

Yes  No

**Please explain and, where possible, provide evidence:**

We believe that rather than 'defects' the area of common law explored in the report is a complex area of law.

Common Law case law has built a number of rules in this area over the years, and whilst complex, we believe that the rules and authorities are clear and have no problem distinguishing between Primary and Secondary victims and the boundaries between same.

The courts should retain flexibility in their decisions on psychiatric injury so as not to restrict the development of law in this area.

Q2(b) do you agree in principle that existing common law rules which apply only to reparation for mental harm should be replaced by a statutory obligation to make reparation for wrongfully caused mental harm?

Yes  No

**Please explain and, where possible, provide evidence:**

We believe a statutory obligation could have grave unintended consequences.

The courts should retain flexibility in their decisions on psychiatric injury so as not to restrict the development of law in this area.

A statutory obligation could have the consequence of creating onerous duties or spurious claims simply because the criteria stipulated has been met. It could also result in the converse situation of a claimant being barred the right to fair compensation, simply because they do not meet some of the criteria set out, where had common law applied, their claim would have been competent.

Q2(c) do you agree that the concept of 'ordinary fortitude' is unsatisfactory and, therefore, should no longer be a consideration in assessing whether a victim should be able to seek damages for his/her psychiatric injury?

Yes

No

**Please explain and, where possible, provide evidence:**

We believe the ordinary fortitude test is used as part of the criteria of recoverability of mental harm for secondary victims. Ordinary fortitude has been the test in a number of cases, therefore the legal standard is established in this regard. The boundaries of liability need to be set so that liability is not unfairly wide and those with valid claims are compensated.

Q2(d) do you agree that an appropriate balance between the right of an injured person to secure damages and the right of a defender to expect a certain level 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?

Yes

No

**Please explain and, where possible, provide evidence/describe situations where such an approach might produce unfair outcomes.**

We believe that mental resilience and ordinary fortitude are closely linked and are factors that require to be considered on a case by case basis and the courts should be allowed to deal with same flexibly to ensure parity of justice between pursuer and pursuer and defender and defender.

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

Yes

No

**Please explain and, where possible, provide evidence:**

Our primary position is that the situation as built up by case law to date (including Page v Smith) clarifies the situations where victims can recover damages.

We believe the current case law and distinction between primary and secondary victims must be maintained and if the distinctions are changed, there are also large implications here.

Our answer would change depending on whether the victim in the question is a primary or secondary victim.

Page v Smith is a prime example where we accept that a primary victim such as Page should be entitled to recover damages as long as causation is established, whereas, we do not believe a secondary victim should have the same entitlement because they would have no actual involvement in the index incident.

Q2(f) do you agree that there should be a general prohibition on obtaining damages for a mental disorder where the victim has sustained that injury as a result of witnessing or learning of an incident, without being involved directly in it?

Yes

No

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

Yes

No

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

Yes

No

Q2(i) do you agree that these two exceptions strike the appropriate balance between the right of an injured person to secure damages and the right of a defender?

Yes  No

**Please explain and, where possible, provide evidence:**

We believe that claimants should not be barred from seeking compensation simply because they do not meet a set criteria defining a relationship or correlation to a victim. This could be too restrictive and lead to injustice.

Again, we believe the case law in this area is clear and provides suitable guidance which allows courts to properly consider the facts on a case by case basis.

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

Yes  No

**Please explain and, where possible, provide evidence:**

We do not support the recommendations at paragraph 1.10 of the *Damages for Psychiatric Injury* Report (2004) which suggest:

1. the removal of the need for mental harm to be induced by 'shock'. The criterion of 'shock' helps to determine whether the psychiatric injury was caused by the defender or by an intervening event. To remove the criteria of 'shock' introduces uncertainty in liability and causation. Further, it may serve to increase medical and legal costs due to the complexities in distinguishing psychiatric injury from other forms of mental illness.

We have already covered our opposition to the removal of primary and secondary victims and the other points raised in this action, therefore, needs no further comment and would refer you to previous answers.

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

Yes  No

**Please explain and, where possible, provide evidence:**

We do not believe that the proposed framework would be fit for purpose given our answers to previous questions.

Q2(l) do you agree that it should not be possible for a bereaved relative to secure damages for psychiatric injury under section 4(3)(b) of the 2011 Act?

Yes

No

**Please explain and, where possible, provide evidence:**

We support the view expressed in the Scottish Law Commission 2008 report on *Damages for Wrongful Death* that the approach in *Ross v Pryde (2004)* should be adopted. In order to secure damages, the pursuer should have to establish a separate duty of care owed to him/her to prevent mental harm, which would only arise if the pursuer was a primary victim or satisfied the criteria of a secondary victim.

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

Is it likely that more or fewer actions will be raised?

Is it likely that more or fewer cases come to court?

Is it likely that more or fewer cases will be settled out of court?

Is it likely that cases will require more or less preparation time?

Is it likely that cases will require more or less court time?

Is it likely that there will be more or fewer awards of damages?

Is it likely that awards of damages will be higher or lower?

Can you quantify the benefits for pursuers?

Can you quantify the benefits for defenders?

Can you quantify the drawbacks for pursuers?

Can you quantify the drawbacks for defenders?

**Please explain and, where possible, provide evidence. Detailed views on the impact of any specific elements of the proposals would also be welcome.**

We believe that this would result in:

- More actions raised, more cases coming to court and fewer cases settled out of court because of satellite litigation around the wording, drafting and interpretation of any legislation
- This would also result in more preparation time being required and more court time taken up because of more issues raised and the complexity of the new issues
- More awards of damages and higher awards of damages because of the potentially wider classifications
- We do not perceive any benefits for either pursuers or defenders
- The obvious drawbacks for pursuers are the length of time the processes would take with additional steps and court time in getting fair access to justice
- The drawbacks for defenders are the increased cost burden (as costs would ultimately be borne by the defenders) or the legal aid board

Any increase in the length of time it takes to access justice would unfairly penalise pursuers and any additional cost incurred would ultimately have to be passed to the consumer by way of increased insurance premiums.

Q2(n) do you consider that the proposals for the reform of damages for psychiatric injury will affect people, either positively or negatively with the following protected characteristics (age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race and religion or belief)?

Yes

No

**Please explain and, where possible, provide evidence:**

We have no comment to offer to this question.

### Chapter 3: Time-Bar

Q3(a) do you agree that – for all personal injuries, regardless of the nature and circumstances of the personal injury – even if it were lawful to do so, it would not be advisable to seek to revive prescribed claims (i.e. claims relating to events before September 1964)?

Yes

No

**Please explain and, where possible, provide evidence:**

We have no additional comment to offer to this question.

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

Yes

No

**Please explain and, where possible, provide evidence:**

We believe that the standard limitation should not be raised above the current 3 years.

In the current age, there is a far increased level of knowledge amongst the general consumer population as to their rights and remedies available.

An increase in the limitation could unfairly prejudice defenders through policyholders either being in liquidation or documentation and/or witnesses not being available because of the passage of time.

Our members see a number of these cases even with the current limitation rules where we simply cannot obtain the documentary evidence required to properly investigate claims and address allegations and therefore have no option but to deal with the claim. Any increase to the period would only serve to compound this point.

Our members also experience unnecessary delays by Solicitors acting for pursuers pre-litigation in not providing medical evidence, disclosure of relevant documents or even in some cases, proper allegations of negligence. Adding an additional 2 years to the limitation period would simply result in an additional 2 years worth of costs to be recovered and the same delay in the pursuer receiving their rightful compensation.

An increase in the limitation period could also clearly hamper the courts with cases calling for Proof or Trial so many years after the event in question. One such recent example being *Lesley Jackson v Andrew Murray* 2012 CSOH 100 where Lord Tyre opines in his introduction:

*"I have to say at the outset that a feature of this case was the poor quality of the evidence available in relation to matters critical to determination of liability. This was due in large measure to the long delay before this action was raised in July 2009. I was given no satisfactory explanation as to why the action was not commenced more promptly. The inevitable consequence of the delay has been that the memories of witnesses - lay persons and police officers alike - have faded and in some cases have become demonstrably less reliable. One key witness has died. One of the investigating police officers has apparently emigrated and did not give evidence"*

As in previous answers, this additional delay is not in the interest of justice, nor beneficial to any party and would result in an increased burden of court time dealing with the matter, and additional cost which would ultimately be borne by the consumer by way of increased insurance premiums.

An increase to 5 years would have no positive impact on the minority of cases such as abuse or disease claims the proposal is designed to fix as the harm would have occurred well before the 5 years in the same way as it would have the 3 years.



Ultimately, the court has discretion under Section 19A to allow such cases to proceed and that is the correct way of dealing with such matters.

Q3(c) do you agree that it is appropriate to have a single standard limitation period for all types of personal injury claim, instead of different periods for different types of injury?

Yes

No

**Please explain and, where possible, provide evidence:**

We believe that a single limitation period is appropriate for ease of public understanding and consistency.

Creating differing limitation periods for different types of injuries will give rise to uncertainty for pursuers and defenders. There may be difficulties in classifying the pursuer's injury/injuries to determine the applicable limitation period, which could result in a dispute between the parties that would require to be resolved by the courts by way of unnecessary preliminary litigation

Q3(d) do you agree there should be a statutory, non-exhaustive list of matters relevant to determining whether it would be equitable for the courts to exercise discretion to allow an action to be brought outwith the limitation period?

Yes

No

**Please explain and, where possible, provide evidence:**

We believe that the correct remedy is that the courts retain the safeguard of Section 19A and that, along with the current case law on limitation properly defines where it is equitable for the courts to exercise discretion.

A proposed non-exhaustive list could never in our view, account for each and every situation.

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

Yes  No

**Please explain and, where possible, provide evidence:**

We believe that the Scottish Law Commission should consider the abolition of Civil Jury Trials given the 'two tier' system of justice created.

Such a 'two tier' approach creates manifest unfairness for pursuers and defenders alike.

Q3(f) do you agree that 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?

Yes  No

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

Yes  No

**If yes, please give examples of the exceptions:**

We believe there should be no exceptions to the principle.

However, if cases arose where it would be in the interest of justice to depart from the principle, the court should retain the power and consider such cases under Section 19A

Q3(h) how would you suggest that the difficulties and anomalies identified by the Scottish Law Commission (in their report at paragraphs 2.17 – 2.24) and the Court in Aitchison might be overcome?

**Please explain and, where possible, provide evidence:**

The difficulties and anomalies identified were addressed by the court in Aitchison and now the law as defined in Aitchison is now part of the bank of case law we discussed earlier which helps inform the court on circumstances where and how to exercise discretion under Section 19A

Q3(i) do you consider that there is there a need to make provision for cases where it was known that the initial harm was actionable but where decisions not to litigate were taken in good faith in reliance on the rule in Carnegie before it was overturned by the Court in Aitchison.

Yes

No

**Please explain and, where possible, provide evidence:**

We believe the provision is actually Section 19A and that is all that is required – there is no need for further provision as the Courts have the discretionary powers conferred by Section 19A with which to redress any apparent injustice.

Q3(j) what do you think the impact of implementing these proposals in full would be particularly in relation to the issues below?

Is it likely that more or fewer actions will be raised?

Is it likely that more or fewer cases come to court?

Is it likely that more or fewer cases will be settled out of court?

Is it likely that cases will require more or less preparation time?

Is it likely that cases will require more or less court time?

Is it likely that there will be more of fewer awards of damages?

Is it likely that awards of damages will be higher or lower?

Can you quantify the benefits for pursuers?

Can you quantify the benefits for defenders?

Can you quantify the drawbacks for pursuers?

Can you quantify the drawbacks for defenders?

**Please explain and, where possible, provide evidence for your answers. In addition, detailed views on the impact of any specific elements of the proposals would also be welcome, for example, is it likely that actions for material but relatively minor injuries would be raised as a matter of course to avoid future claims from being disallowed?**

We believe that this would result in:

- More actions raised, more cases coming to court and fewer cases settled out of court because of satellite litigation around the wording, drafting and interpretation of any legislation
- This would also result in more preparation time being required and more court time taken up because of more issues raised and the complexity of the new issues
- Higher awards of damages because of the time taken to resolve the cases by way of judicial interest etc.
- We do not perceive any benefits for either pursuers or defenders
- The obvious drawbacks for pursuers are the length of time the processes would take with additional steps and court time in getting fair access to justice
- The drawbacks for defenders are the increased cost burden (as costs would ultimately be borne by the defenders) or the legal aid board

Any increase in the length of time it takes to access justice would unfairly penalise pursuers and any additional cost incurred would ultimately have to be passed to the consumer by way of increased insurance premiums.

Q3(k) do you consider that the proposals for the reform of the law of limitation for personal injury actions will affect people, either positively or negatively, with the following protected characteristics (age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race and religion or belief)?

Yes

No

**Please explain and, where possible, provide evidence:**

We have no comment to offer to this question.

## Chapter 4: The Wider Reform Agenda: Before and After

Q4(a) do you consider that the way in which the 2007 Act is working in practice is achieving its central aim of ensuring that a person dying of mesothelioma can secure damages without thereby preventing members of his/her immediate family making a future claim for damages for distress, grief and loss of society?

Yes

No

**Please explain and, where possible, provide evidence:**

In our view the 2007 Act was not actually necessary to prevent the victim's "dilemma" described in para. 4.05 of the consultation paper.

Under prevailing court rules the mesothelioma sufferer can obtain an order from the court for an interim payment of damages. Such a payment is to mitigate the suffering of the victim.

Under the relative court rules the interim payment would be such amount as the court thinks fit not exceeding a reasonable proportion of the damages which the court considers are likely to be recovered by the pursuer.

Such an interim payment would not preclude members of the victim's family for claiming damages for distress and anxiety, grief and sorrow and loss of society (formerly under the Damages (Scotland) Act 1976 and now via the Damages (Scotland) Act 2011).

Q4(b) do you consider that the way in which the 2007 Act is working in practice is having positive or negative impacts / side-effects?

Yes

No

**Please provide examples of positive and negative impacts, explain and provide evidence:**

Positive Impacts

No discernible positive impacts as legislation was not actually necessary

Negative Impacts

No discernible negative impacts as legislation was not actually necessary

Q4(c) do you consider that the Scottish Government's financial estimates were largely accurate, insofar as they forecast:

(i) the number of additional claims?

Yes

No

(ii) the average level of costs associated with those additional claims?

Yes

No

(iii) the overall financial implications of the 2007 Act?

Yes

No

**Please explain and, where possible, provide evidence:**

We have no data to offer to enable further comment here

Q4(d) do you consider that the way in which the 2009 Act is working in practice is achieving its central aim of ensuring that a person with pleural plaques (or one of the other specified asymptomatic asbestos-related conditions) may pursue an action of damages in the same way as a person with any other non-negligible personal injury?

Yes

No

**Please explain and, where possible, provide evidence:**

The Act has achieved its central aim. However, we were, and remain, strongly opposed to its introduction.

Pleural Plaques are symptomless as established by unanimous medical evidence and do not cause asbestos related conditions such as mesothelioma.

The Act retrospectively overturned a fundamental legal principle of UK law, and the considered view of the highest court in the UK that compensation is payable only when someone has suffered physical harm as a result of someone's negligence. The Scots Law is now out of step with most countries, including the USA & Australia in compensating pleural plaques.

Q4(e) do you consider that the way in which the 2009 Act is working in practice is having positive or negative impacts / side-effects?

Yes

No

**Please provide examples of positive and negative impacts, explain and provide evidence:**

Positive Impacts

None

Negative Impacts

There are clear unintended consequences created by the Act, such as the prescription and limitation issues raised elsewhere in the consultation.

Making a claim for pleural plaques could result in claims for later consequences of asbestos exposure (such as mesothelioma) being statute barred, solely because compensation was sought for Pleural Plaques which caused no physical symptoms.

Q4(f) do you consider that the Scottish Government's financial estimates were largely accurate, insofar as they forecast:

(i) the number of claims?

Yes

No

(ii) the average level of costs associated with those claims?

Yes

No

(iii) the overall financial implications of the 2009 Act?

Yes

No

**Please explain and, where possible, provide evidence:**

We have no comment to offer in this regard

Q4(g) do you consider that the way in which the 2011 Act is working in practice is achieving its central aim of bringing greater clarity and accuracy to Scots law so far as it relates to damages for fatal personal injuries, reducing requirements for potentially intrusive, protracted and costly investigations, and thereby facilitating the swift and fair settlement of claims?

Yes

No

Q4(h) do you consider that the way in which the 2011 Act is working in practice is having positive or negative impacts/side-effects?

Yes

No

**Please provide examples of positive and negative impacts, explain and provide evidence:**

Positive Impacts

None

Negative Impacts

Lack of clarity because of the decision to remove the deduction of surviving spousal income and that the lack of clarity over what constitutes 'manifestly unfair' when considering the 75% dependency base figure.

Our members report a number of cases where this is a crucial point (which has not yet been tested in court) that remains a significant barrier to early settlement of these cases without intrusive, protracted and costly investigations.



The increased costs of the Act are being passed on to the end consumer by way of increased premiums

Q4(i) do you consider that the Scottish Government's financial estimates were largely accurate, insofar as they forecast:

(i) the impact on the number of claims?

Yes

No

(ii) the level of award in respect of those claims?

Yes

No

(iii) the overall financial implications of the 2011 Act?

Yes

No

**Please explain and, where possible, provide evidence:**

The financial estimates produced by the Scottish Government (<http://www.scotland.gov.uk/Publications/2010/07/06142911/14>) suggested an annual cost of £4 million per annum and an increase in damages of in excess of £30,000 per claim.

These figures were derived from the figures in the Private Members Bill which were in turn derived from an analysis (which was never made public) of only one firm of Solicitors and their client base.

No breakdown has ever been submitted to suggest what the make up of the sample was between Road Traffic deaths, Workplace deaths or long tail conditions such as Mesothelioma. (such a breakdown would have helped understand the sample and how it related back to the overall number of fatalities in each category from the available public data)

We believe that the true financial implications are far greater than this analysis as we have submitted previously.

The only way any meaningful analysis can be undertaken would be for a number of firms of Solicitors who represent claimants, allowing access to their records for a thorough and independent review to be undertaken.

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

Yes

No

**Please explain and, where possible, provide evidence:**

We believe the Scottish Courts should have the power to impose Periodical Payment Orders upon parties, but only in cases of catastrophic injury claims.

This would address arguments and concerns that a Pursuer could outlive a care package provision or be left with a shortfall in funds with which to pay for their care regime as in PPOs.

PPOs should not be viewed as a replacement for traditional lump sum awards in the majority of cases, but as stated, should be a framework available to the courts to ensure justice is fair and reasonable.

Q4(k) do you consider that there would be merit in reviewing again (but this time, separately) the existing approach to interest on damages for personal injury?

Yes

No

**Please explain and, where possible, provide evidence:**

We believe judicial interest on damages as currently set at 8% is completely out of all proportion given the current economic climate and is unnecessarily punitive.

Judicial interest running at 8% gives a Pursuer a vast financial incentive to delay settlement as long as possible, obstruct the judicial process and prolong court actions unnecessarily in all types of cases as the 8% per annum Judicial Interest would provide a far greater return than could ever have been achieved through investment rates of return.

The concerns which our members have are compounded by the radically different position in relation to interest on damages for injury which prevails in England, where interest is awarded from the date of service of Court proceedings. (no interest is payable for the period prior to service of proceedings)

The current rate has been fixed since 1982 at 2% for General Damages (England and Wales equivalent of Solatium) and half the special account rate on other damages which amounts (at presently) to 0.25% for damages incurred after 1 July 2009.

The issue has been highlighted starkly most recently by the Opinion of an Extra Division of the Court delivered by Lord Eassie in *Farstad Supply AS v Enviroco Limited* [2013] CSIH 9 CA 23/07, in which his Lordship stated at paragraph 31:

“It is plain that the mismatch between the judicial rate and interest rates prevailing in the financial world which has existed following the crisis of 2008 is a matter of concern. In the absence of a wider reaching reform of the law relating to the awarding of interest such as that canvassed by the Scottish Law Commission in its report (which must be a matter for the Scottish Government and the Scottish Parliament), the responsibility for updating the current judicial rate, to meet that mismatch, falls to the Rules Council. It is for that council to consider – we would suggest urgently – the clear mismatch identified by the Lord Ordinary, which we ourselves would endorse, and which is widely recognised by all engaged in litigation before this Court”.

His Lordship continues:-

“For our part, having had the benefit of having had a perhaps wider examination of the law and practice in England and Wales than may have been available to the members of the council. We would, with great respect, suggest that in deciding upon a judicial rate applicable in civil proceedings in Scotland, the council should not feel inevitably thirled to the Judgments Act rate applied in some courts in England and Wales.”

We would echo the comments of his Lordship and would urge urgent review of judicial interest on damages for all types of claim and not solely personal injury.