RESPONSE ON BEHALF OF THE UNITED KINGDOM DELEGATION

to the

QUESTIONNAIRE

on

DAMAGES FOR PERSONAL INJURY

This response has been prepared primarily from the perspective of Scottish law since that is the system in which the author is qualified. However, in most respects English and Scottish law relating to damages for personal injury are broadly similar. Some differences are noted.

Part I – General questions

1a. Does your system of law have any rules governing damages for personal injury? If so, what do they provide?

The awarding of damages for personal injury is subject to the rules or principles governing the award of damages generally which have been developed by the courts in the application of the common law. These include the rule that it is for the injured party to prove loss or damage; the principles relating to foreseeability and remoteness of damage; and the rule that the injured party should take all reasonable steps to mitigate his loss.

Although damages for personal injury are awarded as a single sum, there are generally these possible components:

(i) damages for pain and suffering and the disability inconvenience and loss of amenity arising from the injury (termed, in Scotland, solatium);
(ii) damages for the economic consequences of the injury, particularly loss of earnings, past and future, or loss of profit from inability to continue to carry on a business, and loss of pension rights;
(iii) expenses, past and future, incurred in consequence of the injury on things such as medical expenses, nursing care, domestic help, disability aids (such as a wheelchair) and the cost of adapting a house to meet the needs of a disabled person;
(iv) sums to compensate a close relative who may have provided necessary services — for example assistance to the injured party in washing and getting dressed — the sums being payable to the relative;
(v) sums to compensate the injured party in respect of his inability to perform domestic or household tasks, such as gardening, which he would otherwise have done; and
Damages are awarded as a once and for all single sum. But, exceptionally, where the injured party is at risk of developing a further, specific medical condition in the future, he may choose to have »provisional damages« enabling him to obtain a further award if that medical condition does in fact develop.

1b. Is non-patrimonial (non-pecuniary) compensation limited to cases provided by law?

There are no specific limits but there is also no general rule in favour of awarding non-patrimonial damages for emotional or mental upset.

Non-patrimonial damages are available whenever a person has suffered physical or mental injury giving rise to a right of action. Where a person dies in circumstances in which (had he not died) he could have obtained damages for personal injury, certain relatives have (in Scotland) a derivative claim for non-patrimonial damages for grief and the loss of the society of the deceased.

Apart from those personal injury cases, non-patrimonial damages may be awarded in cases of verbal injury (i.e. defamation or convincium) and in some cases of breach of contract where the subject of the contract was the provision of some pleasurable activity, such as a package holiday.

2. Which are the criteria to distinguish patrimonial and non-patrimonial damage? What are the consequences of the distinction if it exists?

Patrimonial damage is generally thought of as being all those losses which affect the economic or financial position of the person concerned, in other words, his patrimony. In practical terms the distinction is between those items of loss which can be calculated with relative precision (such as expenses already incurred or earnings already lost) or may be estimated on the basis of some financial data (such as estimated future loss of earnings) on the one hand and loss such as pain and suffering in which no financial data can possibly enter into the assessment on the other hand.

3a. What are the primary aim and the general principle of the law of damages for personal injury (e.g. prevention, sanction, distributive function, adequate compensation)?

The fundamental principle is *restitutio in integrum* - the compensation of the loss and damage suffered. Scots law does not allow any form of exemplary or punitive damages but in England such damages may be available in very exceptional cases, such as very oppressive behaviour by the police or other agent of the State.

3b. Do different forms of damages for personal injuries exist (e.g. compensatory, exemplary, punitive damages)?

See answer to question 3a

4. Does your system of law recognize different categories of damages for personal injury, particularly:

   - physical pain
   - mental suffering due to permanent loss of abilities
- mental suffering due to false imprisonment
- mental suffering due to damage to intangible rights of personality
- sentiments of fear (e.g. the worry caused by the fear of developing cancer)
- mental suffering caused by the death of a close relative

Where actionable physical or mental injury has been suffered, a single assessment of solatium is made embracing both pain and suffering and also the effect of any resulting disability so far as concerns daily and family living and the pursuit of sports or other hobbies or pasttimes.

Damages may be awarded for wrongful imprisonment reflecting not just the loss of liberty but also the mental distress involved.

In a recent, controversial decision – Johnston v NEI International Combustion\(^1\) – the House of Lords has held that damages are not recoverable simply for worry or anxiety about developing a cancer. (The case was concerned with plaintiffs who had been detected as having pleural plaques as a result of exposure to asbestos at the workplace. Pleural plaques produce no symptoms or disabilities whatever, but statistically those with such plaques have a higher risk of later developing asbestos related cancer).

In cases in which the injured party has died as a result of the injuries, Scots law allows certain close surviving relatives to claim non-patrimonial damages for »loss of society«, which in practice may include an element for grief and mental stress. The right of the relative to claim solatium and loss of financial support was developed at common law by judicial decision, but is now contained in legislation\(^2\). In England and Wales the rights of the relative were introduced by legislation\(^3\) but do not extend to compensation for grief or mental suffering.

Where the relative has witnessed the death, or learned of it in particularly distressing circumstances, and in consequence has himself developed a recognized psychiatric illness, he may have an independent right of action against the wrongdoer for the injury which he has suffered. But this is a difficult area of the law.

5a. What methods are used to assess the non-patrimonial damage? Are there any statutory rules on sums to be awarded (e.g. minimum, maximum sums)? Are there any judicial tariffs?

Traditionally assessment of solatium is seen as a »jury question«. A small number of civil personal injury claims in Scotland are still decided by a jury and the jury are simply left to decide on a figure which they think is fair and reasonable. Most claims in Scotland and all claims in England are however decided by a judge. A judge will have regard to the general level of awards reported in other broadly similar cases (adjusted if need be for inflation) and also to a booklet published by the Judicial Studies Board which gives guideline figures. There are no statutory rules, and in particular no minimum or maximum awards.

5b. According to your system of law, which circumstances should be taken into consideration in assessing non-patrimonial loss (e.g. nature, intensity and duration of the injury and/or suffering; individual circumstances of the victim; social position; financial situation)?

Social position and financial situation are normally not relevant. But otherwise the court has regard to the nature, intensity and duration of the injury and its particular effects on the individual

\(^1\) [2007] UKHL 39
\(^2\) Damages (Scotland) Act 1976, as amended
\(^3\) Fatal Accidents Act 1846; the current provision is Fatal Accidents Act 1976.
concerned. Thus, for example, a facial scar may be much more concerning to a young lady than would be the same scar to an elderly male and different levels of compensation would be awarded accordingly.

5c. What is the role of an expert appointed by the court in assessing non-patrimonial loss?

Medical experts will of course provide evidence about the nature of the injury, its treatment, prognosis and effects but the court does not appoint an expert to assess or assist in assessing the amount of damages to be awarded for non-patrimonial loss.

II - Cases

6. A defective product harms V, a 25-year-old woman. Her right eye is severely injured (the sight is reduced to 50%). What kind of non-patrimonial (non-pecuniary) damages is she entitled to?

V would be entitled to an award of solatium covering the pain which she has suffered and continues to suffer; the consequences for her daily living and for her ability to pursue sports hobbies and the like. If the injury has affected her appearance, that would also be taken into account.

The Judicial Studies Board guidelines indicate a range between approximately the equivalent of Euro 16 800 to Euro 27 600.

7. A, a 20-year-old student, suffers severe brain injuries. He is reduced to a living dead. Are his parents who take care of him entitled to a compensation for their mental suffering?

No. In his claim for damages the son could include a head of claim relating to necessary services (such as assistance with washing, feeding etc) provided to him by the parents and the amount so awarded under that head would be payable by him to them. This claim is expressly provided for by statute and does not allow for the inclusion of any mental suffering or distress. Otherwise, in non-fatal cases, the relative of the injured party has no independent right of action.

8. A publisher publishes an article, which contains many untrue and offending statements of B's life. B sues for compensation. When assessing the non-patrimonial loss does it make any difference if B is a rock star, a politician or an unknown citizen?

The answer to this question may depend, at least in part, on the precise nature of the defamatory statement. However, in principle, the position or standing in society of the person defamed is not irrelevant to the assessment of damages for the hurt to feelings and reputation. A false allegation of dishonesty is much more damaging to a public figure whose standing in society depends on his honesty and integrity than to a man with a record of crimes of dishonesty and the amount of damages would vary accordingly.

9. A who is slightly injured in a car accident misses a trip to Australia he had booked recently. Is he entitled to a compensation because he was prevented from enjoying his holiday (non-pecuniary damages)?

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4 Administration of Justice Act 1982, ss 8 and 9
5 Robertson v Turnbull 1982 SC (HL) 1
The costs incurred in cancelling the holiday (e.g., non-refundable air fare) would be recoverable but compensation for loss of enjoyment of the whole holiday would probably be seen as too remote. Arguably, some compensation for disappointment at having to postpone the holiday might be covered.

10. A’s house is burgled and he cannot sleep for months after the event. Is he entitled to monetary compensation of his distress?

An interesting question! Most burglars are not worth suing! A possible answer is this. Burglary involves two civil delicts, namely trespass on land and theft, or the wrongful taking, of corporeal moveable property. Trespass, at least in Scotland, does not give rise to any claim for damages unless the trespass causes damage to the property, in which event compensation is confined to the damage and does not extend to emotional suffering. Similarly, in the case of wrongful taking of corporeal property damages are restricted to the value of the property not returned or economic losses flowing from loss of use but not to emotional upset. So despite the sympathy which one would have for A, the answer is probably negative.

III

11. Are there any proposals for reform of the legislation governing damages for personal injury?

The Scottish Parliament is considering legislation to reverse the decision in Johnston (see Answer 4) to make damages recoverable for pleural plaques and any other symptomless asbestos related condition.

12. What points would you wish to discuss in greater detail?

To be advised.

13. What subject do you suggest for the next meeting?

To be advised.

RDM