JUSTICE 1 COMMITTEE

AGENDA

5th Meeting, 2006 (Session 2)

Wednesday 8 February 2006

The Committee will meet at 9.45 am in Committee Room 5.

1. Scottish Commissioner for Human Rights Bill (in private): The Committee will consider a draft Stage 1 Report.

2. Work programme (in private): The Committee will consider its work programme.

Callum Thomson
Clerk to the Committee
Papers for the meeting—

Agenda item 1
Draft report (PRIVATE PAPER) J1/S2/06/5/1

Agenda item 2
Note by the Clerk on work programme (PRIVATE PAPER) J1/S2/06/5/2

Documents for information—
The following documents are circulated for information:

- Correspondence relating to Damages (Scotland) Act 1976
- European Union Justice & Home Affairs Council, Provisional Agenda

Forthcoming meetings—
Wednesday 22 February, Committee Room 6;
Wednesday 1 March, Committee Room 4;
Wednesday 8 March, Committee Room 5.
JUSTICE 1 COMMITTEE

Correspondence relating to Damages (Scotland) Act 1976

Background

1. Correspondence circulated to Members for their information.

2. In June 2005, the Committee received correspondence from Frank Maguire, on behalf of Clydeside Action on Asbestos and Clydebank Asbestos Group, calling for the Damages (Scotland) Act 1976 to be amended. This letter is attached at Annexe A.

3. Mr Maguire suggested that section 1(2) of the 1976 Act currently precludes the immediate family members of a person who suffered and subsequently died as a result of an asbestos-related illness, from claiming compensation where the deceased has settled their own claim whilst still alive. Conversely, in circumstances where the deceased has not settled their own claim it is open for their immediate family members to pursue a claim for compensation. In this way, Mr Maguire believes that the 1976 Act unfairly precludes a surviving spouse or child from claiming non-patrimonial compensation as a result of the death of their relative for reasons that are not based on the merits of their claim.

Committee consideration

4. The Committee considered Mr Maguire’s correspondence at its away day and agreed to write to the Minister for Justice seeking the Executive’s view on Mr Maguire’s proposal and whether the Executive intends to legislate on this matter.

5. The Convener’s letter to the Minister, dated 15 September 2005, is attached at Annexe B.

New correspondence received from the Scottish Executive

6. A reply from the Deputy Minister for Justice has now been received, which is attached at Annexe C.

7. The Minister’s response states that he is pursuing the matter with Mr Maguire and that he will write to the Committee following further consideration.
Ms Pauline McNeill  
Convenor  
Justice 2 Committee  
c/o Room 3.12  
Committee Chambers  
George IV Bridge  
Edinburgh EH99 1SP

20 June 2005

Dear Madam

ASBESTOS  
DAMAGES (SCOTLAND) BILL

I write to you on behalf of Clydeside Action on Asbestos and Clydebank Asbestos Group concerning a particular injustice which is visited upon those suffering from asbestos and their families when they are trying to pursue their rights to loss, injury and damage arising out of negligent exposure in the past.

Clydeside Action on Asbestos would firstly wish to record again its appreciation of the work which has been done by the Committee in the past to improve procedures in the Courts especially where someone was dying of an asbestos condition such as mesothelioma. This followed on a Petition to the Scottish Parliament by Clydeside Action on Asbestos. The issue which we now raise also concerns those who are dying because of their asbestos condition.

The law recognises, quite rightly, that a spouse and children of those dying of asbestos also suffer. In particular they suffer from distress in witnessing their loved one deteriorate, experience grief on their death and miss their love and companionship for the future. They are therefore given a right to claim for this personal loss.

However, there are circumstances, having regard to the way in which the law is framed, where they are prevented from making such claims. This has nothing to do with the merits of the case in question. Indeed one can have identical cases where in one a spouse and children have rights to such personal loss and in another they do not have any.

The reason for this is that the Damages (Scotland) Act 1976 as it is presently framed stipulates that if the person who is suffering from the asbestos condition settles their
own claim while they are alive they automatically extinguish any future claim for their spouse and children. If however they do not manage to settle their claim before they die, and this depends on a number of factors including the stage of their condition, the court procedures and the willingness or otherwise of the other side to resolve the case, the very same spouse and children would have been able to claim.

The foregoing is in our view illogical and unjust.

However, it goes beyond this and leads to terrible hardship for a person suffering and their family due to the disease at a time when their loved one can least deal with it. They are presented with a dilemma. If the person suffering from the disease tries to pursue their own case as best they can they know that they are thereby, if successful before they die wiping out the rights of their spouse and children. On the other hand the spouse and children know that if the injured person does not pursue their own case they will be deprived of damages which they need. The injured person tends towards trying to preserve the rights of their spouse and children and the spouse and children tend towards encouraging the injured person to pursue their claim and to forget their own.

We enclose a draft Damages (Scotland) Bill which would deal with the offending section. This Bill would amend the Damages (Scotland) Act 1976 to ensure that when a person who is suffering from a terminal disease such as mesothelioma obtain damages for their own case, this does not extinguish the rights of personal loss for the future widow and children when they inevitably die from their condition. The Bill has been drafted by Iain Jamieson who is a very experienced draftsman. He has had considerable experience in drafting Bills in the Scottish Parliament.

We can also make available to the Committee a Draft Consultation Paper providing more technical detail, the problem, the existing law, a solution and an appendix with Summary of Existing Law.

I would also be willing to make myself available to the Committee to discuss matters.

Yours sincerely

Frank Maguire
THOMPSONS

FTM/JK
Draft 1 June 2005

Damages (Scotland) Bill

An Act of the Scottish Parliament to amend the law concerning the right of certain relatives of a deceased person to claim damages for non-patrimonial loss in respect of the death of the deceased from personal injuries; and for connected purposes.

1 Rights of relatives of deceased person: special case

(1) The Damages (Scotland) Act 1976 (c.5) shall be amended as follows.

(2) At the beginning of section 1(2) (which provides that the liability of the responsible person to pay damages to a relative does not arise where the deceased has before death excluded or discharged the liability to pay damages for the act or omission in question), insert “Subject to section 1ZA of this Act”.

(3) After section 1 (rights of relatives of a deceased person), insert-

"1ZA Rights of relatives of a deceased person: special case

(1) This section applies where

(a) whether before, on or after the date of coming into force of the Damages (Scotland) Act 2005, a person has sustained personal injuries in consequence of which that person's expected date of death is earlier than it would have been if those injuries had not been sustained; and

(b) on or after date, the liability of the responsible person to pay damages to that injured person in respect of those personal injuries has been discharged (whether by agreement or otherwise) by that person before that person dies; and

(c) that person has subsequently died in consequence of those personal injuries.

(2) Where this section applies, section 1(2) of this Act, and any other rule of law to the same effect, does not prevent the responsible person from being liable under section 1 (rights of relatives of a deceased person) of this Act to pay damages in accordance with subsection (4) of that section (damages for non-patrimonial loss) to
any relative of the deceased who is a member of the deceased’s immediate family.

(3) In this section, “the responsible person” has the same meaning as in section 1 of this Act.

2 Short title and commencement

(1) This Act may be cited as the Damages (Scotland) Act 2005.

(2) This Act shall come into force on the day after Royal Assent.

Explanatory Notes upon the Bill

Section 1- Rights of relatives of deceased person: special case

3.1 Section 1 amends the 1976 Act.

3.2 Section 1(2) amends section 1(2) of the 1976 Act by providing that it is subject to section 1ZA and section 1(3) inserts a new section 1ZA after section 1 of that Act.

3.3 Subsection (1) of the new section 1ZA provides that the section applies where three conditions are met-

- the first condition in paragraph (a) is that a person has sustained personal injuries where the injuries have diminished that person’s expectation of life as, for example, where they consist of some terminal industrial disease, such as mesothelioma. The injuries may have been sustained at any time, whether before, on or after the date of coming into force of the Bill;

- the second condition in paragraph (b) is that the injured person has discharged the liability of the responsible person to pay damages to that person in respect of those injuries. This liability could have been discharged when the injured person recovered damages awarded by a court or following upon a settlement of the claim. However, the discharge must have taken place on or after the date of coming into force of the Bill; and

- the third condition mentioned in subsection (1)(c) is that the injured person subsequently dies in consequence of those injuries.

3.4 Subsection (2) of the new section 1ZA provides that, where this section applies, section 1(2) of the 1976 Act (which is described in paragraph 2.4 above) does not prevent the responsible person from being liable to pay damages to a relative under section 1. However, the responsible person is only liable to pay damages for
Draft 1 June 2005

non-patrimonial loss under section 1(4) (which is described in paragraph 2.3 above) to any relative of the deceased who is a member of the deceased’s immediate family.

3.5 The effect of this provision is that, when section 1ZA applies, section 1(2) of the 1976 Act is dis-applied but only to a limited extent. In other words, it means that, even although the deceased has, before his or her death, discharged the liability of the responsible person to pay damages to the deceased in respect of the injuries, section 1(2) does not prevent any relative who is a member of the deceased’s immediate family from claiming damages under section 1 but only for non-patrimonial loss.

3.6 It is thought that it would be sufficient to dis-apply section 1(2) of the 1976 Act in order to enable a member of the deceased’s immediate family to claim damages under section 1 for non-patrimonial loss. In particular, it is not thought that it is strictly necessary to dis-apply the corresponding common law rule. This is because the relatives claim for damages is now statutory under section 1 of the 1976 Act and, in that context, it is only section 1(2) which prevents the relatives from being able to claim. However, in case the common law rule is still lurking beneath the statutory provisions and revives when they are disapplied, it is thought that it would be safer if subsection (2) also disapplied any common law rule to the same effect.

3.7 The reference to a relative who is a member of the deceased’s immediate family is defined in section 10(2) of the 1976 Act to mean any relative who falls within paragraph 1(a), (b) or (c) of Schedule 1 to that Act, that is

“(a) any person who immediately before the deceased’s death was the spouse of the deceased;
(b) any person who was a parent or child of the deceased;
(c) any other person who was accepted by the deceased as a child of his family.”

3.8 Subsection (3) of the new section 1ZA provides that, in that section, the expression “the responsible person” should have the same meaning as in section 1. Section 1(1) defines it as referring to the person who is liable to pay damages to the injured person.

Section 2 – Short title and commencement

4.1 Section 2(1) provides that the Bill may be cited as the Damages(Scotland) Act 2005.

4.2 Section 2(2) provides that the Act should come into force on the day after it receives Royal Assent.
Justice 1 Committee

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15 September 2005

Dear Cathy

The Justice 1 Committee has received correspondence from Mr Frank Maguire, on behalf of Clydeside Action on Asbestos and Clydebank Asbestos Group (as attached), which calls for the Damages (Scotland) Act 1976 to be amended.

Mr Maguire suggests that section 1(2) of the 1976 Act currently precludes the immediate family members of a person who suffered and subsequently died as a result of an asbestos-related illness, from claiming compensation where the deceased has settled their own claim whilst still alive. Conversely, in circumstances where the deceased has not settled their own claim it is open for their immediate family members to pursue a claim for compensation. In this way, Mr Maguire believes that the 1976 Act unfairly precludes a surviving spouse or child from claiming non-patrimonial compensation as a result of the death of their relative for reasons that are not based on the merits of their claim.

I am writing on behalf of the Committee to ask for the Executive’s view on the proposal outlined in Mr Maguire’s letter and whether the Executive has any intention to legislate on this matter and, if so, in what timescale.

I would be grateful to receive a response by Friday 7 October 2005.

Yours sincerely

Pauline McNeill MSP
Convener, Justice 1 Committee
SECTION 1(2) DAMAGES SCOTLAND ACT 1976 – PROPOSED AMENDMENTS

I refer to your letter of 15 September to Cathy Jamieson in respect of correspondence from Frank Maguire, on behalf of Clydeside Action on Asbestos and Clydebank Asbestos Group, who are calling for an amendment to the Damages (Scotland) Act 1976 (the 1976 Act) to enable a surviving spouse and children to claim non-patrimonial damages even when the deceased has settled his or her own claim while alive.

In my interim reply of 7 October I advised that the draft Bill provided by Mr Maguire raised a new issue and that my officials were investigating this. I undertook to write again to the Committee when I had received additional advice on this.

I have now received further advice and I am considering this. However, while I have great sympathy for the plight of the victims of terminal mesothelioma, I need to look at the issue in relation to the law as I understand it in fully considering these difficult and complex matters.

Clydeside Action on Asbestos also issued a letter to all MSPs seeking their support in respect of the proposed amendment. That letter says that mesothelioma victims face a dilemma of either:

- receiving full and final award of compensation in life, with the spouse and children being unable to receive compensation for their loss and bereavement; or
- not settling a claim before death in order that the spouse and children can receive “not only the award of damages the sufferer was entitled to, but also an award of compensation for their loss and bereavement”.

Dear Pauline,

[Signature]

Annexe C
The law ensures that compensation is payable for personal injuries, even where the sufferer has died from his or her injuries without a claim being made. An injured person may make a claim for full compensation in life, in the knowledge that when he or she dies, that sum can pass to his or her family. If he or she dies before making a claim, his or her executor may make a claim on his or her behalf in respect of the loss sustained up to death. His or her relatives may also make a claim in respect of their suffering arising from the death and its future consequences.

It is suggested that if the injured person does not settle his or her claim whilst alive, his or her immediate family would still inherit the same amount of compensation, as well as being entitled to make claims for compensation of their own. However, I am advised that it is not the actual sum to which the injured person would have been entitled had he or she not died which transfers on death. Rather, it is the entitlement to sue which is transferred to the injured person's executor. I also understand that the amount which may be recovered as a result of the executor exercising that right to claim on the deceased's behalf is likely to be less than if the injured person exercised the right to claim him or herself since it would not include loss in respect of future earnings or future pain and suffering.

I have therefore asked officials to investigate with Mr Maguire, solicitor acting on behalf of the Group, why he considers that the 1976 Act produces the described dilemma for mesothelioma victims and details of, in what circumstances, the family would be entitled to receive a higher amount of compensation than that which the victim would have received if he or she settled their claim while still alive.

You will, of course, be aware that, in response to previous representations, new rules to speed up the resolution of personal injury cases were introduced in the Court of Session in April 2003. The new rules have had the effect of reducing the time to the date of the diet of proof (from the date of the case being raised) to a period typically of around 12 months. An application for acceleration of such a timetable is also available and this is often appropriate where the life expectancy of the pursuer is limited. Research analysis of the success or otherwise of these changes has begun and the findings will inform any debate on the need for further alteration of rules of court.

I hope this information is helpful and I will write again to the Committee when I have received further advice.

Yours sincerely,

Hugh Henry

HUGH HENRY
Provisional Agenda
Justice and Home Affairs Council (JHA)
Brussels 20-21 February 2006

Please note that this Pre-Council Report is based on a provisional agenda which was published in December and may be subject to change. At this stage we do not know which Ministers will be representing the UK. This is the first formal JHA Council of the Austrian Presidency.

CRIMINAL JUDICIAL CO-OPERATION

(poss) Framework Decision on the application of the principle of mutual recognition to the enforcement of sentences.

This draft Framework Decision on the application of the principle of mutual recognition to the enforcement of sentences was introduced in January 2005, but did not enter the working group until later in the year. The initiative deals with the conditions under which a custodial sentence imposed in one Member State can be enforced in another. Negotiations are at a relatively early stage and so a general approach may still be some way off. Amongst the issues requiring further negotiation are the extent to which dual criminality should be a factor when considering transfers and the extent to which prisoners themselves should have a say in the matter of transfer.

A Scottish Prison Service Official is attending the Working Group meetings as part of the UK delegation.

Framework Decision establishing a European Evidence Warrant

The European Evidence Warrant (EEW) is a draft Framework Decision which would apply the principle of mutual recognition to obtaining certain types of evidence. There is general agreement between Member States that the executing State should be responsible for deciding the method and procedures for executing an EEW, that the issuing State should be obliged to ensure that the EEW is necessary and proportionate and that human rights should be protected by the insertion of a human rights clause. However, the precise formula on obligations in relation to coercive measures in the executing State still needs to be finalised.

Significant progress was made during the UK Presidency, but it was not however possible to reach a general approach. Although negotiations are well advanced, final agreement has yet to be reached on a number of matters, including, the precise obligation with regard to requests which may require search and seizure; the procedure where EEWs will be validated when they are not issued by a judicial authority; and the extent to which it ought to be possible to refuse requests for assistance on grounds of territoriality and essential national security. It is hoped that it will nonetheless be possible to arrive at a general approach during the Austrian Presidency, with formal adoption at some point in 2006.

A Scottish Executive official has attended Working Group meetings as part of the UK delegation.
(poss) Framework Decision on certain procedural rights in criminal proceedings.

This is a draft Framework Decision which seeks to define a set of common minimum rights for suspects and accused in criminal proceedings throughout the EU to facilitate the application of the principle of mutual recognition. Progress has been slow, mainly due to the difficulty in arriving at a common approach where procedure may vary in its detail across different jurisdictions in the EU.

A Scottish Executive official has been participating as part of the UK delegation at Working Group meetings in Brussels.

CIVIL JUDICIAL CO-OPERATION

Proposal for a Regulation of the European Parliament and of the Council creating a European order for payment procedure.

This is a proposal for a simplified procedure for obtaining and enforcing a judgement in uncontested claims. Member States confirmed that the scope of the instrument should be limited to cross-border cases. The final Council of the UK Presidency in December 2005 approved, in general, the text of the regulation and listed the finalisation and adoption of it as a priority for 2006. Specification of the forms mentioned in the regulations is one issue to be finalised.

Scottish Executive officials have attended Working Group meetings in Brussels as part of the UK Delegation.


The proposed regulation would govern which country’s law should apply to a civil dispute about a non-contractual obligation which has an international element. Non-contractual obligations cover an extremely wide range of cases, anything from road traffic accidents to liability for defective products to medical negligence. However, the regulation would not harmonise national laws on these subjects, only their conflict rules determining which country’s law should apply when there are international elements to the case. The most politically sensitive aspect of Rome II is defamation, where the search continues for a solution which will do justice between parties while protecting freedom of expression of the media.

The Proposal was first published by the Commission in 2003. It is at the later stages of negotiations in Working Group. The Austrian Presidency hopes to put this to Council in February or April at the latest. The intention is that this proposal be finalised and adopted in 2006. The European Parliament has already considered the dossier and proposed amendments.

POLICE AND JUDICIAL CO-OPERATION

Framework Decision on the fight against organised crime.
This initiative was published by the Commission in January 2005 and working group consideration commenced shortly afterwards. It proposes, amongst other things, creating specific offences of directing a criminal organisation and active participation in a criminal organisation. It would repeal an existing EU Council Joint Action of 1998 on the subject, with the Commission arguing that a harmonised approach is necessary to tackle organised crime across the EU. If adopted in its original form it would require changes to the law in both England and Scotland, as both jurisdictions generally rely on conspiracy provisions to tackle this aspect of criminality. However, as this is a very technical area, with different approaches across the EU, progress has been quite slow.

The Scottish Executive has been fully consulted by the Home Office unit which is leading negotiations for the UK, and has contributed to the development of the UK negotiating line.

ASYLUM AND IMMIGRATION

(poss) Green Paper on European Migration Network

Commission Communication on the establishment of structures involving the national asylum services of the Member States for promoting co-operation.

The Executive has a co-ordination role with regard to the provision of services for asylum seekers and refugees. Any change to operations in Scotland will be for the Home Office to implement.

GENERAL

Follow-up to the Court’s judgement of 13 September 2005 (Case C-176/03 Commission v Council).

In September 2005 the European Court of Justice gave judgement in Case C-176/03. The court found that the council had in this case legislated under the incorrect treaty base, therefore annulling the Framework Decision on Environmental Pollution.

The ECJ judgement reaffirms that, as a general rule, criminal law and measures to facilitate police and judicial co-operation should continue to be agreed unanimously under the Third Pillar.

A Scottish Executive Official is working with HMG colleagues to consider the full implications of how this matter develops in affecting devolved issues.

JD: EU JHA STRATEGY UNIT
25 January 2006