

news release • news release

ISSUED ON BEHALF OF THE SCOTTISH LAW COMMISSION
NOT FOR PUBLICATION OR BROADCAST
BEFORE 0001 HOURS 10 August 2004

DAMAGES FOR PSYCHIATRIC INJURY

The Scottish Law Commission publishes today its Report on *Damages for Psychiatric Injury* (Scot Law Com No 196).

Background

In July 2001 the Commission received a reference from the Scottish Ministers to examine the law of Scotland relating to damages for psychiatric injury caused by another person and to make recommendations as to possible changes. The Commission published a discussion paper in August 2002 proposing reforms. This Report sets out the Commission's recommendations for reform which take into account consultees' responses to the discussion paper.

The Report deals with the delictual liability of those who inflict, whether intentionally or through lack of care, mental harm on individuals where the victims do not also suffer any physical injury or other damage. While headline disasters, such as Piper Alpha, give rise to a large number of claims by immediate victims and their families, many other claims arise out of smaller-scale road and workplace accidents. Stressful working conditions are another, and growing, source of claims.

What's wrong with the existing law?

The existing law has been developed by the courts over the last hundred years or so in a largely ad hoc fashion. The result is an unprincipled set of rules full of anomalies. The main defects are:

- Victims are divided into two categories, primary victims and secondary victims. Roughly speaking, primary victims are those directly involved in the accident, 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 victim's psychiatric injury is reasonably foreseeable by the wrongdoer, a primary victim may recover for an unforeseeable psychiatric injury provided some physical injury was foreseeable even if it did not occur.
- 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.
- Secondary victims can recover only if they meet the so-called *A/cock* criteria:
 - There must be a close tie of love and affection between the secondary victim and the person killed or injured;
 - The secondary victim must have been present at the accident or at its immediate aftermath; and
 - The secondary victim's psychiatric injury must have been caused by direct perception (ie through his or her own unaided senses) of the accident or its immediate aftermath.
- 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 do not have to meet the *A/cock* criteria. However, they may well have to have feared for their own safety.

The Commission's recommendations

The Commission recommends the replacement of the current rules by a statute. The new legislation would set out rules based on principle which the courts could use to decide individual cases and which parties could use to settle claims without litigation. Under the recommendations people would, in general, be liable for mental harm suffered by others as a result of their wrongful actions. In order to place acceptable limits on liability, this general rule would be subject to the following qualifications.

First, there would be no liability for mental harm, whether caused intentionally or unintentionally, if a person could reasonably be expected to endure it without seeking damages. People would be expected to put up with mental harm resulting from bereavements and the normal stresses or vicissitudes of life or the particular life that they lead. For example, a mother merely learning of her child's death would not be sufficient to impose liability, but damages might be claimable if she had seen the accident in which her child was killed or the child had been deliberately killed in a gruesome manner.

Second, mental harm resulting from a person's negligent act or omission would give rise to liability only if it constituted a medically recognised mental disorder and was a foreseeable consequence of the negligent act or omission. Foreseeability is to be judged by the standard of the ordinary reasonable person, unless the wrongdoer was aware of the victim's undue susceptibility.

Third, a person who suffers mental harm as a consequence of witnessing or learning of the death or injury of another in an incident in which he or she was not directly involved would not be entitled to damages unless there was a close relationship between them or the sufferer had been acting as a rescuer. A mere bystander would never be able to claim, however horrific the incident. A close relationship is to be presumed for near relatives, such as children, parents, spouses or cohabitants, and siblings, but others for example long-standing friends or colleagues could also qualify.

What happens next?

The Report has been submitted to the Scottish Ministers. They will decide, after such further consultation as seems appropriate, whether or not to implement the recommendations by legislation. The Report contains a draft Bill, suitable for introduction into the Scottish Parliament, which would give effect to the recommendations.

NOTES TO EDITORS

1. The Scottish Law Commission was set up in 1965 to promote the reform of the law of Scotland. The Chairman is the Honourable Lord Eassie, a senior Scottish judge. The other Commissioners are Professor Gerard Maher QC, Professor Kenneth G C Reid, Professor Joseph M Thomson and Mr Colin J Tyre QC.
2. Further information can be obtained by contacting Sheila Skinner, Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR (Tel 0131 668 2131, Fax: 0131 662 4900, e-mail: info@scotlawcom.gov.uk).
3. The report may also be viewed on our website at www.scotlawcom.gov.uk or purchased from TSO Scotland Bookshop.