The Damages (Scotland) Bill is a Member’s Bill which was introduced in the Scottish Parliament on 1 June 2010 by Bill Butler MSP. Its purpose is to implement the recommendations of the Scottish Law Commission in its report entitled Damages for Wrongful Death (Scottish Law Commission 2008).

Stage 3 proceedings on the Bill are scheduled for 3 March 2011. This briefing considers some of the key issues that were raised in evidence to the Justice Committee at Stage 1 and how these issues were addressed during the Stage 2 proceedings associated with the Bill.
EXECUTIVE SUMMARY

The Damages (Scotland) Bill is members’ bill based on a report of the Scottish Law Commission (Scottish Law Commission 2008) and contains provisions which seek to consolidate and reform the law on damages for wrongful death, ie damages in situations where someone is dying or has died from personal injuries caused by the wrongful act or omission of another person.

The current law in this area can be divided into three parts: 1) the victim’s rights; 2) the executor’s rights and 3) the relatives’ rights. A key distinction relevant to all types of claims is between ‘patrimonial losses’, ie economic losses, such as loss of earnings, and ‘non-patrimonial losses’, ie non-economic losses, such as pain and suffering.

The Justice Committee was designated as lead committee for the parliamentary consideration of the Bill. A number of the key issues on which the Committee received evidence at Stage 1 resulted in amendments at Stage 2.

The main changes to the Bill made at Stage 2 were as follows:

- the introduction of flexibility to depart from the 25% fixed percentage used to calculate the victim’s living expenses in the context of the victim’s claim for damages “for the purpose of avoiding a manifestly and materially unfair result” (section 1). Similar provision was made for flexibility associated with the 75% fixed percentage used to calculate the amount the victim spent on supporting his or her family in the context of the relatives’ claim for loss of support (section 7)
- in relation to the relatives’ claim for loss of support, the removal of the requirement in the Bill to disregard the income of the person making the claim (section 7)
- the re-instatement of the approach currently contained in the 1976 Act to the categories of relatives of the victim who can bring a claim for damages for loss of support on the victim’s death (section 14)
- the deletion of the term ‘grief and companionship award’ as the term used to describe the relatives’ award of damages for non-patrimonial losses
- the removal of a statement in the Bill on the issue of whether mental illness suffered by relatives as a result of the victim’s death can be compensated via an award for damages for non-patrimonial loss

Of the main changes to the Bill made at Stage 2, the removal of the requirement in the Bill to disregard the income of the person making the claim was the subject of the most debate (section 7). The Minister for Community Safety argued that the requirement was unnecessary on the basis that the rest of section 7 already prevented a court from routinely having regard to the income of the person making the claim, but that some facility to do so could still be required where the court wished to depart from the fixed percentages as described above. Some members of the Justice Committee supported the Minister’s view; others felt that there were no circumstances in which the income of the person making the claim was a relevant consideration. The Scottish Government amendment in question (Amendment 6) was ultimately
agreed to on division and Mr Butler agreed not to move his alternative amendment in this regard (Amendment 15).
INTRODUCTION AND BACKGROUND

The **Damages (Scotland) Bill** (plus accompanying documents) was introduced in the Scottish Parliament on 1 June 2010 by Bill Butler MSP. The Bill is based on the recommendations of the **Scottish Law Commission** (‘SLC’) in its report entitled **Damages for Wrongful Death** (Scottish Law Commission 2008) and contains provisions which repeal and re-enact, with some substantive amendments, the provisions of the Damages (Scotland) Act 1976 (c 13) (‘the 1976 Act’).

The Parliament’s Justice Committee was designated as lead committee for the parliamentary consideration of the Bill. Its **Stage 1 Report** (Justice Committee 2010) was published in December 2010. The Bill completed Stage 1 (consideration of general principles) with the Stage 1 debate on **15 December 2010**. The Scottish Government, which supports in principle the broad objectives of the Bill, and ultimately lodged the majority of the Stage 2 amendments, published a **written response** to the Stage 1 Report in January 2011 (Scottish Government 2011).

Stage 2 consideration of the Bill took place on 1 February 2011; thereafter the **Bill (as amended at Stage 2)** was published.

Key dates in the Parliament’s consideration of the Bill are set out in Table 1 below:

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<th>Table 1: Summary of Parliamentary Consideration</th>
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<td>Bill introduced</td>
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<td>Stage 1: Justice Committee evidence sessions</td>
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<td>Stage 1: Plenary Debate</td>
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<td>Stage 2: Justice Committee</td>
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The remainder of this briefing provides a summary of the current law and consideration (in table format) of some of the main issues arising during both Stage 1 and Stage 2 consideration of the Bill. The briefing does not seek to outline all of the issues raised or all of the changes made at Stage 2.

An earlier SPICe Briefing, entitled **Damages (Scotland) Bill** (Harvie-Clark 2010), provides information and analysis associated with the Bill as introduced.

SUMMARY OF THE CURRENT LAW

Damages for wrongful death can be divided into three parts: 1) the victim’s rights; 2) the executor’s rights and 3) the relatives’ rights.

**The victim’s rights**

The victim can claim damages for ‘patrimonial losses’, ie economic losses, such as loss of earnings, and for ‘non-patrimonial losses’, ie non-economic losses, such as pain and suffering experienced. A claim can be made for losses incurred up to the date of the ‘proof’, ie the main court hearing, as well as for future patrimonial and non-patrimonial losses.

Under the Administration of Justice Act 1982 (c 53) (‘the 1982 Act’) victims are also entitled to claim for the cost of necessary services provided to them by relatives (section 8), and for the
value of services that (had it not been for their injuries) they would have provided to their relatives (section 9).

The executor’s rights

If the individual dies before initiating or completing his or her claim for damages, the victim’s right to claim damages transmits to the executor of his or her estate, ie the person in law responsible for gathering in and distributing the deceased’s assets on death. The executor may claim for patrimonial loss and non-patrimonial loss, as well as making the claims regarding personal services under the 1982 Act referred to above.

The relatives’ rights

The victim’s relatives may have a claim for damages for 1) the loss of the victim’s financial support (a form of patrimonial loss); 2) non-patrimonial loss sustained, such as grief and sorrow caused by the death; and 3) by virtue of the 1982 Act, personal services which the deceased would have provided had he or she lived.

Subject to an exception created by the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007 (asp 18) relating to victims who are mesothelioma sufferers, the general rule is that if a court has awarded damages to the victim before his or her death (or he or she had otherwise received a final settlement in respect of this aspect of his or her claim) this has the effect of precluding any subsequent claim by the victim’s relatives.

KEY ISSUES ASSOCIATED WITH THE BILL

Table 2 below outlines some of the key issues associated with the Bill and how they were addressed at Stage 1 and Stage 2. All amendments referred to are Scottish Government amendments unless otherwise stated.
Table 2: Key issues at Stage 1 and Stage 2 of the Bill

<table>
<thead>
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<th>Issue</th>
<th>The Bill as introduced</th>
<th>The Justice Committee’s recommendations</th>
<th>Stage 2</th>
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<tr>
<td>Fixed percentages</td>
<td>Section 1 provided that, in calculating the victim’s claim for patrimonial losses, the court is to deduct 25% of the victim's projected future net income to represent what the victim would have spent on his or her living expenses. Section 7 of the Bill provided that, in calculating the deceased’s relatives’ claim for loss of financial support (where the person making the claim is the deceased’s spouse, civil partner, cohabitant or dependent child), it should be assumed that the deceased used 75% of his or her net income to support his or her family.</td>
<td>The Committee acknowledged that there were arguments both for and against using fixed percentages as opposed to a more flexible case-by-case approach. The Committee suggested a compromise approach which involved using the 25% and 75% figures, but treating them as “rebuttable presumptions”, i.e., figures which could be departed from where evidence was led suggesting that this should occur. This, the Committee stated, would retain some of the benefits of fixed percentages but give the courts flexibility to deal with “the genuinely unusual case.” (Scottish Parliament Justice Committee 2010e, paras 103–107 and 145).</td>
<td>Amendments 1 and 7 sought to modify sections 1 and 7 to allow flexibility to depart from the fixed percentages “for the purpose of avoiding a manifestly and materially unfair result”. These amendments were agreed to (without division) (see Scottish Parliament Justice Committee 2011, Cols 4116–4118 and 4130).</td>
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<td>Disregarding the income of the person making the claim</td>
<td>Section 7 of the Bill as introduced also made a second change to the way the relatives’ claim for loss of financial support is currently calculated, namely by providing that the income of the person making the claim should be disregarded for the purposes of the claim.</td>
<td>The Justice Committee was satisfied with this aspect of section 7, commenting as follows: “The underlying principle must be to restore the family’s finances to the position they would have been in had the family member not died.” (Scottish Parliament Justice Committee 2010e, paras 145).</td>
<td>Amendment 6, in the name of the Minister, removed the requirement to disregard the income of a relative. Amendment 15, in the name of Mr</td>
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<td>person making the claim should always be disregarded.</td>
<td>what they would have been had the wrongful death not taken place, and that requires the lost income-stream from the victim's earnings, insofar as it was previously available to support his or her relatives, to be compensated for in full. The only deduction should therefore be the one required to account for the victim's living expenses…To make any further deduction to reflect the income of a surviving relative would, in the Committee’s view, be irrelevant and inappropriate” (Scottish Parliament Justice Committee 2010e, para 146).</td>
<td>Butler MSP, sought to introduce the requirement later in section 7. Of the main changes proposed to the Bill at Stage 2, the change associated with amendment 6 was the subject of the most debate. The Minister for Community Safety argued that the requirement to disregard the income of the person making the claim was unnecessary as the rest of section 7 ensured that what is known as the Brown v. Ferguson formula, in which damages are assessed by reference to the combined income of the deceased victim and a surviving spouse, could no longer be followed. However, the Minister argued that the earlier amendments to allow some flexibility to depart from the fixed percentages “for the purpose of avoiding a manifestly and materially unfair result” (see above) made it necessary to retain some facility to take the income of the person making the claim into account. Some members of the Justice Committee supported the Minister’s view, others felt that there were no circumstances in which the income of the person making the claim should be a</td>
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### Definition of a ‘relative’

| The Bill as introduced proposed a change to the definition of ‘relative’ restricting the categories of individual who can currently claim damages for patrimonial loss (section 14). This would have removed the current distinction between the larger set of relatives entitled to claim for patrimonial loss and the smaller set of relatives belonging to the deceased’s ‘immediate family’ who are entitled to claim for non-patrimonial loss. |
| The Committee agreed with the large majority of witnesses who gave evidence at Stage 1 that the proposed change would unfairly remove the existing right of certain relatives (beyond those defined as ‘immediate family’) to claim for damages if they could show that they had actually been supported by the victim (Scottish Parliament Justice Committee 2010e, para 187). |
| Amendments 2 and 4 and 8 to 11 sought to retain the wider class of relatives who can claim damages for loss of support which is currently contained in the 1976 Act. These amendments were agreed to (without division) (see Scottish Parliament Justice Committee 2011, Cols 4118–4119, 4121 and 4130). |

### Relatives’ claims for non-patrimonial loss

| The Bill as introduced provided for the current right of relatives to claim for non-patrimonial loss to continue but that any resulting award be re-titled as a ‘grief and companionship award’ (section 4(3)(a)). The Bill as introduced also stated that mental illness caused by the victim’s death is not to be compensated for by such an award. |
| The Committee noted the doubts expressed by witnesses about the name for non-patrimonial loss awards proposed in the Bill and, suggested that unless agreement can be reached on an alternative name, it might be better to rely on the award simply becoming known by reference to its numbering, ie as a ‘section 4(2)(b) award’ (Scottish Parliament Justice Committee 2010e, para 187). |
| Amendment 3 sought to 1) remove the name ‘grief and companionship award’ from the Bill; and 2) leave the Bill silent on the issue of whether mental illness caused by the victim’s death can be compensated via an award for damages for non-patrimonial loss. (Amendments 5 and 12 are associated consequential amendments). |
The Committee recommended that section 4(3)(b) should be removed, leaving the law in its current state until a decisive court ruling on the topic or separate legislation is introduced on damages for psychiatric injury (Scottish Parliament Justice Committee 2010e, paras 124–127).

All amendments were agreed to (without division) (see Scottish Parliament Justice Committee 2011, *Cols 4119–4121 and 4130*).
SOURCES


- APIL
- ASLEF
- Association of British Insurers
- Faculty of Advocates
- Fire Brigades Union
- Forum of Insurance Lawyers (FOIL)
- Forum of Scottish Claims Managers
- Law Society of Scotland
- Peter McCormack, Advocate
- (Dr) Peter Semple
- STUC
- Thompsons Solicitors
- UCATT
- UNITE

*Damages (Scotland) Bill* [Online]. Available at: http://www.scottish.parliament.uk/s3/bills/49-Damages/index.htm


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