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# **Negligence: the law in Scotland (updated August 2026)**

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In some circumstances, it is possible for an individual or organisation to bring a court action in a civil court against another individual or organisation under the law of negligence. This briefing provides an overview of the law of negligence as it applies in Scotland.



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# Summary

Negligence can arise from a failure to behave with the level of care that a reasonable person would have exercised under the same circumstances.

In Scotland, negligence law is part of the wider **law of delict** - known as the **law of tort** in England and Wales.

Negligence law is relevant, for example, in the context of both **personal injuries**, including fatal injuries, and **damage to property**.

The main legal remedy for negligence is for the person or organisation which has suffered harm to bring a civil court action seeking **damages**, meaning an award of financial compensation. Damages aim to put the affected individual or organisation in the same position as they would have been in had the negligence not occurred, to the extent that money can do this.

In practice, an important issue is whether the person or organisation who is the alleged wrongdoer is worth suing financially. For example, if a person or organisation does not have significant assets or insurance cover relating to the harm which has occurred, it may not be worth taking court action against them.

The vast majority of negligence cases do not get as far as court, or at least to the stage of a final decision by the court. Instead, most cases are **settled**, that is ended on agreed terms, between the parties concerned, supported by solicitors or claims management companies.

There may also be a number of alternatives to a negligence claim, with the best choice depending on what the person or organisation aims to achieve. Possible alternative routes to a financial payout include claiming under one's own insurance. However, securing an apology or prompting systemic change could be achieved, for example, through complaints to relevant regulators or ombudsmen, where applicable.

Most of the substance of negligence law is made by the decisions in individual cases (**case law**). However, since its creation in 1999, the Scottish Parliament has passed a wide range of legislation that affects negligence law and practice to varying degrees. Scottish governments have prioritised two specific policy areas: bolstering the rights of childhood abuse survivors and improving protections for people with mesothelioma, the asbestos-related cancer.

The [Scottish Law Commission](#) (SLC), an independent statutory body, is responsible for recommending law reform to Scottish Ministers. Several SLC reports relevant to the law of negligence remain unimplemented, notably one from 2004 [on damages for psychiatric injury](#) and one from 2007 [on time limits in personal injury actions](#).

A Damages Bill, relating to the 2004 and 2007 SLC reports, [was identified as a legislative priority in the Scottish Government's 2013–14 Programme for Government](#). However, no related Damages Bill was ultimately introduced in the Scottish Parliament.

The SLC's [Eleventh Programme of Law Reform](#), covering its plans for 2023-2027, says that the SLC will review [the law on time limits in personal injuries actions](#) again as part of this current programme. However, this work has not yet commenced.<sup>1 2</sup>

A significant, recent development is the SLC's 2024 [Report on Damages for Personal Injury](#). The report proposes wide-ranging reforms, which the Scottish Government, in May 2025, [indicated that it broadly supports](#).

[On 25 June 2026](#), the Scottish Government announced in a parliamentary debate that it intends to introduce a Bill in Session 7 of the Scottish Parliament. [This would give effect to the SLC's 2024 recommendations for reform of the law on time limits in personal injury actions in relation to certain asbestos-related conditions](#).

# The structure of this briefing

This briefing is divided into **two main sections**:

- [The first section](#) provides an overview of the key features of the law of negligence, including how it works in practice. **This section can be read as a stand-alone document.**
- [The second section](#) provides a more in-depth look at a collection of topics associated with negligence law and practice, including, crucially, [how liability in negligence is established in an individual case](#). **This section is suitable for a deeper dive into Scottish negligence law, practice and policy development.**

This briefing updates an earlier version of this briefing from 2026, to take account of [the policy announcement made by the Scottish Government in June 2026](#).<sup>3</sup>

Note that SPICe cannot give legal advice tailored to the circumstances of an individual case. For this purpose, a solicitor must be consulted. If a constituent needs help finding a solicitor, the SPICe publication, [Legal advice - where to go and how to pay](#), may be helpful.<sup>4</sup>

[A later section of the briefing](#) also explores how to find and pay for legal advice, with a particular focus on information relevant to claims for negligence, including personal injury claims.

# An overview of the law of negligence

This **overview section of the briefing** covers the following topics:

- the key features of negligence law and practice
- some important practical considerations when contemplating a negligence claim
- negligence in its broader legal context, including how it differs from criminal law, as well as its place within the wider law of delict
- a description of the courts that consider negligence cases
- an introduction to some specific sources of negligence law
- the key legal terms for the participants in a negligence case
- the different types of harm that can form the basis of a negligence claim
- the standard of evidence required to prove negligence.

## The key features of negligence law and practice

Negligence can arise in law when there is unintentionally caused harm to an individual or legal entity, such as a company, which results [in some form of loss or damage](#).

Examples include **personal injuries**, including fatalities, damage to property, or, in some cases, [financial or economic losses](#).

As a minor point of terminology, **personal injury** typically refers to the type of negligence claim, whereas **personal injuries** describes the specific physical harm suffered by an individual in a particular case.

[The legal remedy where negligence has occurred](#) is **damages**, that is, an award of financial compensation, which can be sought via a civil court action by the affected individual or entity.

Damages aim to put the affected individual or organisation in the same position as they would have been in had the negligence not occurred, to the extent that money can do this. The law recognises that money cannot fully achieve this, particularly in personal injury cases.

[Time limits apply when bringing a negligence case](#) , which is one key reason why legal advice should be sought promptly.

Not every act, or failure to act, causing harm is negligent. [For legal liability in negligence to arise](#), there are three essential elements that must be established:

- the alleged wrongdoer owes a **duty of care** to the person or entity who has been affected

- the alleged wrongdoer **breached** that duty - also known as falling below the required **standard of care**
- the alleged wrongdoer's breach of the duty **caused** the harm to the person or entity affected - this issue is sometimes called **causation**.

The standard of care is usually what a reasonable person would exercise in the circumstances. However, in cases of **professional negligence** - such as those involving solicitors, accountants, engineers, or architects - the benchmark is higher. [The professional is judged against the standard of an ordinarily competent member of their profession](#), rather than that of a general reasonable person.

When the professional involved is a doctor, the matter is typically referred to as a **medical negligence** case.

The term **clinical negligence**, while is sometimes used interchangeably with medical negligence, is often used more broadly to cover the actions of a wider range of healthcare professionals, including nurses, midwives, dentists and opticians.

In terms of the volume of the courts' business, around **10%** of the court cases raised in Scotland's civil courts are **personal injury cases**. While numbers fluctuate annually, **road traffic accidents** dominate here, accounting for about **70%** of personal injury cases in 2024–25, with **workplace accidents** making up around **15%**.<sup>5</sup>

The vast majority of negligence cases, including personal injury claims, do not end up in court or at the stage of a final decision by a court. Instead, the cases are settled via **negotiation** between the parties concerned. A whole industry has developed around that process of negotiation, usually carried out by solicitors and/or claims management companies on behalf of their clients.

### Claims management companies

Claims management companies cannot represent their clients in court. If court action is necessary, they will refer the case to a solicitor.

Claims management companies are regulated by the [Financial Conduct Authority](#) (FCA). It is possible to check the [FCA register](#) to see if a company is authorised by the FCA.

As a reminder, [a later section of the briefing](#) explores **options for paying for legal advice** and, where necessary, legal representation in court.

The normal rule in court cases is that the losing party must pay both sides' legal costs, which creates significant financial risk. Personal injury cases are different: **qualified one-way costs shifting** (QOCS) protects the person by greatly reducing their risk of having to pay the winning party's legal costs.<sup>i</sup> [Further detail on how QOCS works is provided later in the briefing](#).

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<sup>i</sup> [Civil Litigation \(Expenses and Group Proceedings\) \(Scotland\) Act 2018](#), Part 2.

## Some considerations when contemplating a negligence claim

A crucial issue for any potential litigant under a negligence claim is whether starting a claim is the right course of action for them. [Only a solicitor can give legal advice according to the circumstances of the individual case.](#)

However, in general terms, part of the assessment here involves considering the **viable alternatives** to such an action, [a topic explored in more detail later.](#)

A further consideration that a solicitor may highlight is that a specific case might have a **low chance of success**. [This could be due to insufficient evidence being available](#) and/or because the relevant part of negligence law is unfavourable to the individual or entity considering action.

Another important issue is **whether the person or entity who is the alleged wrongdoer is worth suing financially**. Sometimes the potential damages are low compared to the costs of bringing the action.

More fundamentally, the person or entity sued may not have the money or assets to satisfy a court judgement made against them. Accordingly, if a person or body does not have insurance cover relating to the harm which has occurred, it may not be worth taking court action against them. <sup>6</sup>

The risk is that compensation will not be recovered, even if the case is won. [As discussed later](#), this risk is reduced if the person or body being sued has assets - such as land or buildings, business stock or money - which can be seized to enforce a court award. <sup>6</sup>

### Vicarious liability

When deciding whether to pursue court action, the concept of **vicarious liability** should be considered. This holds one party ('A') legally responsible for the negligent acts of another ('B'), even if A was not personally at fault.

The classic example is the **employer-employee relationship**: an employer may be vicariously liable for an employee's negligence, where certain requirements are satisfied.

As a general rule, employers are **not** vicariously liable for the actions of independent contractors. However, there are a few limited exceptions to this principle. <sup>7</sup>

Under the current law, the courts will determine whether one party is vicariously liable for the acts of the other party by considering:

- whether there is a relationship akin to employment
- whether the wrongdoer's wrongs are so closely connected with the wrongdoer's authorised functions that it can fairly be considered as being done in the course of that relationship. <sup>8</sup>

# Negligence in its broader legal context

As alluded to earlier, the law of negligence is part of Scotland's **civil law**, which gives people a framework to enforce their rights, through the civil courts if necessary.

Civil law is very broad and has a range of distinct areas. Under the general civil law umbrella, negligence falls within the **law of delict**. Delict, in turn, includes various wrongful acts or omissions, such as trespass and defamation (both outside the scope of this briefing). A later section of this briefing describes certain types of delict action that can be alternatives to negligence actions.

The equivalent to Scotland's law of delict in England and Wales is the **law of tort**, which is why many online and AI sources use the term **tort**.

In Scotland, negligence law is not focused on punishing wrongdoing. **Punitive** or **exemplary damages** - possible in some limited circumstances in other legal systems - are not available. Damages in negligence cases serve only to put the person back in the position they would have been in had the negligence not occurred.

Instead, punishment and deterrence are largely matters for the criminal law, where the [Crown Office and Procurator Fiscal Service](#) (COPFS) prosecutes offences and this may result in conviction and sentencing.

Although civil and criminal courts (and cases) are separate from each other, the same judges often hear both types of case, [sometimes in the same court buildings](#). This can be confusing to those unfamiliar with the system.

## Negligence and the Scottish court system

This section of the briefing explains the structure of the Scottish court system as it applies to negligence cases.

### The sheriff courts

Sheriff courts consider both civil and criminal cases.

A civil case, including a negligence case, with a monetary value of up to £100,000 must be brought in the sheriff court (or [the National Personal Injury Court](#), considered later), not [the Court of Session](#).<sup>ii</sup>

However, the sheriff can request that the Court of Session **remit proceedings** (transfer them) where their importance or difficulty justifies it. The Court of Session may permit such a transfer 'on cause shown' - that is, where sufficient reason is demonstrated to the court.<sup>iii</sup>

In addition, in practice, some cases heard in the sheriff court might be worth more than

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<sup>ii</sup> [Courts Reform \(Scotland\) Act 2014](#), section 39.

<sup>iii</sup> [Courts Reform \(Scotland\) Act 2014](#), section 92(3)-(7).

£100,000.

Sheriff courts are [geographically spread throughout Scotland](#). Judges in the sheriff court are either [sheriffs](#) or [summary sheriffs](#).

Claims in the sheriff court are dealt with as follows:

- Claims worth **£5,000 or less** [excluding personal injury claims](#) but including other types of negligence case are covered by [the simple procedure](#).
- Personal injury claims worth **£5,000 or less**, and other claims - including negligence claims - where the value of the claim is over **£3,000** up to **£5,000**, are covered by [the summary cause procedure](#).
- Claims, including negligence claims, worth **more than £5,000** are dealt with [using the ordinary cause procedure](#).

Simple procedure and summary cause procedure are meant to be accessible for individuals without using solicitor. However, a solicitor can still be consulted for legal advice and representation if desired. The [Scottish Courts and Tribunals Service](#) has published a [guide to using the simple procedure](#) and [guidance on the summary cause procedure](#).

Ordinary procedure is more complex and legal advice is recommended.

## The National Personal Injury Court

The [National Personal Injury Court](#) (also known as the 'All-Scotland Sheriff Personal Injury Court') in Edinburgh hears all eligible personal injury cases, including cases where a death has resulted from personal injuries.<sup>iv</sup>

A claim is **eligible** if one of the following applies:

1. its value exceeds £5,000<sup>v</sup>
2. it is a workplace-related personal injury case worth £1,000 or more<sup>vi</sup>
3. it is a workplace-related personal injury claim worth less than £1,000 but it is sent to this court from [a sheriff court elsewhere in Scotland](#), due to the case's importance or difficulty.

The National Personal Injury Court shares its remit with the local sheriff court.<sup>vii</sup> This means that, for these eligible cases, a person or organisation considering court action can usually choose to bring a case in either [their local sheriff court](#) or the [National Personal Injury Court](#).

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iv All-Scotland Sheriff Court (Sheriff Personal Injury Court) Order 2015/213 (Scottish SI); [Courts Reform \(Scotland\) Act 2014](#), sections 41-42.

v All-Scotland Sheriff Court (Sheriff Personal Injury Court) Order 2015/213 (Scottish SI), arts 3 and 4.

vi All-Scotland Sheriff Court (Sheriff Personal Injury Court) Order 2015/213 (Scottish SI), arts 3 and 5(1) & (2).

vii [Courts Reform \(Scotland\) Act 2014](#), section 42(2).

In 2024-25, **around 62%** of personal injury cases were begun in the National Personal Injury Court.<sup>9</sup>

## Sheriff Appeal Court

Appeals from [the sheriff courts](#) and [the National Personal Injury Court](#) are heard by [the Sheriff Appeal Court](#).

## The Court of Session

The [Court of Session](#), based in Edinburgh, is the highest civil court in terms of seniority operating within Scotland.

[The next section of this briefing](#) addresses the role of [the UK Supreme Court](#), based in London, in relation to civil cases from Scotland.

[As noted earlier](#), cases that are worth **less than £100,000** cannot be brought in the Court of Session but have to be brought in the sheriff court.<sup>viii</sup>

The Court of Session is made up of:

- the **Outer House**, where actions may be initiated where a large amount of money is being claimed
- the **Inner House**, which deals with people who are appealing against decisions of either [the Sheriff Appeal Court](#) or the Outer House of the Court of Session (with the latter type of action being known as **a reclaiming motion**).

Normally a single judge, called a Lord Ordinary, presides over the case in the Outer House. In certain cases, the judge will sit with a jury of 12 people.

The Court of Session can accept court action from a group of people in [group proceedings](#).<sup>ix</sup> This could be two or more people who have similar or related claims against the same company, organisation or person.

[A person should get legal advice](#) if they think they, along with other people, have related claims that could be dealt with in group proceedings.

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viii [Courts Reform \(Scotland\) Act 2014](#), section 39.

ix [Civil Litigation \(Expenses and Group Proceedings\) \(Scotland\) Act 2018](#), Part 4.

## UK Supreme Court

If a person or organisation in a (Scottish) case is not satisfied with the decision of the Inner House of [the Court of Session](#), they may be able to appeal to [the UK Supreme Court in London](#). Either the Inner House of the Court of Session or the UK Supreme Court will have to grant permission for the appeal to be heard.<sup>x</sup>

This is the final court of appeal for all Scottish civil cases, as well as for those civil cases in other parts of the UK. [As with appeals to the Inner House](#), it can be very expensive to appeal a case to the UK Supreme Court.

## Sources of negligence law

While some statutes affect negligence claims - [such as those setting time limits](#) - the substance of negligence law is mainly shaped by the **common law**, developed through judicial decisions (also known as **case law**).

In terms of court cases decided south of the Scottish border, only [UK Supreme Court](#) rulings in Scottish cases are binding in Scotland. However, decisions from other courts in England and Wales can still be treated as **persuasive** - that is, influential though not binding.

In practice, despite historical legal differences, the content of Scots negligence law largely now mirrors the position in England and Wales. Key negligence cases, regularly referenced by Scottish courts in reaching their own decisions, were actually decided by courts in England and Wales (and vice versa).

## Who's who in a civil court action

Although England and Wales has different terminology, in Scotland, the person or organisation bringing a case in the civil courts is called **the pursuer** or, if the simple procedure is being used, the **claimant**.

The person or organisation defending the claim is called **the defender** or, if the simple procedure is being used, **the respondent**.

If a case reaches the stage of an **appeal** from a lower court's decision, the terms are usually **appellant** (for the person appealing) and **respondent** (for the person defending). For cases being appealed from [the Outer House to the Inner House of the Court of Session](#), the person appealing is called the **reclaimer**.

For convenience, the rest of the briefing uses the terms **pursuer** and **defender** to describe the parties in a negligence action, even when referring to cases from England and Wales.

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<sup>x</sup> [Courts Reform \(Scotland\) Act 2014](#), section 117.

## Types of harm

As mentioned earlier, there are different types of harm that an individual or organisation may have suffered, on the basis of which they may wish to bring a negligence claim.

Specialists in negligence law often group harms into three broad categories:

- **physical harm** – covering personal injuries and damage to property
- **psychiatric harm** – a distinct form of personal injury, still sometimes referred to by the older term 'nervous shock'
- **economic loss** (or 'pecuniary loss') – financial losses that can be readily quantified, such as lost earnings or the cost of repairing damaged property.

More detail on how the courts treat each category of harm is provided [later in the briefing](#). For now, the key point is simply that different types of harm are not treated in the same way.

## Proving negligence and the standards applied by the courts

In a negligence case, it is the pursuer who has to **prove** to the court that certain matters are established. This usually takes the form of evidence (including expert evidence where relevant) brought before the court by the pursuer.

A civil court, including in a negligence case, applies a different and lower **standard of proof** compared to the criminal court, that is the standard relating to the evidence that must be satisfied for a case to be successful. In more detail:

- in criminal courts, a person's guilt must be proved **beyond reasonable doubt**
- in civil courts, facts must be proven **on the balance of probabilities**. In simple terms, this means showing that it is more likely than not (greater than 50% probability) that the fact in question is true.

**Res ipsa loquitur** (Latin for 'the thing speaks for itself') is a legal doctrine that creates a limited exception relating to the normal rules around evidence in civil cases. The doctrine allows the courts to infer negligence from the nature of an accident or injury, even without direct evidence of the defender's conduct.

For example, a piano falling from the window of a high building is so unusual that the courts might conclude that this must have involved carelessness on the part of the defender under negligence law, even without detailed evidence of the defender's conduct.

Separately, and [as explored in more detail later in the briefing](#), various possible **defences** may be available to the defender in the particular circumstances of the case. It is for the

**defender**, not the pursuer, to prove that one of the defences applies.

# Negligence law in more detail

This section of the briefing considers a collection of topics associated with negligence law and practice, **in more detail** than was provided [in the overview section](#).

Specifically, this section looks at:

- [the legal principles which the courts apply to determine whether legal liability in negligence arises](#)
- [the defences to a negligence action](#)
- [the time limits which apply to bringing a negligence claim](#)
- [how damages are calculated by the courts](#)
- [legal expenses and qualified one-way cost shifting \(QOCS\)](#)
- [the relationship between joint wrongdoers](#)
- [how a court order for damages can be enforced](#)
- [the various alternatives to a negligence claim which may be available in some circumstances](#)
- [how to pay for legal advice and legal representation in court](#)
- [a summary of some recent reforms to the law, as well as a discussion of some reform proposals which are outstanding, or at an earlier stage of development.](#)

## Legal liability in negligence

To recap, for legal liability in negligence to arise, there are **three essential elements** that must be established:

- the defender owes a **duty of care** to the pursuer
- the defender breached that duty - also known as falling below the required **standard of care**
- the defender's breach of the duty **caused** the harm to the pursuer (**causation**).

This section of the briefing considers all these areas in more detail.

### Duty of care: general

In many cases, the existence of a duty of care will be well-established in law and not in doubt. For example:

- car drivers owe a duty of care to all other drivers, cyclists and pedestrians
- healthcare professionals owe a duty of care to their patients

- parents owe a duty of care to their children in their care
- employers have a duty of care to employees relating to their health and safety
- manufacturers owe a duty of care to consumers (although [a separate statutory regime governing product liability](#) can provide a preferable legal route over negligence in an individual case).

If there is doubt about the duty of care, then this can be an issue considered in detail by the courts.

### **Reasonable foreseeability: Donoghue v Stevenson (1932)**

The key case on duty of care (and a very famous one for lawyers) continues to be that of **Donoghue v Stevenson** (1932).<sup>10</sup> Here the judge said:

“ The rule that you are to love your neighbour becomes in law, you must not injure your neighbour ... You must take reasonable care to avoid acts or omissions which would be likely to injure your neighbour. Who then is my neighbour? ... [P]ersons who are so closely affected by my act, that I ought reasonably to have to them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question.”

In other words, for a duty of care to be owed, the pursuer must be in the class of people to whom it was **reasonably foreseeable** that they may be injured or suffer loss as a result of the defender's acts or omissions.

### **The development of the duty of care (1970s-1990s)**

Later case law after the Donoghue case developed the test for establishing a duty of care. Here it is possible to spot shifting approaches in the different decades of the 20th and 21st centuries.

The late 1970s and 1980s involved a particularly expansive approach by the courts, in terms of the likelihood of a duty of care being found.<sup>11</sup>

However, the early 1990s saw the courts shifting their approach. The influential case of **Caparo Industries v Dickman** (1990) - [still relevant to some extent today](#) - resulted in the courts, for some time, applying a more complex, **three-stage approach** relating to duty of care.<sup>12</sup>

### **2018 onwards: a retreat from the three-stage test**

The case of **Robinson v Chief Constable** (2018) marked another shift. In that case, the court emphasised that it was unnecessary to apply Caparo's three-stage analysis in cases where the duty of care is well-established.<sup>13</sup>

Furthermore, in novel situations - where it is uncertain whether a duty of care exists - the

judges in Robinson decided that the courts should adopt **an incremental approach** in developing the law. This attempts to draw analogies with decided case law.<sup>13</sup>

If there is no existing or analogous duty that can be applied, the so-called 'Caparo factors' can still be considered, to the extent that they are at issue.<sup>14</sup>

### The Caparo three-stage approach

The three-stage approach asks:

1. Was the harm reasonably foreseeable?
2. Is there a sufficiently 'proximate' relationship between the pursuer and defender?
3. Is it fair, just and reasonable in all circumstances to impose a duty of care?<sup>12</sup>

### Public policy considerations

When deciding whether to impose a duty of care in a novel situation, **public policy considerations** can help inform a court's decision.

In this context, the courts assess factors such as:

- [the availability of alternative remedies](#)
- [whether there is obtainable insurance against the risk at issue](#)
- the potential for numerous, future claims - sometimes referred to as the risk of 'opening the floodgates'
- where the defender is publicly funded, the impact on public finances and service delivery
- the danger of an unduly cautious approach to the discharge of legal responsibilities in future.

## The role of statute in influencing public policy considerations

Publicly-funded bodies acting under a statutory framework can be sued for negligence. However, statutes often describe these bodies' powers or obligations without clearly stating whether they create a duty of care.

In these situations, the courts still use the statutory framework to help their analysis of public policy considerations and to decide whether a duty of care arises in negligence.<sup>15</sup>

However, this is different from cases where the courts find that **the statute itself** creates an enforceable legal duty that allows a claim for damages. Those claims fall under **breach of statutory duty**, a separate category of liability under delict. See [Alternatives to a negligence claim](#), later in the briefing.

[The next section of the briefing](#) explores some specific situations where the courts have either found that there is no duty of care, or will scrutinise its possible existence in a particular situation very carefully.

## Duty of care: specific rules for certain situations

This section of the briefing considers the duty of care in the following situations:

- [omissions or failures to act](#)
- ['pure' economic loss](#)
- [psychiatric injury \(sometimes called 'nervous shock'\)](#).

### Omissions or failures to act

Negligence law distinguishes between **actively causing harm** (making things worse) and an **omission**, also known as a **failure to act** or, more recently, a **failure to confer a benefit**. Failure to confer a benefit includes situations where a defender does not provide the pursuer with protection either from harm caused by **third parties** (not the defender) or from **natural events**.<sup>16</sup>

The general rule is that the law does **not** impose a duty of care on a person or organisation for an omission.<sup>17</sup>

This is even the case if there is a statutory power to do a certain thing. That legislation, by itself, does not create a legal duty to do that thing.

However, there are **certain exceptions** to the general rule on omissions, where the law recognises a duty of care requiring positive action by the defender:

- **assumption of responsibility**: if the defender, through their conduct, leads the pursuer to rely on them (an 'assumption of responsibility')<sup>18</sup>

- **special relationships:** where the defender has a specific relationship with the pursuer, or level of control over the source of danger, that creates an obligation to protect the pursuer from harm - for example, parent and child, employer and employee, occupier and visitor, or school and pupil <sup>18</sup>
- **interference or prevention:** if the defender has done something which prevents another person or entity from protecting the pursuer from danger - note that this type of case is sometimes classified as involving a positive act by the defender, rather than an omission. <sup>19</sup>

### 'Pure' economic loss

Earlier in the briefing, it was explained that one type of harm that can be suffered is **economic loss**. To recap, this is financial harm or loss that can be readily quantified in monetary terms.

There are actually two types of economic loss:

- **Derivative economic loss** arises as a consequence of another harm to the pursuer, such as lost earnings following the pursuer's personal injuries or lost business income while the pursuer's damaged property is being repaired. <sup>20</sup>
- On the other hand, **pure economic loss** occurs without any accompanying personal injuries or property damage to the pursuer. This is a complex area, but two examples of pure economic loss are described in the box below.

#### Example 1

A tells B that B should enter into a contract with C. Relying on A's advice, B enters into the contract with C. As a result, B loses money. B's loss is pure economic loss.

#### Example 2

A damages the property of B. As a result of B's property damage, C - who relies on the property of B for a specific business purpose - experiences a loss of profit. C's loss is pure economic loss.

While derivative economic loss is usually recoverable, the general rule is that pure economic loss is **not** recoverable in negligence. <sup>21 22</sup> In policy terms, one reason for this is because economic damage can grow out of proportion very quickly, compared to what happens when someone is injured or their property is damaged.

### An example to illustrate the difference

A negligent driver takes out an electricity pylon supplying a small village. If economic harm was recoverable, then the driver could be liable for the loss of business of every shop and business run from that village. In contrast, a negligent driver who causes an accident will only cause so much physical harm - eventually the cars involved will come to a stop, no further harm will stem from the driver's negligence.<sup>23</sup>

This example helps illustrates why, in in policy terms, a duty of care for pure economic loss should not be owed.

However, despite the general rule on economic loss, the courts created certain **exceptions** by developing the duty of care in particular situations.

The basis for liability is most clearly established in the case of a **negligent misstatement** causing economic loss, [considered in more detail in the next section of the briefing](#).

### Negligent misstatements

In relation to negligent misstatements, the most common scenario involves a careless response to a request for specific information.

However, it can now also extend to statements made or advice given in the wider context of the delivery of professional services, such as an audit report relating to a company.<sup>24</sup>

Overall, the law in this area is very complex. However, broadly speaking, to claim for economic loss caused by a negligent misstatement, four conditions must be met:

1. A **special relationship** must exist between pursuer and defender - this must be a relationship of trust where one party holds themselves out as having superior knowledge, typically this is in a professional capacity
2. A key requirement is that the defender must have voluntarily **assumed responsibility** and accepted the risk that their statements would be relied upon
3. The pursuer must have actually **relied on the advice** - for instance, if the pursuer would have acted the same way regardless, this requirement is not satisfied
4. That reliance must be **reasonable and foreseeable** in the circumstances.

In most negligent misstatement cases, the pursuer is the person or organisation to whom the statement was originally made and who detrimentally relied on it. However, in certain limited situations, a **third party** - someone for whom the statement was not specifically prepared or addressed - may also be able to recover for economic loss caused.<sup>24</sup>

Here, under the current law, additional requirements must be satisfied, principally that:

- the statement was intended to reach the pursuer or an identifiable class of recipients to which they belong

- the statement was intended for the purpose for which the pursuer relied on it.<sup>25</sup>

## Psychiatric injury ('nervous shock')

Earlier in the briefing, it was explained that one type of harm that might be suffered by a pursuer is **psychiatric injury**, sometimes still referred to by the old-fashioned term 'nervous shock'.

Where certain conditions are satisfied, it is possible to claim in negligence where there are injuries caused to a person's mental health by virtue of either being involved in, or witnessing, an accident - such as a road or industrial accident.<sup>26</sup>

To succeed in this type of a negligence claim, the mental harm the person suffers must amount to a recognised psychological or psychiatric disorder, not simply a fright or natural human reaction to a distressing incident.<sup>27</sup>

Furthermore, in relation to this category of injury, the courts make an important distinction between **primary victims** and **secondary victims**:

- **primary victims**: a pursuer who is directly involved in an accident and, despite no physical injury, suffers a psychiatric/psychological injury is a **primary victim**.
- **secondary victims**: a pursuer who was not involved in the accident, but witnessed it and subsequently suffered from a psychiatric/psychological injury, is a **secondary victim**.<sup>28</sup>

If the defender was negligent, **primary victims** can claim under negligence if they were exposed to the danger of physical injury and suffered a recognisable psychiatric/psychological illness, even if no physical injury actually occurred.<sup>29</sup>

To be successful in a negligence claim, **secondary victims** must satisfy the following requirements:

- **ordinary fortitude**: it must be reasonably foreseeable that a person of ordinary fortitude in the pursuer's position would suffer psychiatric injury
- **love and affection**: the pursuer must have a close tie of love and affection with the person injured (such as between a parent and child, or between spouses)
- **perception of the accident**: the pursuer must have directly perceived the loved one's involvement in accident, or its aftermath.<sup>30 26 31</sup>

## The standard of care

As noted earlier, if the defender does owe the pursuer a duty of care, the next issue that must be established is whether there has been a **breach of the duty of care**, sometimes described as whether the defender falls below the requisite **standard of care**.

As mentioned earlier, the main standard of care is that of the **ordinary reasonable**

## person.

When a defender's conduct is being judged against this standard of care, this is an objective assessment. Crucially, no account is taken of individual traits or personal characteristics of the defender. For example, learner drivers are expected to be the same standard as drivers who have passed their test.<sup>32 33</sup>

An exception applies for **child defenders**: their conduct is judged against the standard of care reasonably expected from a child of the same age in the circumstances.<sup>34</sup> In practice, it is rare for children to be defenders in negligence actions.<sup>35</sup>

When assessing the main standard of care, the court weighs several factors. First, it considers the **magnitude of the risk**: the greater the risk involved in the activity at the centre of the claim, the greater the precautions the defender should have taken. The court also looks at **the potential seriousness of any harm**, recognising that the standard of care depends not only on how likely an incident is, but also on how severe the consequences could be if it occurs.

The court will then assess **the practicality and cost of taking precautions**. Put simply, the easier and more feasible it was to mitigate the risk, the more likely the court will find that the defender breached their duty of care.

Another factor is **the social value of the activity**. Activities with significant social utility may justify taking certain risks, making a breach less likely - though social value alone does not remove the obligation to take reasonable care.

Finally, if a person is confronted with **a sudden emergency not of their own making**, their actions are judged in light of that situation. For example, in one case from the 1980s, a police officer who accidentally struck a fleeing suspect with his vehicle was found not to have fallen below the required standard of care.<sup>36 37</sup>

## Professional negligence cases

[As noted earlier](#), a professional will be judged in a professional negligence case against the standard expected of the ordinarily competent professional, rather than that of the reasonable person.

In Scotland, the legal test for establishing professional negligence is rooted in the case of **Hunter v Hanley** (1955). There are three parts to the legal test:

1. there must be a usual and normal practice
2. it must be shown that the defender failed to adopt that practice
3. it must be shown that no professional person of ordinary skill would have adopted the same course of action as the defender, if acting with ordinary care.

All three parts of the test must be satisfied for a professional negligence claim to succeed.

Note that, where there is a strand of professional practice supporting the defender's actions, the court may still reject this strand if the court decides that it is illogical, irrational

or unable to withstand logical analysis.<sup>38</sup>

A pursuer will usually need **expert evidence** to support their negligence claim. This involves instructing a qualified professional to review the case and produce a report. The court then considers that report, along with any expert evidence from the defender and all other evidence, when applying [the three-part test for establishing negligence](#).<sup>39</sup>

### **Cockburn v Hope (2024)** (also known as Cockburn v Cockburn's Judicial Factor)<sup>40</sup>

Traditionally, expert evidence is seen as essential in professional negligence cases, particularly where technical issues arise. But this recent court decision confirms that a case will not automatically fail without an expert report. A court may decide the matter without expert input in straightforward situations, as long as it has enough evidence to apply the Hunter v Hanley test.

## **Whether the breach of the duty of care caused the harm to the pursuer**

As noted earlier, the final part of the test for establishing legal liability in a negligence case relates to what is often referred to as **causation**.

There are two distinct elements to causation, considered in turn in this section of the briefing:

- [factual causation](#)
- [legal causation](#) (also called **remoteness of damage**).

### **Factual causation**

The pursuer must prove [on the balance of probabilities](#) that the defender's negligence has caused the harm that is at the centre of the negligence action in question.

Here the courts apply two main tests:

- [the 'but for' test](#)
- [the 'material contribution' test](#).<sup>34</sup>

These are considered in this section of the briefing.

#### *The 'but for' test*

The question which the court asks itself here is **but for** the negligence of the defender, would the harm have occurred to the pursuer.<sup>34</sup>

### **Barnett v Chelsea and Kensington Hospital Management Committee (1969)** <sup>41</sup>

This leading case illustrates how the 'but for' causation test works. Here the court decided that the hospital had been at fault by refusing to treat Barnett, a night watchman, after he was poisoned. However, medical evidence showed that, in any event, the hospital's treatment would not have saved him. His widow's claim was unsuccessful because the hospital's failure to treat did not **cause** Barnett's death. <sup>42</sup>

The '**material contribution to risk**' test - not to be confused with the **material contribution test** [discussed later](#) - relaxes [the normal 'but for' causation test](#) in exceptional and specific circumstances. The test was established in the case described in the box below.

### **Fairchild v Glenhaven Funeral Services Ltd (2002)** <sup>43</sup>

The pursuers developed the cancer, mesothelioma, after being exposed to asbestos by multiple employers. Medically, it was impossible to prove which exposure (which employer) actually caused the disease.

Under the usual rule (['but for' causation](#)), each defender might escape liability because the pursuers could not prove that their particular breach caused the illness.

Here the House of Lords held that a defender can be liable if their breach **materially increased the risk** of the pursuer contracting the disease. In other words, in these specific circumstances, the pursuer does not have to prove that the defender actually caused the harm.

#### *The 'material contribution' test*

Separately, the **material contribution test** applies when more than one factor may have caused the harm.

A defender can still be held liable if their negligence **materially contributed** to the harm, even if it was not the sole cause.

If more than one cause has made a material contribution, the court will **apportion liability**, making the defender responsible only for the share of harm they contributed. <sup>44</sup>

[See also later in the briefing on joint wrongdoers.](#)

### **Legal causation (remoteness of damage)**

Under the law on causation, it must also be established that the harm sustained by the pursuer is not too remote. **Remoteness of damage** also has a number of elements.

First, a defender is not liable for any damage that was not reasonably foreseeable.

Furthermore, where damage is reasonably foreseeable, the defender is **not** automatically liable for all such damage.<sup>14</sup>

As noted earlier, reasonable foreseeability is also central to the **duty of care**, however, there the question is whether the relationship between the pursuer and defender is too remote to justify imposing a duty. In the context of **causation**, the focus shifts to whether the damage itself is too remote to be legally attributable to the defender's conduct.<sup>14</sup>

Under legal causation, liability may be excluded if the loss results from a **novus actus interveniens** or unreasonable conduct by the pursuer - even if these developments were themselves foreseeable.<sup>14</sup>

### Novus actus interveniens

A **novus actus interveniens** breaks the chain of causation when a significant, independent event occurs after the defender's original negligent act, such that the later harm can no longer be attributed to the defender. As noted above, this intervening act may be carried out either by a third party or by the pursuer themselves.<sup>14</sup>

For example, in a 1969 case, the pursuer's leg - occasionally going numb due to the defender's negligence - went numb on a staircase. He then impulsively jumped to the bottom and was further injured. The court held that this impulsive act was a novus actus interveniens, breaking the chain of causation and removing the defender's liability for the additional harm.<sup>45</sup>

The next key principle is that, provided there is no novus actus interveniens or unreasonable conduct by the pursuer, a defender will be liable if the **type** of injury, loss, or damage was reasonably foreseeable - even if the **extent** of the harm is greater than expected or it occurs in an unforeseeable way. This reflects the principle that the defender must 'take their victim as they find them,' commonly referred to as the **thin skull rule**.

### The thin skull rule

A classic illustration of the **thin skull rule** uses an example involving a person who actually has a thin skull. Suppose someone walking along the pavement is knocked over by a negligent skateboarder. They suffer a skull fracture because a medical condition makes their bones far more fragile than average.

Although the **extent** of the injury could not have been foreseen, the **type** of injury - being knocked down and hurt - is foreseeable. In such cases, the thin skull rule applies, and the defender remains liable for the full extent of the injury.<sup>46</sup>

Note that, although the name of the rule suggests it only applies to personal injury claims, the thin skull rule can also apply to cases of economic loss resulting from property damage.<sup>47</sup> However, the thin skull rule appears not to apply in cases of pure economic

loss.<sup>14</sup>

Finally, a further key principle is that, where personal injury is reasonably foreseeable, the pursuer may recover damages for **psychiatric harm**. This again is subject to the absence of any novus actus interveniens or unreasonable conduct on the part of the pursuer.<sup>14</sup>

This final rule also operates alongside the rules governing primary and secondary victims in respect of the **duty of care**, as **discussed earlier in this briefing**.

## Defences to a negligence action

As mentioned earlier in the briefing, there are **various defences** that can be used by the defender in a negligence action. It is for the defender to prove that a defence applies in an individual case.

Some defences to a negligence claim are common to all civil court actions. These include arguing that **the case is affected by a relevant time limit**, or that the case has been **raised in a court without the authority to hear it**. The defender may also contend that the claim cannot proceed because it has already been decided between the same parties by a competent court - a defence known as **res judicata**.

However, some defences are specific to the law of negligence such as:

1. **Contributory negligence** – where the pursuer is partly at fault for their own harm, the claim can still succeed, but damages may be reduced to a 'just and equitable' extent<sup>xi</sup>
2. **Illegality** – where the pursuer was engaged in unlawful (typically criminal) conduct connected to the harm, based on the principle that no one should benefit from their own wrongdoing<sup>48</sup>
3. **Voluntary assumption of risk (volenti non fit injuria)** – where the pursuer knowingly and freely accepted the exact harm which befell them. This defence is most often raised in sports-related cases.<sup>48</sup>

Note that a defender might also rely on a **denial** in a negligence case, similar to a defence but relating directly to the test for establishing legal liability under the law of negligence. For example, the defender might argue **they did not owe a duty of care** or, even if they did, **that they did not breach the duty**.

## Time limits apply to bringing negligence cases

Various **time limits** can apply in a negligence case, in terms of how long the pursuer has to start a court action.

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<sup>xi</sup> **Law Reform (Contributory Negligence) Act 1945**, sections 1, 3-7.

These time limits, considered in more detail in this section of the briefing, are set out in the [Prescription and Limitation \(Scotland\) Act 1973](#) ('the 1973 Act') as amended, including by the [Prescription \(Scotland\) Act 2018](#).

## Why are there time limits?

At first glance, it can seem a little odd that time limits for negligence actions exist at all. However, time limits in law exist to encourage people to assert their rights promptly.

The aim is to prevent evidence from deteriorating through fading memories, lost documents, or witnesses who have since died or become untraceable.

Time limits also promote legal certainty by allowing individuals and organisations to plan confidently, knowing they will not face legal action for their conduct after a defined period.

## The legal concepts of prescription and limitation

Generally, negligence claims in Scotland can be impacted by two types of time limits:

- **Prescription** means that a legal obligation, including one arising from negligence, can be permanently extinguished once a specified period of time has passed.<sup>xii</sup>
- **Limitation** (also called **time bar**), by contrast, does not extinguish the obligation, but it usually prevents the pursuer from beginning court proceedings after the deadline has passed.<sup>xiii</sup>

Since 1984, personal injury claims have only been affected by limitation, not prescription.<sup>xiv</sup> Conversely, other types of negligence claim are currently affected by prescription, but not limitation.

## The main time limits (three, five and 20 years)

At present, two key time limits are:

- a **three-year** limitation period for personal injury claims, which can be overridden by the court in certain limited circumstances<sup>xv</sup>
- a **five-year** prescriptive period for other types of negligence claims.<sup>xvi</sup>

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xii [Prescription and Limitation \(Scotland\) Act 1973](#), Part I, sections 6-13A and schedules 1 and 2.

xiii [Prescription and Limitation \(Scotland\) Act 1973](#), Part II, sections 16A-18, 19A.

xiv [Prescription and Limitation \(Scotland\) Act 1984](#), schedule, para 2, amending [Prescription and Limitation \(Scotland\) Act 1973](#), section 7(2).

xv [Prescription and Limitation \(Scotland\) Act 1973](#), Part II, sections 17, 18 and 19A.

xvi [Prescription and Limitation \(Scotland\) Act 1973](#), Part I, section 6 and schedule 1.

## Childhood abuse cases

The [Limitation \(Childhood Abuse\) \(Scotland\) Act 2017](#), amending the 1973 Act,<sup>xvii</sup> removed the three-year time limit for personal injury claims relating to childhood abuse, recognising these cases as exceptional. As a result, survivors can now bring claims at any time for abuse that occurred **on or after 26 September 1964**.

Separately, for claims subject to prescription, a **20-year** 'long-stop' period may apply. This can extinguish an obligation even if the five-year prescriptive period has not yet started to run.<sup>xviii</sup>

The five-year time period may not start to run if the criteria set by the relevant legal test, governing when the clock begins to tick, have not yet been satisfied.

## The Prescription (Scotland) Act 2018

Related to this, the [Prescription \(Scotland\) Act 2018](#) ('the 2018 Act') changed when the five-year prescriptive period begins for negligence actions where damages are sought.

The five-year period now only begins when the pursuer who suffered the loss claimed for, was aware, or could with reasonable diligence have been aware of three things:

- that loss, injury or damage had occurred
- that the loss, injury or damage was caused by a person or organisation's act or omission
- the identity of that person or organisation.<sup>xix</sup>

Unlike five-year prescription, 20-year prescription takes **no account of the pursuer's knowledge of the circumstances of the claim** in deciding when the clock starts to tick.<sup>xx</sup> This is why it can operate in circumstances where the five-year period does not.

## How damages are calculated by the courts

At the end of a successful negligence case, it will usually be necessary for the court to work out the appropriate amount of damages (known as the **quantum of damages**). This section of the briefing covers this complex topic.

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xvii [Limitation \(Childhood Abuse\) \(Scotland\) Act 2017](#), section 1, inserting [Prescription and Limitation \(Scotland\) Act 1973](#), section 17A.

xviii [Prescription and Limitation \(Scotland\) Act 1973](#), Part I, section 7, as amended by [Prescription \(Scotland\) Act 2018](#), section 6.

xix [Prescription \(Scotland\) Act 2018](#), section 5, amending [Prescription and Limitation \(Scotland\) Act 1973](#), Part I, section 6.

xx [Prescription and Limitation \(Scotland\) Act 1973](#), Part I, section 7, as amended by [Prescription \(Scotland\) Act 2018](#), section 6.

## Key terms

As a starting point, it is useful to understand a **few key terms** which are used specifically in the law on damages:

- **Patrimonial loss** refers to economic or financial loss that can be precisely measured. This includes losses arising from damage to or destruction of property, as well as financial consequences of personal injuries - such as loss of earnings, medical treatment costs, and expenses associated with ongoing care.
- **Solatium** refers to damages awarded for **non-patrimonial loss**. These are losses that cannot easily be measured in financial terms and generally relate to the pain, suffering, and loss of enjoyment of life caused by personal injuries. Examples include developing a related mental health condition, being unable to continue a valued hobby, or experiencing persistent symptoms resulting from an injury.

Statutes and case law provide principles which assist in the quantification of claims.

For example, one key principle is that pursuers have to take reasonable steps to mitigate or reduce their loss. If they do not do this, the court may refuse to award compensation for the part of the loss that could have been avoided.<sup>49</sup>

This section of the briefing now looks at various areas of the law on damages in more detail:

- [property damage or economic loss cases](#)
- [non-fatal personal injuries](#)
- [fatal personal injuries](#) - commonly referred to as **damages for wrongful death**
- [deductions from damages](#) - that is, sums that might be taken off when calculating a damages payment.

## Property damage or economic losses

When there is **property damage**, courts award the reasonable cost of repairs if the asset can be sensibly repaired. If repairs are impossible or disproportionately expensive, damages instead reflect the asset's market value immediately before the damage occurred.<sup>50</sup>

For [economic loss cases](#), distinct rules apply for different types of case. For example, for [negligent misstatement cases](#), compensation aims to restore the pursuer to the position they would have been in had the statement not been made at all - not the position they would have enjoyed if the incorrect statement had been true.<sup>51</sup>

## Damages for personal injuries

When calculating an award of damages for personal injuries, the courts will consider

various categories of loss. [As mentioned earlier](#), broadly, these can be divided into **solatium** and damages for **patrimonial loss**.

A pursuer may claim for loss suffered up to the date of the **proof**, that is, the main court hearing where the parties present their evidence. They can also claim for any **future losses**, such as future loss of earnings.<sup>52</sup> In practice, it is the future-focused part of the claim that is the most important.<sup>53</sup>

The level of compensation will depend on a number of factors, for example:

- how serious the injury was
- whether the pursuer has recovered from the injury, or whether it will have an ongoing effect
- the personal circumstances of the pursuer, such as the nature of the work they do and the amount they earn.

There is room for significant argument over what an appropriate level of compensation might be.<sup>6</sup>

Note that a **discount rate** is applied to the part of the compensation covering future [patrimonial losses](#) (such as future loss of earnings). This is because, when damages for future loss are paid as a lump sum, the pursuer could gain an advantage by investing the money early and earning returns, leading to over-compensation. To prevent this, the award is reduced using the discount rate, which reflects the expected investment return.

Separately, a **multiplier** is a figure by which an annual loss (in turn, known as the **multiplicand**) is multiplied by to calculate an award for future losses. It takes into account factors like life expectancy and the period the person is expected to experience the particular type of loss.

**Provisional damages**, **interim damages** and **periodic payments** may be awarded in a negligence case and [are explained in the next section of the briefing](#).

## Relatives: the Administration of Justice Act 1982

Under [the Administration of Justice Act 1982](#), an **injured person** may claim compensation for two types of services involving relatives:

- **services provided to the injured person (section 8)**: these are services given by relatives to support the injured person, such as personal care, doing shopping for them, household chores, or transport - for example, driving them to medical appointments.<sup>xxi</sup>
- **services provided by the injured person (section 9)**: these are tasks the injured person previously carried out for family members, such as DIY, childcare or household duties, which would require paid assistance if performed by someone outside the family.<sup>xxii</sup>

A key point to note is that a relative has **no direct right to bring a negligence claim** under these provisions.<sup>xxiii</sup>

However, **if the injured person has died**, an equivalent claim to that under section 9 of the 1982 Act is possible by relatives under separate legislation - [see later in the briefing](#).

## Provisional damages, interim damages and periodical payments

The normal rule in personal injury actions of damages is that the damages are assessed once and for all at the date of **proof**, that is, the main court hearing relating to the case. Consequently, pursuers used to delay bringing proceedings for a considerable period until they could ascertain the full extent of their loss. Pursuers often suffered hardship during the period between the accident and the date of proof.<sup>54</sup>

However, the [Administration of Justice Act 1982](#) ('the 1982 Act') allows courts to award **provisional damages** where the defender's actions create a risk of the pursuer developing a serious future illness or deterioration in their condition.<sup>xxiv</sup> Case law shows such awards are rarely granted unless medical evidence predicts the illness or deterioration within roughly ten years.<sup>55</sup> The Act also limits provisional damages to cases where the defender was a public body or insured at the time of the accident.<sup>xxv</sup>

The court can award **interim damages** for immediate needs in a wider set of circumstances. They do not depend upon a pursuer suffering from a continuing condition, the eventual seriousness of which cannot be ascertained, although various other criteria do apply for such an award.<sup>55 xxvi</sup>

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xxi [Administration of Justice Act 1982](#), sections 8 and 13.

xxii [Administration of Justice Act 1982](#), sections 9 and 13.

xxiii [Administration of Justice Act 1982](#), sections 8(4) and 9(4).

xxiv [Administration of Justice Act 1982](#), section 12.

xxv [Administration of Justice Act 1982](#), section 12(1)(b).

xxvi [Court of Session Rules](#), rule 43.11.

Separately, where both sides in the litigation agree, damages can be paid by way of **periodical payments** (relating to all or part of the damages award). Periodical payments can mitigate the uncertainties involved in lump sum calculations. They are most relevant in high value cases where pursuers have suffered serious, ongoing injury. It is thought that periodical payments are relatively rare in Scotland, although it is not entirely clear why.<sup>6</sup>

## Damages for wrongful death

The law makes specific statutory provision for cases of personal injuries which result in premature death, whether that death is immediate or more protracted.

The [Damages \(Scotland\) Act 2011](#) (the '2011 Act') is the main piece of legislation addressing damages for wrongful death. It covers three main areas:

- [the victim's rights](#)
- [the executor's rights](#)
- [the relatives' rights](#).

### The victim's rights

When an injury shortens a person's life, the 2011 Act entitles the victim to claim two specific heads of damages:

- **solatium** - compensation for the distress of knowing their life will be shortened
- **patrimonial loss during the 'lost period'** - compensation covering the economic losses (such as earnings or benefits, minus living expenses) that the victim would have received between their now-anticipated date of death and their expected date of death, had the injury not occurred.<sup>xxvii</sup>

These awards are on top of the victim's ordinary entitlements to solatium for pain and suffering and patrimonial losses incurred up to their expected date of death.

### The executor's rights

When someone dies, their **executor** is responsible for handling their estate.

If someone is killed instantly, the executor cannot raise a negligence claim on their behalf - [only the deceased person's relatives can bring a claim](#).<sup>56</sup>

But if the person is injured and survives for a period, then dies before starting or completing their claim, the 2011 Act allows their existing rights to solatium (for pain and suffering) and patrimonial loss, **up to the date of death**, to be passed to the executor.<sup>xxviii</sup>

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xxvii [Damages \(Scotland\) Act 2011](#), section 1.

xxviii [Damages \(Scotland\) Act 2011](#), section 2.

Losses relating to **after death**, such as future earnings, do **not** transfer to the executor. This avoids 'double compensation', since relatives may separately claim for loss of support, [as discussed in the next section of the briefing](#).

## The relatives' rights

The 2011 Act also covers damages that can be paid to relatives after the deceased's death.<sup>xxix</sup>

Under section 4 of the 2011 Act, members of the deceased's **immediate family** can claim:

- **loss of society** – compensation for their emotional suffering caused by the death
- **loss of financial support** – where they depended on the deceased's income or services
- **reasonable funeral expenses** that they personally incurred.<sup>xxx</sup>

### Who is immediate family?

Under the 2011 Act, the term **immediate family** is defined broadly. It includes the deceased person's spouse, civil partner, cohabitant, parents, children, siblings, grandparents, and grandchildren.

The definition also covers certain **non-biological family relationships**: a person can be treated as a parent, child, grandparent, or grandchild where a child was accepted into the family, whether the deceased had been accepted as a child themselves or had accepted another child into their household.<sup>xxxi</sup>

A wider group of **relatives** beyond the immediate family - such as an aunt, uncle, or a former spouse or civil partner - can also make claims under section 4 of the 2011 Act. These relatives are entitled to seek compensation for any **loss of financial support** they received from the deceased, as well as **reasonable funeral expenses** they personally incurred.<sup>xxxii</sup>

As a **general rule**, relatives cannot make a claim under section 4 of the 2011 Act if the victim (or their executor) has already received damages or reached a final settlement for that part of the claim before the victim's death.<sup>xxxiii</sup>

However, an **important exception** applies to victims of **mesothelioma**, an asbestos-related cancer. First introduced by the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007 and now incorporated into the 2011 Act, this exception allows relatives to pursue their own claim even if the victim (or their executor)

xxix [Damages \(Scotland\) Act 2011](#), sections 3-6.

xxx [Damages \(Scotland\) Act 2011](#), sections 3, 4(1)(a), (2)-(5), 7 and 14(a)-(d).

xxxi [Damages \(Scotland\) Act 2011](#), sections 4(5) and 14(a)-(d).

xxxii [Damages \(Scotland\) Act 2011](#), sections 3, 4(1)(b), (2), (3)(a), (4), 7 and 14.

xxxiii [Damages \(Scotland\) Act 2011](#), sections 4(2)(a).

previously settled the damages claim during the victim's lifetime.<sup>xxxiv</sup>

### Personal services provided by the injured person

As noted earlier, under the [Administration of Justice Act 1982](#), an injured person can claim for the personal services they can no longer provide to their relatives.<sup>xxxv</sup> If that injured person later dies, **section 6 of the 2011 Act** allows their relatives to make a claim instead.

For this purpose, **'relative' is defined broadly**, using the wider definition in section 4 of the 2011 Act (and already referred to above). This means the right to claim can extend not only to close family members but also, for example, to an aunt, uncle, or former spouse or civil partner.<sup>xxxvi</sup>

## Deductions from damages

Finally on the topic of damages, note that section 10 of the [Administration of Justice \(Scotland\) Act 1982](#), in tandem with the [Social Security \(Recovery of Benefits\) Act 1997](#) in relation to social security payments,<sup>xxxvii</sup> requires certain injury-related payments received by an injured person - other than their damages award - to be deducted from that award.

The purpose of these provisions is to ensure that damages reflect true compensation only, restoring the person to their pre-injury position without over-compensating them.

Working out which social security benefits (and other payments) are deductible from a damages award is a very complex area and [the advice of a solicitor is required](#).

## Legal expenses and qualified, one-way cost shifting (QOCS)

This section of the briefing looks at **legal expenses** in more detail, both the general position and the rules applying for personal injury actions.

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<sup>xxxiv</sup> [Damages \(Scotland\) Act 2011](#), section 5.

<sup>xxxv</sup> [Administration of Justice Act 1982](#), sections 9 and 13.

<sup>xxxvi</sup> [Damages \(Scotland\) Act 2011](#), section, 4(1)(b), 4(3)(a), 6(1) and 14.

<sup>xxxvii</sup> See also the [Social Security \(Scotland\) Act 2018](#), section 94A (**not yet in force**), as inserted by the [Social Security \(Amendment\) \(Scotland\) Act 2025](#).

**Legal expenses** cover **all costs** involved in taking court action. They include a solicitor's fees as well as additional charges - such as expert reports, fees payable to the court and, where such services are needed, advocates' fees. [See later in the briefing on the role of advocates, a specialist type of lawyer, in litigation.](#)

All these extra charges are initially paid by the litigant's solicitor and later recovered from the client. They are known as **outlays**.<sup>57</sup>

[Earlier in the briefing](#), it was explained that, in litigation, the general rule is that the losing party pays both their own legal expenses and those of the winning party, under the **expenses follows success** rule. The court will calculate the legal expenses payable using rates set out in legislation.

However, as discussed earlier, there is an **exception** to the general rule for personal injury cases, including fatal cases, and including in relation to appeals about personal injury cases.

Here **Qualified, one-way costs shifting** (QOCS) applies under the [Civil Litigation \(Expenses and Group Proceedings\) \(Scotland\) Act 2018](#).<sup>xxxviii</sup> This significantly reduces the financial risk for the pursuer.

QOCS is a system whereby the pursuer is not liable for the defender's legal expenses if they lose, but can claim their own expenses from the defender if they win.

In order to benefit from QOCS, a pursuer must **conduct the court proceedings in an "appropriate manner."** This is further defined, so that a person can lose protection only if they:

- make fraudulent claims
- do not comply with reasonably expected standards of behaviour
- in some other way, abuse court procedures to advance their case.<sup>xxxix</sup>

## Joint wrongdoers

[As explained earlier](#), multiple parties can materially contribute to an injury, loss or damage, resulting in shared liability under the law of negligence. Different parties then bear proportionate responsibility for the harm which has been suffered by an injured party.

When more than one party contributes to the harm through negligence, they are **jointly and severally liable**. This means that the injured person or organisation can choose to sue all responsible parties or just one of them, or some of them, for the full amount.

If all relevant parties are sued, the court can divide [the damages](#) and [legal expenses](#) between them at the conclusion of the negligence case.

xxxviii [Civil Litigation \(Expenses and Group Proceedings\) \(Scotland\) Act 2018](#), Part 2.

xxxix [Civil Litigation \(Expenses and Group Proceedings\) \(Scotland\) Act 2018](#), section 8.

However, on the other hand, if not all wrongdoers are sued and someone ends up paying more than their fair share, they have a **right of relief**. This means they can seek **contributions** from the other parties who would also have been found liable had they been sued.<sup>xl</sup>

## Enforcing a court order for damages

As noted earlier, for a negligence action to be financially effective in practice, the winning party must be able to recover the compensation from the person or organisation concerned.

If there is a court order awarding damages granted by a court, this gives the winning party access to a group of **debt enforcement options** which are not available to people or organisations who do not have the authority of the courts. The technical name for these debt enforcement methods is **diligence**.

The methods of debt enforcement include:

- **attachment**: seizing assets in the possession of the losing party (or parties)
- **arrestment**: seizing assets belonging to the losing party/parties in the hands of a third party – such as money in a bank account or wages in the hands of an employer
- **inhibition**: preventing the sale of land or buildings until the debt is paid.

## Alternatives to a negligence claim

This section of the briefing looks at alternatives to bringing a negligence claim.

The best approach in any case depends, to some extent, on the outcome sought. If the priority is **financial compensation**, only those routes that allow for a monetary award are relevant. By contrast, if the aim is a **non-financial remedy** - such as an apology, an explanation, or action to prevent similar harm - then a wider range of options may be appropriate.

## Insurance

This briefing previously considered whether a potential defender has insurance and is therefore financially worthwhile to pursue.

However, a pursuer's own insurance can be just as important as the defender's. Instead of raising a negligence claim, the would-be pursuer may be able to recover losses directly under their own insurance policy. Some insurance, such as motor and employer liability insurance, is compulsory. Other types, like household or public liability cover, are common.

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<sup>xl</sup> Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, section 3.

### Uninsured drivers

Note that, for uninsured drivers, the [MIB Uninsured Drivers' Agreement](#) (2015) governs compensation for accidents on or after 1 August 2015, setting out how the MIB compensates victims of negligent, uninsured motorists.

**Comprehensive insurance policies** often allow claims regardless of fault, removing the need for lengthy court proceedings. However, it is important to consider the scope of cover, any exclusions, the excess payable by the insured, and the potential effect on future premiums.

### Transfer of rights to sue in negligence

When an insurer pays out, the policyholder usually transfers their right to sue the negligent party to the insurer, preventing double recovery. The insurer may then pursue the third party, although, [as noted earlier](#), some negligence actions may still be difficult or uneconomical to run.

## Statutory compensation schemes

In some situations, a **statutory compensation or payment scheme** may apply, and key examples are set out in the table below. Eligibility for these schemes does not depend on proving negligence. For example, compensation for a miscarriage of justice (discussed below) does not require demonstrating that the police or prosecutors were at fault.

**Table 1: Statutory compensation or payment schemes**

| Scheme                                                                        | Main features                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
|-------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <a href="#">Redress for Survivors (Historical Child Abuse in Care) Scheme</a> | <ul style="list-style-type: none"> <li>• <b>Purpose:</b> Provides financial redress and support for people who experienced abuse in care as children in Scotland before December 2004.</li> <li>• <b>Eligibility:</b> Survivors of abuse in care settings, or their next of kin if the survivor has died.</li> <li>• <b>Payments:</b> Available as either a fixed-rate payment of £10,000 or an individually assessed award (up to £100,000).</li> <li>• <b>Other features:</b> May also include an apology and access to emotional support.</li> </ul>                                                                                                                                                                                                             |
| <a href="#">Infected Blood Compensation Scheme</a>                            | <ul style="list-style-type: none"> <li>• <b>Purpose:</b> provides compensation to people infected with HIV, hepatitis C or serious long-term hepatitis B from contaminated NHS blood, blood products or tissue before screening was introduced.</li> <li>• <b>Structure:</b> previously delivered through support schemes (such as <a href="#">the Scottish Infected Blood Support Scheme</a>), but now moving to a UK-wide statutory compensation system following the <a href="#">Infected Blood Inquiry recommendations</a> <sup>58</sup></li> <li>• <b>Eligibility:</b> based on diagnosis and treatment history</li> <li>• <b>Further reading:</b> see <a href="#">the House of Commons Library briefing</a> on how the scheme works. <sup>59</sup></li> </ul> |
| <a href="#">Pneumoconiosis etc. (Workers' Compensation) Act 1979</a>          | <ul style="list-style-type: none"> <li>• <b>Purpose:</b> provides lump sum payments to workers (or their dependants) who develop certain dust-related industrial diseases</li> <li>• <b>Eligibility:</b> criteria include that all relevant employers are no longer in business.</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| <a href="#">Diffuse mesothelioma payments</a>                                 | <ul style="list-style-type: none"> <li>• <b>Purpose:</b> Provides compensation to people diagnosed with mesothelioma (a tumour caused by asbestos exposure) who cannot trace a liable employer or insurer</li> <li>• <b>Payments:</b> <ul style="list-style-type: none"> <li>◦ <b>2008 Scheme:</b> offers a one-off lump-sum payment</li> <li>◦ <b>Diffuse Mesothelioma Payment Scheme (DMPS):</b> provides payments based on the specific details of the claim.</li> </ul> </li> </ul>                                                                                                                                                                                                                                                                             |
| <a href="#">Miscarriages of Justice Compensation</a>                          | <ul style="list-style-type: none"> <li>• <b>Legal basis:</b> sections 133-133B of the <a href="#">Criminal Justice Act 1988</a> (as applied in Scotland)</li> <li>• <b>Purpose:</b> provides compensation to individuals whose convictions have been quashed on the basis that a new fact shows they did not commit the offence</li> <li>• <b>Alternative scheme:</b> as well as the statutory scheme, there is a discretionary non-statutory scheme (details in the hyperlink opposite).</li> </ul>                                                                                                                                                                                                                                                                |
| <a href="#">Criminal injuries compensation schemes</a>                        | <ul style="list-style-type: none"> <li>• <b>Purpose:</b> provides compensation to victims of violent crime and certain other individuals</li> <li>• <b>Structure:</b> administered by the <a href="#">Criminal Injuries Compensation Authority</a> (CICA)</li> <li>• <b>Payments:</b> awards are based on a tariff system.</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                               |
| <a href="#">Vaccine Damage Payment Scheme</a>                                 | <ul style="list-style-type: none"> <li>• <b>Purpose:</b> offers a one-off payment to individuals severely disabled as a result of certain vaccinations</li> <li>• <b>Legal effect:</b> not a compensation scheme, so, significantly, a legal claim in negligence is still possible after receiving payment.</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| <a href="#">Armed Forces Compensation Scheme</a>                              | <ul style="list-style-type: none"> <li>• <b>Purpose:</b> covers injuries, illnesses, or deaths caused by service on or after 6 April 2005 in the armed forces</li> <li>• <b>Payments:</b> both lump sum and monthly payments are possible.</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |

## Complaints, ombudsmen and regulators

Sometimes a **formal letter of complaint** or using an organisation's **internal complaints process** can resolve an issue. It can result in an explanation, an apology, or even a small financial settlement without needing to take legal action.

Depending on the situation, it might be possible to complain to an **ombudsman**. This is an independent and impartial body that reviews complaints about public and private organisations.

### The Scottish Public Services Ombudsman

The [Scottish Public Services Ombudsman](#) (SPSO) is the final stage for most complaints about public services in Scotland. It can usually only be contacted after the organisation's own complaints process is complete.

Complaints should typically be made within **one year** of the issue becoming known, although the SPSO can extend this time limit in exceptional circumstances.

The SPSO's [redress policy](#) sets out how it may resolve complaints and what recommendations it can make when a public body has acted wrongly.

Where the issue concerns a professional, it may be possible to complain to the relevant **regulator**. For example, the [Scottish Legal Complaints Commission](#) is the first point of contact for complaints about solicitors in Scotland. [It can order a range of remedies](#), including financial compensation. However, many regulators mainly focus on disciplining the professional involved rather than compensating the individual who has suffered harm.

## Alternative dispute resolution

**Alternative Dispute Resolution** (ADR) refers to a collection of methods for resolving disputes without going to court. Depending on the circumstances, it can offer greater flexibility, faster outcomes, less stress and formality, and sometimes more creative, tailored solutions. However, some ADR options still involve costs, and they do not always lead to a financial settlement.

ADR methods include:

- **negotiation:** direct discussions between the parties (often via solicitors or a claims management company) to reach a settlement, which can be made legally binding - [as noted earlier](#), this is extensively used in negligence cases
- **mediation:** a voluntary and confidential process where an independent mediator helps the parties reach a mutually acceptable agreement. The outcome is not legally binding without further steps being taken
- **arbitration:** a more formal process in which a neutral arbitrator hears evidence and issues a binding decision - its use is not common in routine negligence cases
- **conciliation:** similar to mediation but more interventionist, with the conciliator suggesting possible solutions. Again, outcomes are not binding without further steps
- **expert determination:** a technical expert decides a specific issue, and the parties agree in advance to be bound by the decision.

**Complaints to an ombudsman**, [discussed in the previous section](#), are also sometimes classified as a form of ADR.

[Earlier in the briefing](#), it was explained that the [simple procedure](#) applies to non-personal injury claims up to £5,000. Sheriff courts must actively encourage ADR within this process.

In addition, the courts more generally use various **pre-action protocols** which aim to promote early resolution of a dispute and the use of ADR. These protocols provide a structured framework and timetable to guide parties through the pre-action process, making it clearer for all involved.

### Pre-action protocols

To explore this topic in more detail:

- **Compulsory pre-action protocols** apply to most personal injury claims up to £25,000 and require parties to consider settlement and alternative dispute resolution before raising court proceedings<sup>xli</sup>
- **Voluntary pre-action protocols** may be used for [professional negligence claims](#) up to £20,000 and for so-called [disease cases](#), though the disease protocol is rarely used in practice
- **New compulsory protocols** for clinical negligence and disease claims were approved by the [Scottish Civil Justice Council](#) in 2022 and will take effect once associated fee structures have been finalised.<sup>60</sup>

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xli [Ordinary Cause Rules](#), chapter 3A; [Summary Cause Rules](#), chapter 4A; [Court of Session Rules](#), chapter 42A.

## Other civil law remedies

There are a **range of other civil law remedies** that might be available as an alternative to a negligence action. Legal advice should be sought in relation to individual circumstances.

### Breach of contract

If harm arises from a **breach of contract**, an individual or organisation may be able to raise a contractual claim as an alternative to, or alongside, a negligence action.

However, this is not always the case. Sometimes a court might determine that the presence of a contract displaces a remedy in negligence. Sometimes a specific contractual term may exclude or limit liability, subject to statutory controls.

A solicitor can provide advice specific to the circumstances of the individual case.

### Other remedies in delict

A court action under the law of delict may be possible in areas beyond negligence.

Significantly, this includes where **strict liability** applies. Here someone can be held responsible without proof of fault. Where certain criteria are satisfied, strict liability applies, for example, to **defective products** (under the [Consumer Protection Act 1987](#))<sup>xlii</sup> and **damage caused by some types of animals**, including dogs (under the [Animals \(Scotland\) Act 1987](#)).<sup>xliii</sup>

Some legislation does not go as far as to create strict liability. However, they still change the relevant legal duties significantly. Key examples include **occupiers' liability** under the [Occupiers' Liability \(Scotland\) Act 1960](#) and the **regulation of hazardous substances** under the Control of Substances Hazardous to Health Regulations 2002.<sup>xliv</sup>

Separately, [as noted earlier](#), a **breach of statutory duty** claim can sometimes be brought where a defender acts under a statutory framework, but only if Parliament intended to create a private right of action, assessed through established legal principles. In practice, most claims against public authorities are brought in negligence, not for breach of statutory duty.<sup>61</sup>

Beyond financial compensation, other areas of delict - such as **common law nuisance** - can offer alternative remedies, including court orders to stop harmful conduct (**interdict** or **suspension**) or to require corrective action (**specific implement**).

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xlii [Consumer Protection Act 1987](#), Part 1.

xliii [Animals \(Scotland\) Act 1987](#), sections 1-2.

xliv [Occupier's Liability \(Scotland\) Act 1960](#); Control of Substances Hazardous to Health Regulations 2002 (SI 2002/2677).

## Common law nuisance

A nuisance arises where someone's use of their land or property **unreasonably interferes** with a neighbour's enjoyment of their land or property. Whether it amounts to nuisance depends on the circumstances, including the seriousness of the harm, the character of the area, the practicality of preventing it, and the presence of fault, which may include negligent conduct.<sup>62</sup>

Common law nuisance - enforced through civil court action - should not be confused with statutory nuisance, where enforcement is led by local authorities. For more detail on both, see the 2024 SPICe briefing, [Nuisance - some frequently asked questions](#).<sup>62</sup>

## Damages for breach of Convention rights

The [Human Rights Act 1998](#) ('the Human Rights Act') incorporates rights from [the European Convention on Human Rights](#) into UK domestic law. Under section 6 of the Human Rights Act, **public authorities** must not act incompatibly with these rights unless required by an Act of Parliament.<sup>xlv</sup>

Under **section 8** of the Human Rights Act, a court can order a public authority to **pay damages** if the public authority acts unlawfully in this regard, and the court considers it "just and appropriate." Such claims can be pursued instead of, or alongside, a negligence action.<sup>63</sup>

## Finding and paying for legal advice and representation in court

This section considers in more detail how to find, and pay for, legal advice and, where necessary, legal representation in court.

As a reminder, under the general **expenses follow success** rule, the losing party must pay both their own legal expenses and the winner's, creating significant financial risk. However, in personal injury cases, [qualified, one-way costs shifting](#) (QOCS) can apply, which significantly reduces this risk for pursuers.

## Finding a solicitor

To recap, SPICe has published a briefing entitled [Legal advice - where to go and how to pay](#).<sup>4</sup>

As this briefing mentions, to find a solicitor practising in Scotland, the [Law Society of](#)

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xlv [Human Rights Act 1998](#), section 6.

Scotland has an online [find a solicitor](#) search facility.

This allows a person to search by areas of law as well as location. It also has an option to list only firms that are registered to provide advice and representation through legal aid. On legal aid, [see later in this section of the briefing](#).

### Advocates and solicitor-advocates

Note that if a litigant needs legal representation in the higher civil courts applicable to Scotland, that is [the Court of Session](#) and the [UK Supreme Court](#), it may be necessary to [use an advocate](#), a lawyer with specialist rights to appear before these courts. An advocate is broadly equivalent to a barrister in England and Wales.

However, the litigant does not arrange this service directly with an advocate, but via their solicitor.

Separately, [some solicitors are solicitor-advocates](#), meaning they themselves have the right to appear before the higher civil courts.

## How solicitors charge for their work

The fees charged by solicitors are a private matter between the solicitor and their client. This means that there is little publicly available information on the costs of taking different legal actions.

Solicitors charge for their services in a range of different ways, for example, an hourly rate or a fixed fee for different types of work. Different solicitors charge different fees; and clients can negotiate over the price or the way the work is charged for.<sup>57</sup>

Solicitors can choose to work for free and they may do so for certain types of case. This is described as working **pro bono**.

Some solicitors will give up to half an hour of legal advice free or at a fixed rate. This can be useful if a potential litigant wants to get an idea of whether they have a case which is worth defending or pursuing.<sup>4</sup>

## Legal aid

As noted earlier, [legal aid may be available](#) to an individual. Legal aid provides financial assistance to enable people who may not otherwise be able to afford it to access legal services. Legal aid is funded by the Scottish Government and administered by the [Scottish Legal Aid Board](#) (SLAB).

There are two main types of legal aid which may be available. **Advice and Assistance** is available for advice - but not representation in court - from a solicitor. **Civil Legal Aid** covers representation by a solicitor in court.

There is a financial eligibility test for both types. Further eligibility criteria also apply in

some circumstances. SLAB has [various online tools](#), aimed at enabling an individual to calculate if they are financially eligible for legal aid.

## 'No win, no fee' arrangements

Many solicitors will offer to take on certain types of case on a **'no win, no fee' basis** - or at least a 'no win, lower fee' basis. The most common type of situation where these types of arrangements are offered is in relation to a personal injury claim.

When taking on a case on a 'no win, no fee' basis, a solicitor will consider how likely it is that the case will be won. Solicitors are likely to be unwilling to take on cases which do not have a good prospect of success, due to the risk that they will not get paid.<sup>57</sup>

In practice, there are different types of agreements and there is a potentially confusing range of different terms in this area.

With a **speculative fee arrangement** (also known as a **conditional fee arrangement** or **contingency fee agreement**) the client will not usually pay anything if they lose a case, but will pay an enhanced fee over and above the solicitor's standard fees if they win.

Another type of arrangement is a **damages-based agreement** ('DBA'), where (all or part of) the legal fees relate to the amount of damages awarded. DBAs can be sub-divided into:

- a **pure 'no win, no fee' DBA**, where the whole legal fee is calculated as a percentage of the damages awarded
- a **'no win, lower fee' hybrid DBA**, where only the additional success element of the fee is determined by reference to the amount of compensation awarded.

Not all fee arrangements even in the same general category are the same so **it is important to check the details**. For example, sometimes even with a speculative fee arrangement, a client may be expected to pay [outlays](#), that is, costs other than a solicitor's fees, such as the costs of obtaining an expert report.

## Personal injury claims

The statutory term, **success fee arrangements**, found in the [Civil Litigation \(Expenses and Group Proceedings\) \(Scotland\) Act 2018](#) ('the 2018 Act') covers both speculative fee arrangements and DBAs.<sup>xlvi</sup>

Under the 2018 Act, there are some specific requirements in terms of how success fee arrangements must operate for personal injury claims.

In particular, they must be genuinely no fee if the claim is unsuccessful, so a client cannot be charged for outlays. There are also caps on the proportion of compensation which can be claimed in the event of success:

- 20% of compensation of £100,000 or less
- 10% of compensation above £100,000 up to £500,000
- 2.5% of compensation over £500,000.<sup>xlvi</sup>

## Other routes to obtaining legal advice

Finally, a person might have other options for obtaining or paying for legal advice, for example:

- **an insurance policy** - many house contents policies, car insurance or travel insurance policies have legal expenses cover attached
- **a trade union** might be able to help members with free legal advice if the injury happened at work
- **a motoring organisation**, like the AA or RAC, might be able to help members with free legal advice if the injury resulted from a road accident.<sup>64</sup>

## Reforms affecting negligence actions

This final part of the briefing concludes with a summary of some **completed reforms** to the law, as well as **some proposals** which are outstanding or are at an earlier stage of development.

This part of the briefing is split into four sections:

- [completed Scottish Parliament legislation](#)
- [recommendations of the Scottish Law Commission \(2004-2013\)](#)

xlvi [Civil Litigation \(Expenses and Group Proceedings\) \(Scotland\) Act 2018](#), section 1.

xlvi [Civil Litigation \(Expenses and Group Proceedings\) \(Scotland\) Act 2018](#), section 6.

- [the Scottish Law Commission's Report on Damages for Personal Injury \(2024\)](#)
- [the Scottish Government's 2026 consultation](#).

## Completed Scottish Parliament legislation

For ease of reference, **Table 2** below provides a summary of **Scottish Parliament legislation** relating to negligence actions, or indirectly affecting them. Some of the relevant legislation has been covered in more detail earlier in the briefing.

**Table 2: Legislation of the Scottish Parliament relating to negligence actions**

| Legislative reform                                                                                          | Summary                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
|-------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007 ('the 2007 Act') ( <b>now repealed</b> )  | The 2007 Act concerned mesothelioma, an asbestos-related cancer. It changed the law so that close family members of a deceased sufferer can claim damages without reducing the compensation the sufferer could receive while alive.<br><br>It was later repealed and <a href="#">replaced by equivalent provision in the Damages (Scotland) Act 2011</a> . <sup>xlvi</sup>                                                                                                                                                                                                                                                                                                                   |
| <a href="#">Damages (Asbestos-related Conditions) (Scotland) Act 2009</a> ('the 2009 Act')                  | The 2009 Act provides that pleural plaques, asymptomatic pleural thickening and asymptomatic asbestosis constitute actionable harms in Scotland, for which damages are recoverable, even though the conditions are symptom-free.                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| <a href="#">Damages (Scotland) Act 2011</a> ('the 2011 Act')                                                | <a href="#">The 2011 Act reformed the law on damages for wrongful death from personal injuries</a> .                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| <a href="#">Apologies (Scotland) Act 2016</a> ('the 2016 Act')                                              | The 2016 Act gives legal protection to an apology in most civil court proceedings by preventing the apology being used as evidence of legal liability. The Act's aim is to encourage apologies and, indirectly, the resolution of disputes outside the courts.                                                                                                                                                                                                                                                                                                                                                                                                                               |
| <a href="#">Limitation (Childhood Abuse) (Scotland) Act 2017</a> ('the 2017 Act')                           | For childhood abuse after 26 September 1964, the 2017 Act removed the three-year time limit for bringing civil claims for damages for childhood abuse in Scotland, recognising that this was a special category of case.                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| <a href="#">Prescription (Scotland) Act 2018</a> ('the Prescription Act')                                   | The Prescription Act amended the main legislation on <a href="#">time limits in court actions</a> , including for negligence cases.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| <a href="#">Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018</a> ('the 2018 Act')      | The 2018 Act introduced changes including: <ul style="list-style-type: none"> <li>• <a href="#">allowing damages-based agreements (DBAs)</a>, so solicitors could take a percentage of a client's compensation in successful court cases</li> <li>• <a href="#">setting out financial caps on damages-based and other 'no win, no fee' arrangements</a></li> <li>• <a href="#">introduced qualified one-way costs shifting (QOCS)</a> to protect personal injury pursuers from paying defenders' costs if they lose</li> <li>• let parties represented for free claim legal expenses from the other side if they win, with any recovered legal expenses being donated to charity.</li> </ul> |
| <a href="#">Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019</a> ('the 2019 Act')   | The 2019 Act made some technical changes to how damages are calculated in personal injury cases. More information can be found in <a href="#">the 2018 SPICe briefing on the relevant bill as introduced</a> . <sup>6</sup>                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| <a href="#">Redress For Survivors (Historical Child Abuse In Care) (Scotland) Act 2021</a> ('the 2021 Act') | <a href="#">As noted earlier</a> , as an alternative to a negligence action, the 2021 Act sets out the framework for a time-limited statutory compensation scheme for survivors of historical child abuse in certain care settings in Scotland.                                                                                                                                                                                                                                                                                                                                                                                                                                              |

xlvi [Damages \(Scotland\) Act 2011](#), section 5.

## Recommendations from the Scottish Law Commission (2004-2013)

The [Scottish Law Commission](#) (SLC) is the independent statutory body responsible for making recommendations for law reform to Scottish Ministers. It has published a number of reports relevant to negligence claims. As well as a significant report **from 2024** - [discussed in the next section of the briefing](#) - the SLC's publications include the following:

- [Report on Damages for Psychiatric Injury](#) (2004)<sup>65</sup>
- [Report on Personal Injury Actions: Limitation and Prescribed Claims](#) (2007)<sup>66</sup>
- [Report on Damages for Wrongful Death](#) (2008) – largely implemented by the [Damages \(Scotland\) Act 2011](#).<sup>52</sup>

To avoid any confusion arising from the title of the 2007 report (referenced above), it should be remembered that personal injury claims are **not** currently subject to prescription in Scotland. The 2007 report instead considers a policy issue affecting victims of childhood abuse which stemmed from the operation of the previous prescription regime.<sup>66</sup>

In 2012, the Scottish Government published [a consultation paper](#) covering the SLC's 2004 and 2007 reports, as well as an unresolved issue from the 2008 report that remained following the 2011 Act.<sup>67</sup> An [analysis of consultation responses](#) was subsequently published in August 2013.<sup>68</sup>

A Damages Bill was identified as a legislative priority in the Scottish Government's 2013–14 Programme for Government, announced on 3 September 2013. The [Government's response to the 2012 consultation](#), published in December 2013, set out the intended focus of that legislation.<sup>69</sup> **However, no Damages Bill was ultimately introduced in the Scottish Parliament.**

## The 2024 SLC Report on Damages for Personal Injury

In **December 2024**, the [Scottish Law Commission](#) ('SLC') published its [Report on Damages for Personal Injury](#) ('the 2024 report'),<sup>49</sup> accompanied by a draft Damages (Scotland) Bill and an [executive summary](#).<sup>70</sup> In **May 2025**, the Scottish Government issued its response, expressing overall support for the proposals set out in the 2024 report.<sup>71</sup>

The 2024 report sets out reforms designed to modernise Scots law and to remove existing areas of unfairness and inconsistency. The accompanying Damages (Scotland) Bill ('the draft Bill') recommends amendments to three statutes: the [Prescription and Limitation \(Scotland\) Act 1973](#), the [Administration of Justice Act 1982](#) ('the 1982 Act') and the [Children \(Scotland\) Act 1995](#).

Key proposals from the draft Bill are summarised in the next sections of the briefing.

Note that, on **25 June 2026**, the [Scottish Government announced in a parliamentary debate](#) that it intends to introduce a Bill in Session 7 relating to one key recommendation of the 2024 report. This would give effect to the SLC's recommendation for reform of the law on time limits in personal injury actions in relation to certain asbestos-related conditions. See, in particular, [Limitation and asbestos-related cases](#).

## Award of damages to or by the injured person

As discussed earlier, section 8 of the [Administration of Justice Act 1982](#) ('the 1982 Act') enables the victim to claim for various services provided **to** the injured person by relatives.<sup>xlix</sup> Furthermore, section 9 of the 1982 Act allows the victim for services provided **by** the injured person to relatives.<sup>I</sup>

In relation to both sections 8 and 9, the draft Bill proposes extending the definition of **relative** to include people accepted into a family as a parent, grandparent, sibling or grandchild of the injured person, which would make the 'accepted relationships' category wider in scope.

The draft Bill also proposes extending eligibility for damages for necessary services **provided to the injured person by relatives** (1982 Act, section 8) to include **non-relatives**, such as friends or neighbours, who provide care to the injured person.

## Permanent Health Insurance (PHI)

As noted earlier, section 10 of the [Administration of Justice \(Scotland\) Act 1982](#) requires that certain payments an injured person receives in connection with their injury - other than their damages award - must be deducted from that award.

**Permanent Health Insurance (PHI)**, also known as **income protection insurance**, provides long-term, tax-free monthly payments to individuals who cannot work due to illness or injury. Many employers run PHI schemes: the employer claims on the insurance policy and then passes the payments on to the employee during their prolonged absence.

The draft Bill aims to resolve conflicting case law by stating that PHI payments should **not** be deducted from damages under section 10 of the 1982 Act when the employee has contributed financially to the insurance scheme.

## Private medical treatment, care, accommodation, and equipment

As a reminder, there is a duty upon the injured person to take reasonable steps to mitigate their loss. Where the injured person fails to do so, they cannot make a claim against the

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<sup>xlix</sup> [Administration of Justice Act 1982](#), sections 8 and 13.

<sup>I</sup> [Administration of Justice Act 1982](#), sections 9 and 13.

responsible person for any expenses incurred.<sup>49</sup>

However, section 2(4) of [the Law Reform \(Personal Injuries\) \(Scotland\) Act 1948](#) says that an injured person is entitled to seek private health care despite the availability of medical treatment under the National Health Service. A similar common law principle (that is, the law as set out in previously decided cases) applies to care, accommodation, and equipment.<sup>49</sup>

The draft Bill would confirm the current position, and provide one statutory source, replacing the 1948 Act (on medical treatment) and the common law (for care, accommodation and equipment).

## Limitation and asbestos-related cases

Significantly, the draft Bill seeks to fix an unintended problem relating to limitation affecting people with asbestos-related conditions. This relates to an interaction between the [Damages \(Asbestos-related Conditions\) \(Scotland\) Act 2009](#) (discussed earlier) and the [law of limitation](#).

Under current law, diagnosis of an asymptomatic condition (such as pleural plaques) starts the three-year limitation period, which can prevent future claims for serious diseases like mesothelioma.<sup>li</sup>

New statutory provisions would ensure that a later-developing symptomatic condition is not time-barred by limitation [for a victim's claim](#), and would also protect [relatives' claims in fatal cases](#).

[As explained earlier](#), **the Scottish Government has announced it intends to introduce a Bill, ideally in year 1 of Session 7 of the Scottish Parliament**, relating to this recommendation.

Note that the SLC's [Eleventh Programme of Law Reform 2023-2027](#) says that a more general review of [the law on limitation](#) is planned as a later project for the SLC.<sup>1</sup> However, this work has not yet commenced.<sup>2</sup>

## Management of damages awarded to children

In negligence cases, awards of damages can be made to injured children (in this context, **under 16s**). The current powers available to the court to manage these awards is contained in section 13 of the [Children \(Scotland\) Act 1995](#).

A new procedure proposed under the draft Bill would require the court to consider how awards to injured children will be managed, and to involve [the Accountant of Court](#) where appropriate, with the aim of ensuring proper oversight and protection of children's funds.

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<sup>li</sup> [Damages \(Asbestos-related Conditions\) \(Scotland\) Act 2009](#); [Prescription and Limitation \(Scotland\) Act 1973](#), section 17.

## Scottish Government consultation on the personal injury discount rate and judicial rate of interest

To conclude the briefing on a technical note, [the Scottish Government has recently consulted](#) (closing **January 2026**) on which measure of inflation should be used in two specific areas:

- The first such area is the [personal injury discount rate](#). To recap, this lowers the part of the award of damages for future losses to reflect that the injured person can invest their lump-sum damages payment and earn a return before the relevant costs actually arise. The law here was last reformed via the [Damages \(Investment Returns and Periodical Payments\) \(Scotland\) Act 2019](#),<sup>lii</sup> referenced earlier.
- The consultation also examines the **judicial rate of interest**, which, very broadly, is the standard rate applied when a court order requires interest to be included or paid, such as with a court order for damages. This rate has remained unchanged for over thirty years.

Again, because of the timing of this consultation, it will fall to the Scottish Government formed for Session 7 of the Scottish Parliament to decide whether to bring forward implementing legislation during Session 7.

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lii [Damages Act 1996](#), as amended by the [Damages \(Investment Returns and Periodical Payments\) \(Scotland\) Act 2019](#).

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