FACULTY OF ADVOCATES

RESPONSE ON BEHALF OF THE FACULTY OF ADVOCATES

IN RELATION TO

THE SCOTTISH LAW COMMISSION DISCUSSION PAPER ON DAMAGES

FOR PERSONAL INJURY

Question 1: Do consultees have any comments on economic impact?

No. The Faculty is not in a position to adduce evidence or data on economic impacts.

Question 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?

The Faculty considers that the definition of 'relative' in section 13(1) should be amended to include any person who has been accepted by the injured person as a part of their family, either as a parent, grandparent, grandchild or sibling.

a) The principle that in this context a 'relative' may include a person accepted by the injured person as a part of the family is already recognised by section 13(1), in that the definition there includes (and has since the enactment of the 1982 Act included) a person accepted by the injured person as a child of their family.
b) It is a matter of common experience and knowledge that people are from time to time informally accepted as part of families as parents, grandparents, grandchildren or siblings. The Faculty does not consider therefore that the amendment would in this context offend against contemporary ideas of what is meant by a 'relative'. Indeed the Faculty considers that the amended definition would be more consistent with those ideas than the current, more restrictive definition.

c) The Faculty considers that in circumstances where a person has been accepted by the injured person as part of their family as a parent, grandparent, grandchild or sibling, it would be unjust to exclude them from the definition of 'relative' and therefore from the scope of sections 8 and 9 of the 1982 Act.
d) The Faculty notes that section 14 of the Damages (Scotland) Act 2011 includes in the definition of 'relative' a person who accepted the deceased as a child of their family; a person brought up in the same household as the deceased and accepted as a child of the deceased's family; a person who accepted the deceased as a grandchild; and a person who was accepted by the deceased as a grandchild. Given that the 2011 Act and the 1982 Act are both concerned with reparation for personal injuries, and notwithstanding that the Acts concern different categories of claim, the Faculty considers that it is desirable that consistency of definition be maintained between the Acts, so far as possible.
e) The Faculty considers that it is important to bear in mind that in the context of the 1982 Act an award of damages will only be made to, or in respect of, a relative where the requirements of either section 8 or section 9 are satisfied. An award will not be made merely by reason of the relationship. Further, the overall aim of sections 8 and 9 is to restore the injured person (section 9) and the relative (section 8) to their position but for the injuries sustained. While therefore a widening of the definition of 'relative' is likely to lead to an increase in the value of claims, we do not consider that that increase would be disproportionate or unjustified.

Question 2 (b): Do you consider that there is any other category of "relative" which should be included?

The Faculty considers that the definition of 'relative' in section 13(1) should also be amended to include any person who has been accepted by the injured person as a part of their family, either as a great grandchild or great grandparent. The Faculty considers that this would be a logical extension of the amendment discussed in para. 2 above.

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

The Faculty considers that the definition of 'relative' in section 13(1) should be amended to include ex-partners.

a) The definition in section 13(1) already includes divorced spouses and former civil partners. In the context of a claim under either section 8 or section 9, the Faculty

does not consider that there is a principled distinction to be made between a person falling within one of those categories and an ex-partner who is neither a divorced spouse nor a former civil partner of the injured person.

b) Again the Faculty considers that it is important to note that in this context an award of damages will only be made to, or in respect of, a relative where the requirements of either section 8 or section 9 are satisfied and that the overall aim of section 8 and 9 is to restore the injured person (section 9) and the relative (section 8) to their position but for the injuries sustained. While therefore it might be said (for example) that ex-partners should not be included in the definition because the person in question may only have been in a relationship with the injured person for a very short time, or that there may be a proliferation of ex-partners for whom, or in respect of whom, claims may be made under section 8 or section 9, the Faculty does not consider that such arguments weigh significantly against the inclusion of ex-partners in the definition, since an award will only be made if, and to the extent that, the ex-partner provided necessary services to the injured person (section 8) or if, and to the extent that, the injured person would have rendered personal services to them (section 9).

Question 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?

The Faculty considers that section 8 should be extended to claims in respect of necessary services provided gratuitously to an injured person by individuals who are not family members.

a) The Faculty considers that there is obvious merit in providing that where a person has rendered necessary services to an injured person gratuitously then the injured person should be entitled to recover reasonable remuneration for those services (and related expenses) on their behalf, even where they are not a relative (within the meaning of s.13(1)).

b) Again the Faculty considers that it is important to bear in mind that in this context an award of damages will only be made where the requirements of section 8 are satisfied. Thus, if section 8 were extended in this way, an award would only be made where the individual in question had rendered necessary services to the injured person and where they had done so gratuitously. While therefore an extension of section 8 in this way would likely lead to an increase in the value of damages claims, we do not consider that that increase would be disproportionate or unjustified.

c) The Faculty considers that in this context there is no longer any sound justification for distinguishing between necessary services rendered by a relative, as opposed to those provided by a person who is not a relative.
d) In particular the Faculty notes the previous rationale for confining such claims to relatives (Discussion Paper, paras. 2.24 and 2.25). The Faculty does not consider that the factors identified there justify continuing to confine claims to persons within that category. For example, the Faculty considers that the contention that 'it is only within the family group that there is a demonstrable social need to allow recovery in respect of services rendered' no longer holds good. It is within common experience and knowledge that persons who are not relatives, such as friends and neighbours, provide necessary services to injured persons and that they do so gratuitously. That such individuals do so, at the expense of their time and effort, is no less meritorious or deserving of remuneration than relatives who provide necessary services. The Faculty agrees with the comments in the Discussion Paper (para. 2.35) to the effect that admitting claims for individuals who are not relatives would not be likely either to complicate the procedure for settling claims or to increase the number of spurious claims. We agree with the comments in the Discussion Paper (para. 2.37) summarising the advantages of extending such claims beyond relatives.

Question 4 (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?

The Faculty considers that an appropriate formulation would be to the effect that the services were provided:

a) By an individual;
b) Otherwise than in the course of a business, profession or vocation;
c) Without the individual having been paid for the services; and
d) Without the individual having an enforceable contractual or other right to payment for the services (save as arises under section 8).

Question 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?

The Faculty does not consider that section 8 should be extended to claims in respect of necessary services provided gratuitously to an injured person by bodies or organisations such as charities.

a) The Faculty acknowledges that the idea of such an extension has attracted judicial and other support (Discussion Paper, paras. 2.40 - 2.41). The Faculty agrees that it is arguable that the provision of gratuitous services by a charitable organisation is analogous in this context to the provision of such services by an individual. It would no doubt be financially advantageous for charities and other organisations to be able to recover remuneration for services rendered under section 8. Indeed the availability of remuneration under section 8 may encourage charities and other organisations to make necessary services available gratuitously to persons who have sustained injury as a result of the fault of a third party, in the expectation that they would recover remuneration for providing the services. It is not however clear whether charities would welcome an extension of the type under discussion or the extent to which they would be likely to take advantage of it in practice - those questions would best be answered by the charities themselves.
b) On the other hand, charitable organisations have existing fundraising avenues available to enable them to perform their functions including, where applicable, the provision of necessary services to injured persons. It is therefore arguable that there is no need for them to be able to recover remuneration under section 8. Indeed it might be said that opening this avenue to charities as a source of generating revenue would allow them to make double recovery - by raising funds to enable them to provide the necessary services and by then claiming remuneration for having provided them. In any event if charities considered that it would be in their interests to recover payment for the services that they are rendering, then they may well be able to provide the services through a commercial agency or subsidiary and charge for the services commercially, with an expectation of recovery in the event of a successful damages claim. For that reason the suggested extension of section 8 may be unnecessary.
c) On balance, the Faculty considers that it would be undesirable to extend section 8 in the manner under discussion. At present there is a clear distinction between, on the one hand, claims under section 8 in respect of necessary services provided by individuals and, on the other hand, claims for charges incurred by the injured person for obtaining services on a commercial basis. The

Faculty considers that extending section 8 claims to charitable and other organisations would blur that distinction unnecessarily. The present approach to quantifying section 8 claims, which is generally regarded as a 'jury' question according to the circumstances of the case, as opposed to reliance on fixed rates, would sit uncomfortably with a claim by an organisation for providing services in a quasi-commercial manner. The Faculty considers that it is unnecessary to go down this route, because as noted above it may well be open to charities to provide necessary services on a fully commercial basis, through a suitable agency or subsidiary, on the basis that where a claim for damages is available the pursuer would seek to recover the charges on their behalf from the defender.

d) The Faculty notes that the recovery of gratuitous hospice costs has been allowed in England, in two cases at first instance (Discussion Paper, paras. 2.40 - 2.41). Although to that extent the position in Scotland differs from that in England, the Faculty does not consider that that in itself is sufficient justification for extending section 8 in the manner under discussion.

Question 5 (b) If so, should legislation prescribe how damages should be assessed or should it be a matter left to the discretion of the courts?

Please see the answer to q.5(c).

Question 5 (c) If you consider that legislation should so prescribe, what factors do you consider that the court attention should be directed to? For example should the court be directed to consider "such sum as represents reasonable remuneration for those services and repayment of reasonable expenses incurred in connection therewith" as an appropriate means of assessment or should a concept of reasonable notional costs be adopted? Or some other way of assessment?

If section 8 were to be extended to claims in respect of necessary services provided by charitable and other organisations, the Faculty considers that the assessment of damages should be left to the discretion of the courts. For example, the courts in the two English cases cited in the Discussion Paper (at paras. 2.40 - 2.41) appeared to manage quantification without undue difficulty. The Faculty further considers that the court should be directed to consider 'such sum as represents reasonable remuneration for those services and repayment of reasonable expenses incurred in connection therewith', or similar, as an appropriate means of assessment, in order that the court has full discretion to award such sum as it considers reasonable in the circumstances of the case.

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

The Faculty does not consider that there should be an absolute bar to the recovery of damages for the gratuitous provision of services in circumstances where the services have been provided by the wrongdoer, (whether or not the defender). Rather, the Faculty considers that the court should be given the power to award damages in such circumstances, subject to a discretion to refuse to make such an award where it would be unreasonable or unjust to do so in the particular circumstances of the case.

a) The Faculty notes the undesirable consequences which have been identified as potentially arising from an absolute bar on making such an award (Discussion Paper, para. 2.46). The Faculty agrees that unfairness may well arise in circumstances where a wrongdoer has provided necessary services but does not receive remuneration for them, or where the wrongdoer would otherwise have provided services but does not do so because of a bar on recovering remuneration for them. The Faculty considers that the general position should be maintained, namely that where necessary services are rendered to an injured person gratuitously, remuneration for such services should be recoverable on behalf of the person who has provided them.
b) The Faculty notes the absurdity which might arise in circumstances where a wrongdoer is found liable to pay damages, including remuneration for necessary services which the wrongdoer has themselves provided, resulting in an obligation upon the pursuer to pay that remuneration back to the wrongdoer. In such circumstances a discretion of the type which the Faculty has suggested would enable the court, if it saw fit, to decline to award damages representing such remuneration. The Faculty acknowledges that in practice the obligation to pay damages falls more often than not upon a third party, such as an insurer or employer, rather than the wrongdoer themselves, though the court would with the suggested discretion also be able to take such circumstances into account.

Question 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?

The Faculty does not consider that section 9 of the 1982 Act should be extended to entitle the injured person to recover damages in respect of personal services provided gratuitously to a third party who is not their relative.

a) The Faculty considers that extending section 9 in this manner would create a right of recovery which differs substantially from the right which presently exists under the section. The justification for the right of recovery under the section as it presently stands is the injured person's loss of their ability to offer a counterpart in kind for the benefits that they receive within the family group (Discussion Paper, para. 2.53). In contrast, with the extension under discussion the loss would be that of the recipient of the services. The justification for the right of recovery which applies to existing claims under section 9 would therefore not apply to such a claim. Further, given that the loss would lie with the recipient rather than the injured person, the extension to section 9 would have to be accompanied by an obligation on the injured person to account to the recipient of the services.

b) The Faculty considers that the loss which the extension of section 9 would be intended to address would be too remote to justify the significant innovation which the suggested extension would represent. The loss under contemplation is that of a person outwith the family group and the personal services themselves would be rendered outwith the family group. That loss may therefore readily be distinguished from the loss addressed by the present section 9: the loss there is suffered by the injured person, characterised as the loss of their ability to offer a counterpart in kind for the benefits that they receive within the family group. The latter loss is therefore reasonably proximate to the wrong which caused the injuries. It may also be helpful to consider the proximity of losses addressed by section 8. The existing section 8 addresses necessary services provided to the injured person, the loss being the time and effort expended by the relative in providing those services. Again therefore the losses there are reasonably proximate to the wrong which caused the injuries. Even if section 8 were extended to encompass necessary services rendered by a person who is not a relative, a reasonable degree of proximity would remain, in that the services would be received by the injured person and the provider would have expended time and effort in providing those services to the injured person as a result of their injuries. In contrast therefore to the losses recoverable under the existing sections 8 and 9, and to those which would be recoverable under an extended section 8, the losses which would be recoverable for personal services lost by a person who is not a relative of the injured person would be remote.

c) While it may of course be argued that it is reasonable that a recipient of personal services outwith the injured person's family group should receive redress for the loss of those services resulting from the wrong in question, in the circumstances the Faculty does not consider that section 9 should be extended in the manner under discussion.

Question 7 (b) If so, should the injured person be under an obligation to account to such a third party for those damages?

The Faculty considers that if section 9 were to be extended in the manner proposed, it would be necessary to introduce an obligation on the injured person to account to the third party for the damages in question. As discussed above, since the loss addressed by the extension would be that of the third party, as opposed to that of the injured person, then in order for the extended section to provide effective redress to the third party it would be necessary to provide a mechanism to ensure that the injured person accounted to them for the damages in question.

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

No. The Faculty agrees with the SLC's assessment that the recovery of benefits works in practice and that there is no useful change that can be suggested. The statutory scheme applies the principle that the state should be reimbursed while at the same time the wrongdoer should not pay more than is necessary to compensate the injured person. The identification of deductible benefits is workable in practice, subject to the caveat identified in paragraph 3.20 regarding Universal Credit. The Faculty has nothing to add to the SLC's conclusions.

Question 8(b) If so, could you outline those problems? Do you have any solutions to suggest?

Please see answer to question 8 (a) above.

Question 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?

In relation to benevolent payments, the Faculty agrees that these should continue to be excluded from any deduction from damages. As the SLC note, even if the result is that the injured party may receive more than he has lost, there is a clear basis in common law and equity to exclude them (*Henderson v Sutherland* 2008 SCLR 219 at para 36).

The Faculty agrees that there are no grounds for deducting a payment from an insurance policy arranged and contributed to by the injured person. As the authorities note, the basis for the payment is the contract of insurance and not the event that triggers the payment.

Question 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?

The Faculty considers that clarification would be helpful on this question.

Question 10 (b) If so, could you outline the essential elements of any clarification or reform which you suggest?

As the SLC identify, the main question that arises is factual – whether payments made from a particular scheme should be deducted from damages. Difficulties here may occur more often in considering settlement, and it is unhelpful for there to be a degree of uncertainty that might stand in the way of that settlement. It seems to us that any change would be better if it were easy to apply, notwithstanding the variety of factual circumstance that may pertain to a PHI policy.

Question 10 (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?

The Faculty agrees therefore that the reform should be restricted to allowing for deduction only where the employee has made no contribution to the scheme. It appears to us that the suggested approach of continuing to allow the exception where the employee at least pays tax on the membership is the correct one.

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

The Faculty agrees that it should remain in force for the reasons set out in paragraph 3.66 of the Discussion Paper. The Faculty would add that, in many higher value cases, the cost of medical treatment and the cost of care can be the most significant elements in terms of the sums involved. In relation to claims for care, the cost of professional long term care may far exceed the cost of such care as the state is able to provide. It is often the case that a higher level of care can be obtained privately. That may not be so in relation to medical treatment. However, the general principle that the injured party should not be penalised for making reasonable choices in relation to treatment or care, would seem to apply to both. In both cases, an injured person also has to prove that as matter of fact they will obtain the treatment or care.

Question 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?

Recovery of NHS charges is, as identified in the discussion paper, a question of policy. It does not feature in the calculation of damages (although the reduction of the compensator's liability where contributory negligence is a factor can be an issue in settlement discussions – see section 152(3) of the 2003 Act). It is primarily a matter for the compensator or his insurers, and the Faculty does not have any comment to make in response to this question.

Question 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?

This again looks to an extent to be a question of policy. The Faculty does however agree with the proposition in the question.

Question 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?

Yes. The Faculty notes that *Sowden v Lodge* was considered by Lord Stewart in *Clark v Greater Glasgow Health Board* 2016 Rep LR 126 in which he said at paragraph [4]:

> 'The principle derived by the pursuer is that if a claimant proposes a particular care regime it is for the wrong-doer to pay for that regime in damages unless the proposed regime is unreasonable: it is not for the court to decide what is "in the best interests" of the claimant or to stipulate for the minimum acceptable level of care. The principle is correctly stated but does not greatly help in the present case. The cited decisions have to be understood in context.'

The Faculty agrees that the injured person should be entitled to opt for private care. The Faculty sees no reason in principle for differentiating between medical treatment and care, even if section 2(4) of the 1948 Act makes the position certain in relation to the former. As observed in response to question 11 above, a crucial hurdle that a claim must pass is proving what care or treatment will in fact be used. By way of illustration, in *Clark*, the pursuer argued that a (private) care regime should be run by an agency rather than simply arranged by the family. The difference in cost was more than £80,000 a year. The court was not satisfied that such an expensive model would in fact be employed. An identical question would arise when comparing private and public provision – if the likelihood is that the public provision would be used, the award of damages should reflect that. If, due to the nature of public provision of care

services and the resources available to them, in the majority of cases an injured person would be better with private care, it would seem wrong to deprive him of that opportunity. The Faculty considers that the principle of reparation answers this question in the affirmative.

Question 15. Do you have any other comments?

No.

Question 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.

The Faculty is of the view that the abovementioned options are properly matters of policy and not law and so the Faculty does not have any comment to make in response this question.

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

No.

Question 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?

The Faculty agrees that, with the exception of asbestos-related disease, there is no general need for reform of the law of provisional damages.

Question 18 (b) **If you disagree, can you describe what needs reformed and, if so, what reforms you would propose?**

Please see answer to question 18 (a) above.

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

The Faculty considers that there are problems with the way in which provisional damages operate in asbestos-related disease claims.

Following upon the Damages (Asbestos-related Conditions) (Scotland) Act 2009 ("the 2009 Act") and *Aitchison v Glasgow City Council* 2010 SC 411 if a person is told he suffers from pleural plaques and seeks to retain his right of action to sue for mesothelioma he must now sue within three years of his knowledge of the 'relevant facts' under s.17(2)(b) Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act") in relation to the pleural plaques. Should he fail to do so, and should he then develop mesothelioma (even many years later), his claim for mesothelioma will be time-barred, subject to application of s.19A. As noted at 4.23 to 4.25 of the Discussion Paper, there are factors at play in such cases which make this a particularly harsh situation for a potential pursuer. Firstly, absent legal advice, he may be unlikely to make a claim for asymptomatic pleural plaques. Secondly, the medical records might record a diagnosis of pleural plaques, but not answer the question of what (if anything) the person was told about them. Thirdly, the pursuer may or may not have been referred to an Asbestos Action group.

Further, if the person diagnosed with pleural plaques, who has failed to litigate within the triennium, has gone on to develop mesothelioma and has then died from mesothelioma, his family's claim for damages for his death from mesothelioma will also be time-barred, by operation of s.18(4) of the 1973 Act. The executors' claim will be time-barred. The relatives' claims as individuals will also be time-barred. See, generally, discussion in *Prescription and Limitation,* Johnston 2nd. ed. at 10-102 to 10-104. This was the position in *Quinn v Wright's Insulations Ltd.* 2020 SCLR.

As set out at 4.27 of the Discussion Paper, one solution might be s.19A of the 1973 Act. This was also the solution suggested in *Aitchison* at para. [41]. However, as noted from cases such as *Kelman v Moray Council* [2021] CSOH 1131 and *Quinn v Wright's Insulations* the application of s.19A in plaques/mesothelioma cases leads to uncertainty and, in some cases, unfairness. In *Quinn* the Lord Ordinary held:

> [58]. I do not take the passage in para.41 of *Aitchison* as indicating that any case in which a more serious disease develops will be a "hard" case meriting the exercise of the court's discretion under s.19A . I consider that the court had in mind a case that was hard for some reason other than the inevitable harshness caused by the operation of the law under ss.17(2) and 18(4) so as to bar a claim…
>
> [60]. In relation to claims for childhood abuse, Parliament has recognised that a number of special features justify a different approach to time-bar, notwithstanding the existing provision in s.19A : ss.17A–D of the 1973 Act, added by the Limitation (Childhood Abuse) (Scotland) Act 2017 . … Since the decision in *Aitchison* , Parliament has not made any special provision in relation to mesothelioma or any other late-emerging industrial disease, so far as time-bar is concerned.

Alongside the aforementioned uncertainty, the Faculty considers problems can be created by the requirement under s.12(1)(b) for non-public authorities or corporations to be Insured or otherwise indemnified. Historic disease cases predominantly involve asbestos exposure which took place decades ago. Often insurance cannot be found for potential defenders, because, for example, the defender did not have insurance or the details of the insurance they did have are lost due to the passage of time.

The interplay between *Aitchison* and the 2009 Act means any pursuer diagnosed with pleural plaques ought to bring a claim if possible. Where the defender is solvent and trading, but uninsured at the time of exposure (or details of any insurance cannot be traced) a pursuer can pursue his claim but cannot competently obtain an award of provisional damages as the defender does not meet the criteria of s.12(1)(b). Any pursuer who finds himself in that position can claim for the first diagnosed asbestos condition but will be barred from obtaining provisional damages. The pursuer's only statutory remedy is to choose to accept full and final damages and lose the right to any future claims.

Secondary victims (e.g. family members whose exposure to asbestos arose from washing clothes covered in asbestos) also face potential problems due to the requirement for insurance under s.12(1)(b). Such cases often fall under the remit of public liability insurance (see Employers' Liability Policy "Trigger" Litigation [2008] EWHC (QB) 2692).) Unlike employer's liability policies, there is no central database for public liability policies. Further, such policies often trigger at the date of diagnosis. This creates a tension with the terms of s.12(1)(b) in which the requirement is for insurance at the "…*time of the act or omission giving rise to the cause of the action*". As such, for a secondary victim, even where the negligent party may have funds or insurance to meet the current claim, an award of provisional damages cannot be competently made unless the terms of s.12(1)(b) can be satisfied.

Question 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?

It is submitted that (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, would operate to avoid the unfairness noted above.

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

Considering the uncertainty and, sometimes, unfairness, facing pursuers, discussed in the response to Question 19 the Faculty considers that the alternative outlined above ((b)) is preferable to relying on s.19A as the safeguard to the *Aitchison* rule, whereby a diagnosis of a benign condition can so significantly prejudice a pursuer and his family in the event that he develops a malignant condition in the future.

The current law forces pursuers to make a claim for asbestos related conditions at the earliest opportunity to protect their position. This leads to cases being raised where the pursuer is only seeking a provisional decree, and where the actual award of damages may be small. This can arise in various circumstances but most frequently in cases where there is a significant *Holtby* discount for unsued exposure or where the pursuer has received a PWCA payment that outweighs, or is a substantial proportion of, any award of compensation. Were the law to be altered so that such a diagnosis would not bar future claims this would remove the need for pursuers to bring such claims before the court.

However, the Faculty does not consider that such claims should be open ended. A balance must be struck between the interests of pursuers and defenders. Simply exempting

asbestos conditions from the usual limitation rules would not be equitable. As such, the Faculty is in favour of retaining the 3-year limitation period for claims for Pleural Plaques, Diffuse Pleural Thickening and Asbestosis. The reason for this is that in any asbestos related claim there are significant evidential difficulties caused by the passage of time and it is best that any such claims are brought at the earliest stage to limit the deterioration of evidence. The retention of the three-year period would allow defenders certainty after the triennium in respect of claims for Pleural Plaques, Diffuse Pleural Thickening and Asbestosis and not move the balance too far in favour of the pursuers.

Question 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?

The Faculty does not consider that the establishment of liability should be capable of being deferred until a more serious condition emerges. Such a move would tend to promote uncertainty in the litigation, and generate more litigation at a later stage. The question of liability should not be contingent upon the size of the award of damages. All issues of liability should be determined at or before the award of provisional damages. The Faculty commends the approach taken in *Boyd v Gates (UK) Ltd.* 2015 SLT 483 at [11]:

> "[11] It is clear to me that the whole scheme of s.12 proceeds on the basis that in the particular case liability is no longer in issue. Section 12(1)(a) uses the words "as a result of the act or omission which gave rise to the cause of action" and s.12(1)(b) refers to "the responsible person". An act or omission can give rise to a cause of action only if it is wrongful, either at common law or under statute. Moreover, the section uses throughout the word "damages". A court does not make an award of damages for personal injuries unless liability has been admitted or proved. … It would be strange indeed if, the court having made an award of damages against a defender and allowed the pursuer to apply to the court for a further award of damages, it would be open to the defender nevertheless to contest the issue of liability when an application for a further award of damages was made."

and in *Fraser v Kitsons Insulation Contractors Ltd.* 2015 SLT 753 at [29]:

> "[29] It is regrettable that there was disagreement between the parties in the present case as to the basis upon which provisional damages ought to be awarded. It is highly desirable that parties resolving a litigation strive to avoid future potential disputes as to the terms of settlement."

The Faculty acknowledges that obtaining technical liability reports dealing with exposure to asbestos can be expensive. That might appear to be a disproportionately high cost in a low-value pleural plaques claim. However, it is important that a clear view is obtained on liability before any offer is made to settle a claim, whether on a provisional basis or on a full and final basis (under the approach set out in *Harris v AG for Scotland* 2016 SLT 572).

This is particularly important when considering the apportionment of damages in pleural plaques cases. The courts treat pleural plaques as a divisible/dose-related injury. In cases where the pursuer has been negligently exposed to asbestos with more than one employer (each with a traced insurer) there will be multiple defenders. The defenders will need to agree, or the court will need to determine, the apportionment of damages between them. There have been instances of defenders agreeing to pay a high percentage contribution for provisional damages for pleural plaques and then seeking to negotiate a lower percentage for return conditions of asbestosis or mesothelioma. This is undesirable and should be discouraged.

There is one related point in connection with provisional damages for pleural plaques and litigation for the return condition of mesothelioma. As above, pleural plaques are treated as divisible/dose-related. Further, pursuers and defenders can agree to settle plaques claims on a basis whereby there is a period of unsued for exposure. This may be so when a former employer has been struck off the register, or where no insurer can be traced. In that event, damages for pleural plaques can be paid under deduction of the percentage of unsued for exposure. That can be done when pleural plaques claims are settled on a provisional basis. If, however, the pursuer then litigates for the return condition of mesothelioma there can be no deduction for unsued for exposure. That is on the basis of s.3 Compensation Act 2006 which provides that the responsible person shall be liable for the whole of the damages caused by the mesothelioma (subject to a right to claim contribution from other wrongdoers).

s.3(4) Compensation Act 2006 provides that responsible persons may agree to apportion responsibility (for damages for mesothelioma) on any basis. The alternative is to assume that the relative length of periods of exposure goes to determine the extent of contribution. In practice, defenders might choose to increase their respective percentages *pro-rata*. However, there may be merit in seeking to make legislative provision to cover the gap between (i) unsued for exposure in provisional damages for pleural plaques; and (ii) the shortfall to be made up by defenders when the pursuer (or his family, if deceased) litigate for the return condition of mesothelioma.

Questions 23 – 39 inclusive

FACULTY OF ADVOCATES

The Faculty has no comment to make in relation to the matters discussed in Chapter 5 of this Discussion paper – Management of damages awarded to children. Such matters tend to be within the remit of solicitors and financial advisors instructed by solicitors.

27 May 2022