Damages (Scotland) Bill: Consultation Paper

Bill Butler MSP

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3 List of Commission’s recommendations
Part 1: Introduction

1.1 I propose to introduce a Member’s Bill into the Scottish Parliament which would implement the Scottish Law Commission’s (“the Commission”) Report on Damages for Wrongful Death (“the Report”).¹ The proposal is for a Bill—

“in relation to rights to damages in respect of personal injuries and death.”

1.2 At present, the primary legislation concerned with the law of damages in respect of death from personal injury is the Damages (Scotland) Act 1976. Two types of claim for damages arise on the death of a person from personal injury: the victim's own claim which can transmit to his or her executor and a claim by the deceased's relatives.

1.3 That Act remains the foundation of the rules governing damages for wrongful death. However, in their Report, published 30 September 2008, the Commission concluded that there are some areas of the current law which no longer reflect the economic realities of modern family structures and reform was advisable. In addition, the Commission felt reform was necessary, as the Act had become over-complex and contained inaccuracies as a consequence of numerous amendments made to it.²

1.4 In their Report, the Commission recommended that the existing statutory provisions relating to damages for personal injuries resulting in death should be re-enacted in a more logical and coherent way, subject to 5 specific amendments being made. These amendments are discussed later in the consultation document The Commission attached to their Report³ a draft Bill, with explanatory notes, entitled the Damages (Scotland) Bill which gave effect to the Commission’s recommendations. This draft bill can also be found as an appendix to this consultation document.

1.5 Of the five amendments recommended by the Commission the two most significant are considered in detail in Part 3 of this paper but it may be helpful to give a brief indication of them here. They relate to cases where:

(a) the injured person has died from their injuries and his or her relatives are seeking damages for the financial loss which the family will suffer as a result of their loss of support. Under the existing law, a deduction is made from what would have been the deceased’s earnings to take account of (i) what the deceased would have spent on themselves if they had not died and (ii) the earnings of the widow or widower and other members of the family who may be dependants.

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² Amendments include: Damages (Scotland) Act 1993 (c.5); Administration of Justice Act 1982 (c.53); International Transport Conventions Act 1983 (c.14); Consumer Protection Act 1987 (c.43); Antarctic Minerals Act 1989 (c.21); Law Reforms (Parent and Child)(Scotland) Act 1986 (c.9); Civil Partnership Act 2004 (c.33); Family Law (Scotland) Act 2006 asp2; Rights of Relatives to Damages (Mesothelioma)(Scotland) Act 2007 asp 18.
³ Report, Appendix A
This can lead to cases where there are no damages for loss of support even although the deceased may have been making a substantial contribution into the household income. As well as being unfair, the existing law also leads to considerable delay in resolving matters while the respective arguments ensue about how much the deceased spent on themselves and on others and how it was pooled, etc.

The Commission considered that there should continue to be a deduction made for the living expenses of the deceased but that this should be assumed to be 25% of their earnings and there should be no deduction made for the earnings of the widow or widower. This avoids the necessity of delving into the financial circumstances and respective earnings, lifestyles, etc and, by simplifying the calculations, would lead to a speedier resolution of such cases; and

(b) the injured person, who is dying from their injuries, seeks damages for the earnings which they would have received in the future if they had not been injured. As above, a deduction has to be made for their reasonable living expenses and this leads to similar arguments as mentioned above. The general effect of the existing law is that the dying person only obtains, at most, about 50% of their future earnings.

The Commission recommended that their “reasonable living expenses” should be assumed to be 25% of their earnings so that, here too, there would be a straight 75% of their earnings awarded to them.

1.6 These recommendations of the Commission would resolve the existing inconsistency between the sum awarded for loss of support following upon the death and the awarded sum for loss of earnings for someone who is dying. At present, the application of the rules under the existing law mean that the amount of damages awarded will generally be lower if a case has settled before the person dies as opposed to a loss of financial support for the relatives. The Commission’s recommendations would make both these cases consistent by applying a straight 25% deduction in both circumstances. This would remove any incentive to delay by either party (depending on where the advantage falls) as well as unfairness between the two cases. It would also speed up the settlement of cases by the use of such a straightforward formula.

1.7 Although the Report was submitted to Scottish Ministers in September 2008, Ministers have so far not indicated whether they agree with the Commission’s recommendations and, if so, whether they are proposing to introduce a Bill into the Scottish Parliament to give effect to them.

1.8 Since devolution there has been a marked decrease in the number of Commission reports being implemented. The Chairman of the Commission has recently articulated his concern at this trend:
“The danger [is] that Scots law will fall behind the rest of the world's legal systems in responding to the challenges of an era marked by rapid technological and economic change.”  

This concern and the comments of the Chairman were highlighted by the Law Society of Scotland in evidence to the Calman Commission.

1.9 Having read the Report on Damages for Wrongful Death and discussed the matter with Professor Thomson, the lead Commissioner on the project, I believe that the current system of damages for wrongful deaths can be improved and reform should be implemented as a matter of urgency I am proposing to introduce the appropriate legislation as a Member’s Bill, in this case by introducing into the Parliament effectively the same Bill as the draft Bill attached to the Commission’s report. For ease of reference, a copy of that Bill, together with its explanatory notes, is contained in Appendix 1 to this paper.

1.10 A draft proposal for such a Bill was lodged in the Parliament on 29 April 2009, together with a statement of my reasons as to why I considered that, as the Commission has already consulted upon their proposals, a case for the Bill had already been established and that further consultation on the draft proposal was therefore unnecessary. However, the Justice Committee decided that it was not satisfied with my statement. Accordingly, it is necessary to carry out the present consultation upon these proposals.

1.11 This consultation is an important part of the Bill’s development. I welcome any comments which you may have on this paper and upon the Commission’s report and draft Bill. I invite you to answer the questions which are asked at the end. The responses that I receive will be taken into account, and any consequential amendments considered necessary to the draft Bill as a result will be made, before the Bill is introduced.

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4 See the Commission’s Annual Report 2008 Scot Law Com 214. www.scotlawcom.gov.uk
Part 2: Review of existing law

2.1 In September 2006, Scottish Ministers asked the Commission to review the existing law on damages for wrongful death. The remit given to the Commission was:

“To consider the law relating to damages recoverable in respect of deaths caused by personal injury and the damages recoverable by relatives of an injured person; and to make appropriate recommendations for reform”.

2.2 Accordingly, the Commission reviewed the existing law on its merits in order to identify whether or not any changes were required.

2.3 An outline of the current law is set out in Part 2 of the Commission’s Report. For ease of reference, and with the permission of the Commission, this is reproduced in Appendix 2 to this paper.

2.4 On 1 August 2007, the Commission issued a Discussion Paper on Damages for Wrongful Death which canvassed a wide range of options for reform of the law. The Commission invited comments from a number of specific consultees and more generally from the public on a number of questions. The discussion paper produced 15 formal responses.

2.5 Having reviewed the existing law, the Commission concluded that:

“it has become clear that there is general satisfaction with the existing law and that there is little support for radical reform. However, as we shall see, there are some areas where the current law no longer reflects the realities, in particular the economic realities, of contemporary family structures in Scotland. Here the law has become anachronistic and the majority of respondents agreed that reform of these areas was desirable. Moreover, it was also accepted that the Damages (Scotland) Act 1976 has become over-complex and, indeed, contains inaccuracies as a consequence of the numerous amendments made to it. Accordingly, our major recommendation is that the 1976 Act should be repealed and replaced by new legislation which will restate the current law with greater clarity and accuracy.”

2.6 For ease of reference, a complete list of the Commission’s recommendations is reproduced in Appendix 3 to this paper. It can be observed that most of them recommended the continuation of the existing law. The Commission only recommended making five substantive changes to the existing law. Two of them have already been

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8 Discussion Paper No 153
9 The consultees who submitted written comments are listed in Appendix D to the Report.
10 Report, paragraphs 3.32-3.44; 3.52-3.57.
11 Report, paragraph 3.1
briefly described.\textsuperscript{12} These recommendations and the Commission’s reasons for them are summarised in Part 3 of this paper.

2.7 In order to effect these changes the Commission prepared a draft Bill. The result is that the draft Bill appears, in effect, to be essentially a consolidation or re-enactment of the existing law, which is contained in the Damages (Scotland) Act 1976\textsuperscript{13} (“the 1976 Act”), but with Commission recommendations. It also makes amendments to the Administration of Justice Act 1982\textsuperscript{14} (“the 1982 Act”).

2.8 However, it is important to appreciate that consolidation of the existing law was not the purpose of the Commission’s remit but rather its result. What the Commission did was to take a fresh look to ascertain whether the existing rules were justified. The Commission concluded that they were. However, the Commission did not refer to the Bill as a consolidation and this is not reflected in its long title. This is no doubt because, if it was a consolidation Bill, the Commission could only recommend amendments which are “necessary for the purpose of producing a satisfactory consolidation”\textsuperscript{15}. It would be difficult to take the view that the two main amendments which the Commission recommended and which have been described briefly above as coming within that criterion.\textsuperscript{16}

2.9 In view of this, it is not proposed to introduce the draft Bill as a Consolidation Bill which would attract the expedited procedure in the Parliament\textsuperscript{17}.

\begin{itemize}
\item \textsuperscript{12} See paragraphs 1.5 and 1.6 above
\item \textsuperscript{13} 1976 c 13
\item \textsuperscript{14} 1982 c 53
\item \textsuperscript{15} See paragraphs 17-23 of the 1\textsuperscript{st} Report 2003 of the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Bill Committee. http://www.scottish.parliament.uk/business/committees/historic/ad-fish/index.htm
\item \textsuperscript{16} See paragraph 1.5-1.6 above [check para numbering] The Scottish Government propose to take a wider power to make amendments in consolidation Bills – see Interpretation and Legislative Reform (Scotland) Bill, section 47
\item \textsuperscript{17} See Rule 9.18 of the Standing Orders
\end{itemize}
Part 3: Summary of Commission’s recommendations and reasons for amendments

3.1 The Commission recommended five amendments to the existing law. These are summarised in the following paragraphs.

3.2 The two major amendments have already been briefly described but they are described again in greater detail below.

1 Victim’s damages for patrimonial loss: assessment of future reasonable living expenses

Current legislation

4.1 The amount of damages which a victim of personal injuries can claim includes any patrimonial loss suffered as a result of those injuries. A victim can claim for damages up to the date of proof and for future loss.

4.2 Section 9(2)(a) of the 1976 Act provides that, when quantifying future loss, the courts are to assume that the victim will live until the date when he would have been expected to die if he had not suffered the injuries. This date is known as the "notional date of death". This provision allows the victim to recover damages for the "lost period", which is the period between his expected date of death and his notional date of death.

4.3 Under the existing law, the court is required, when assessing patrimonial loss during the lost period, to deduct an amount to account for the living expenses which in the opinion of the court the victim would have reasonably incurred during that period.

Commission consideration

4.4 The Commission considered that a deduction should continue to be made for the victim’s reasonable living expenses. However, it thought that there could be scope for argument and evidential problems if this was left to the courts to assess, particularly if this was done not by reference to objective factors but by reference to the circumstances of the particular victim.

Recommendation

4.5 The Commission considered that it would be simpler to provide for a fixed percentage deduction to be made from the deceased’s net income to represent that

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18 See paragraphs 1.5-1.6 above
19 See Appendix 2, paragraph 2.4
20 1976 Act, section 9(2)(c)
21 As appears to be the position in England under the Court of Appeal’s decision in Harris v Empress Motors Ltd 1984] 1 WLR 212.
amount. The Commission considered that it was reasonable to assume that a person should be taken to have spent 25% of his net annual income on his own living expenses. Accordingly, the Commission recommended that the court should make a fixed deduction of 25% of his net annual income during the lost period to represent the victim’s reasonable living expenses.22

4.6 This is given effect to in section 1(6)(c) of the draft Bill.

2 Victim’s damages for patrimonial loss: personal services under section 9 of the 1982 Act

Current legislation
5.1 Where a victim of personal injuries provided personal services gratuitously to a relative and he is no longer able to do so as a result of those injuries, he or she may claim damages in terms of section 9 of the 1982 Act.23 This applies to services which the relative would otherwise ordinarily have to pay for.24 The damages are intended to stand as payment for the provision of these services to the relative by someone other than the victim. Under the existing law, there are no damages payable for the deceased’s inability to provide such services during the lost period.

Commission consideration
5.2 However, the Commission considered that there is no reason why such damages should not be recovered during the lost period because, if he or she had not been injured, the victim would have been able to provide personal services gratuitously to his family until the notional date of death.

Recommendation
5.3 Accordingly, the Commission recommended that a claim under section 9 of the 1982 Act should include damages in respect of the victim's inability to provide gratuitous personal services to his relatives during the lost period.25

5.4 This recommendation is given effect to in section 13(a) of the draft Bill.

3 Relatives’ damages for patrimonial loss: assessment of loss of support

6.1 The main policy change which the Commission recommended should be made related to the rights of relatives to damages for patrimonial loss and in particular the calculation of loss of the deceased's support.

6.2 A relative of a person, who has died from personal injuries, may recover, as damages for patrimonial loss, an amount which will compensate the relative for the loss

22 Report Recommendation 4, paragraph 3.9
23 Administration of Justice Act 1982, s 9(1) and (3)
24 Administration of Justice Act 1982, s 9(3)(b). The definition of ‘personal services’ has been interpreted widely by the courts: see Ingham v Russell (Transport) Ltd 1991 SC 201
25 Report Recommendation 5(b), paragraph 3.12
of the financial support which the deceased would have provided for the relative if he or she had not died from the personal injuries. The Commission recommended that this should continue to be the law.

Current legislation and Commission consideration

6.3 However, the Commission made 3 criticisms of the existing law relating to how the calculation is made of the amount of the compensation for that loss of support. Under the existing law

(a) it is for the relative to prove the amount of the actual financial support which he received, and was likely to receive in the future. The Commission considered that it was difficult to establish the deceased’s current and future income and the extent to which the deceased might have spent on himself as distinct from his relatives;

(b) where the pursuer is the deceased's spouse, civil partner or cohabitant, the loss of support for the pursuer and dependent children is calculated using the formula laid down in Brown v Ferguson. The Commission pointed out that this formula might have been satisfactory in the days of the traditional family, when the deceased was the main breadwinner and the surviving partner's primary role was to look after the home and children and had no substantial income of their own. However, this no longer represented current economic realities. The usual situation nowadays is for both the deceased and the pursuer to have joint incomes and, in such a case, the application of the formula leads to unsatisfactory results because it reduces the sum for loss of dependency available for the pursuer and any dependent children. It does not recognise that a surviving partner may sustain substantial economic loss as a result of the victim's death, even though the survivor was not being supported by the deceased in the traditional sense because he or she was also earning a substantial salary. The Commission therefore took the view that the formula has become anachronistic;

(c) after the amount of loss of support has been calculated, the courts then apply the Ogden Tables to find an appropriate multiplier as from the date of

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26 1976 Act, section 1(3)  
27 Report Recommendation 10 paragraphs 3.30-3.34  
28 Report paragraph 3.35  
29 1990 SLT 274. This formula first aggregates the net incomes of the deceased and the pursuer; then deducts 25% as representing the deceased's living expenses; finally, the pursuer's net income is then subtracted to leave a sum for loss of dependency which, when multiplied by an appropriate multiplier, will give the total sum for that head of damages.  
30 Report paragraphs 3.39-3.43. In Appendix B to the Report, the Commission has set out several worked examples of this formula as it applies in different scenarios.  
31 Actuarial Tables for Use in Personal Injury and Fatal Accident Cases ("The Ogden Tables"). The 6th edition of the Tables provides detailed guidance on how the courts should assess awards of damages. The Tables and explanatory notes are published by the Government Actuary's Department and are available online at http://www.gad.gov.uk/Documents/Ogden_Tables_6thEdition.pdf.
death rather than from the date of the proof. However, the multiplier, which is used to calculate future loss, is discounted to take account of factors which may arise in the future. The Commission considered that there was no need for a multiplier to be applied for the period between the date of death and the date of proof because, as it is in the past, the loss sustained by the relative can be properly quantified. A multiplier should continue to be used to compensate the relative's future loss when the damages for that loss should continue to be subject to an appropriate discount.\footnote{Report, paragraphs 3.45 and 3.46}

**Recommendation**

6.4 The Commission therefore recommended that, when assessing the victim’s claim of damages for patrimonial loss,

(a) in every case, the court should assume that the total amount available to support the deceased’s relatives is an amount equivalent to 75% of the deceased’s net annual income. In other words, it should be assumed that, in every case, the deceased would have spent 25% of his net annual income on his own living expenses. This accords with their recommendation regarding the victim’s future living expenses\footnote{See paragraphs 4.1-4.4 above};

(b) in the case where the claim for loss of support is made by a relative who is the deceased's spouse, civil partner, cohabitant, or dependent child and no other relative makes such a claim, the court should

(i) assume that the deceased supported them to the extent of 75% of his net income;

(ii) the pursuer’s net income is to be disregarded. In other words, the rule in *Brown v Ferguson* is no longer to apply;

(c) in other cases, the relative is not to be awarded more in compensation for loss of support than the actual amount of that loss and this cannot exceed 75% of the deceased's net income;

(d) where a claim is made by the deceased's spouse, civil partner, cohabitant or dependent child, and also another relative whom the deceased was supporting, the amount of that other relative's support must be deducted from the 75% of the deceased's net income which the deceased is to be taken to have used to support his partner and dependent children;

(e) a dependent child is to be defined for those purposes as a child of the deceased, or a child accepted by the deceased as a child of his family, who is
under the age of 18 and to whom the deceased owed an obligation of aliment at the time of his death;\textsuperscript{34} and

(f) the relative's loss of support should be divided into past loss and future loss, and a single multiplier should run from the date of the interlocutor awarding damages in respect of future loss only\textsuperscript{35}.

6.5 These recommendations are given effect to in section 7 of the draft Bill.

4 Relatives’ title to sue for patrimonial loss

Current legislation

7.1 Under the existing law, the group of relatives who can sue for patrimonial loss (e.g. loss of support) is different from those who can sue for non-patrimonial loss (e.g. grief and suffering).

7.2 The relatives who can sue for non-patrimonial loss are restricted to the deceased’s immediate family. This is defined as (i) the deceased's spouse or civil partner; (ii) the deceased's opposite sex or same sex cohabitant; (iii) the deceased's parents and children; (iv) any person who was accepted by the deceased as a child of the family; (v) any person who accepted the deceased as a child of the family; (vi) any person who was the brother or sister of the deceased or was brought up in the same household as the deceased and was accepted as a child of the family in which the deceased was a child and (vii) any person who was a grandparent or grandchild of the deceased.

7.3 The relatives who can sue for patrimonial loss include not only the deceased’s immediate family but also extends to deceased's further ascendants and descendants, the deceased’s uncles, aunts, nieces and cousins and deceased's former spouse or civil partner. It is further extended by the inclusion of "in-laws".

Commission consideration

7.4 The Commission considered that title to sue for patrimonial loss should be restricted to those relatives who currently constitute the deceased's immediate family. It considered these are the relatives who are most likely to have had an affective relationship with the deceased and who are most likely to have been in receipt of the victim's support at the time of his death. In other words, the Commission considered that the current group of relatives with title to sue for patrimonial loss is too wide and has become anachronistic. In addition, the Commission considered that definition of relatives in the 1976 Act was complicated and ambiguous and that their recommendation would simplify the law.

\textsuperscript{34} Report Recommendation 11(a)-(d), paragraphs 3.36-3.43
\textsuperscript{35} Report Recommendation 12, paragraphs 3.45-3.46
Recommendation
7.5 Accordingly, the Commission recommended that the right to sue for patrimonial as well as non-patrimonial loss should be restricted to those relatives of the deceased who currently constitute the deceased's immediate family. This recommendation is given effect to in the definition of “relative” in section 14 of the draft Bill.36

5 Relatives’ damages for non-patrimonial loss; exclusion of mental illness

Commission consideration
8.1 The Commission considered that the relatives should continue to be able to claim damages for non-patrimonial loss to compensate for the grief and suffering caused by the wrongful death of a relative and the loss of their love and companionship. However the Commission recommended that it should be called "grief and companionship award".37

8.2 There was some authority to suggest that, where a relative suffers mental illness as a result of the deceased's death, damages for that mental illness should be awarded as falling within the heading of grief and sorrow.38 However, the Commission considered that it should be made clear that damages for non-patrimonial loss should not include damages in respect of any mental illness suffered by a relative as a consequence of the victim's death because it was more appropriate for the question whether such damages can be recovered to be determined in an independent action39.

Recommendation

8.3 These recommendations are given effect to in section 4(2)(b), (3) and (5) of the Bill.

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36 Report Recommendation 15, paragraphs 3.54-3.57
37 Report Recommendation 13, paragraphs 3.47-3.52
38 Gillies v Lynch 2002 SLT 1420
39 Report Recommendation 14, paragraphs 3.53
Part 4: Questions

I would welcome any comments which you may have upon this paper and upon the Commission’s report and draft Bill and, in particular upon the following questions.

1 Do you agree with the Commission’s main recommendation, and the reasons for it, that the existing law, which is contained in the 1976 Act, should be repealed and consolidated or re-enacted in the draft Bill, subject to certain amendments to it and to the 1982 Act. (see paragraphs 2.1-2.9 above)? If you do not agree, please explain why not.

2 Do you agree with the Commission’s recommendations Nos 4 and 5(b), and the reasons for them, that, when assessing the victim’s claim of damages for patrimonial loss,

(a) the court should make a fixed deduction of 25% of his net annual income during the lost period to represent the victim’s reasonable living expenses (see paragraphs 4.1-4.4 above); and

(b) a claim under section 9 of the 1982 Act should include damages in respect of the victim's inability to provide gratuitous personal services to his relatives during the lost period (see paragraphs 5.1-5.2 above)?

If you do not agree, please explain why not.

3 Do you agree with the Commission’s recommendations Nos 11(a) –(d) and 12, and the reasons for them, that, when assessing the relatives’ claim of damages for patrimonial loss,

(a) in every case, the court should assume that the total amount available to support the deceased’s relatives is an amount equivalent to 75% of the deceased’s net annual income

(b) in the case where the claim for loss of support is made by a relative who is the deceased's spouse, civil partner, cohabitant, or dependent child and no other relative makes such a claim, the court should

(i) assume that the deceased supported them to the extent of 75% of his net income;

(ii) the pursuer’s net income is to be disregarded;

(c) in other cases, the relative is not to be awarded more in compensation for loss of support than the actual amount of that loss and this cannot exceed 75% of the deceased's net income;
(d) where a claim is made by the deceased's spouse, civil partner, cohabitant or dependent child, and also another relative whom the deceased was supporting, the amount of that other relative's support must be deducted from the 75% of the deceased's net income which the deceased is to be taken to have used to support his partner and dependent children;

(e) a dependent child is to be defined for those purposes as a child of the deceased, or a child accepted by the deceased as a child of his family, who is under the age of 18 and to whom the deceased owed an obligation of aliment at the time of his death; and

(f) the relative's loss of support should be divided into past loss and future loss, and a single multiplier should run from the date of the interlocutor awarding damages in respect of future loss only (see paragraphs 6.1-6.5 above)?

If you do not agree, please explain why not.

4 Do you agree with the Commission’s recommendation No 15, and the reasons for it, that states that the right to sue for patrimonial as well as non-patrimonial loss should be restricted to those relatives of the deceased who currently constitute the deceased's immediate family (see paragraphs 7.1-7.5)? If you do not agree, please explain why not.

5 Do you agree with the Commission’s recommendation No 14, and the reasons for it, that the relatives’ damages for non-patrimonial loss should not include damages in respect of any mental illness suffered by a relative as a consequence of the victim’s death (see paragraphs 8.1-8.3)? If you do not agree, please explain why not.

6 Do you think there will be additional costs associated with this proposed bill and in what areas will they arise?

7 In what ways do you think the proposed Bill have equal opportunities impacts, if any?

8 Do you have any other comments in relation to my proposal for a Member’s Bill?

Please submit your response to this consultation exercise by 26 October 2009.

Please make it clear whether you are responding as an individual or on behalf of an organisation.
If you wish your response to be confidential, please say so. Otherwise it will be available for public inspection, in accordance with the principles of transparency and freedom of information. Confidential responses will be included in any summary or statistical analysis but this will not reveal the identity of any respondent who has requested confidentiality.

Additional copies of the paper or alternative formats can be requested using the contact details below and calls via Typetalk are welcome.


Responses can be sent electronically to Bill.Butler.MSP@scottish.parliament.uk or by post or fax to Bill Butler MSP, Room MG. 14, Scottish Parliament, Edinburgh EH99 1SP Fax: 0141 944 9442

Further copies of this consultation paper can be obtained by email from the above address.

3 August 2009
APPENDIX 1

Damages (Scotland) Bill 2009
[DRAFT]

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Schedule 1—Minor and Consequential Amendments
Schedule 2—Repeals
Damages (Scotland) Bill 2009

[Draft]

An Act of the Scottish Parliament to make further provision as regards rights to damages in respect of personal injuries and death; and for connected purposes.

1 Damages to injured person whose expectation of life is diminished

(1) This section applies to an action for damages in respect of personal injuries suffered by a pursuer whose date of death is expected to be earlier than had the injuries not been suffered.

(2) In assessing the amount of damages by way of solatium the court is, if the pursuer—

   (a) was at any time,

   (b) is, or

   (c) is likely to become,

aware of the reduced expectation of life, to have regard to the extent to which the pursuer, in consequence of that awareness, has suffered or is likely to suffer.

(3) Subject to subsection (2), no damages by way of solatium are recoverable by the pursuer in respect of loss of expectation of life.

(4) In making an award of damages by way of solatium, the court is not required to ascribe specifically any part of the award to loss of expectation of life.

(5) In assessing the amount of any patrimonial loss in respect of the period after the date of decree the court is to assume that the pursuer will live until the date when death would have been expected had the injuries not been suffered (the “notional date of death”).

(6) Such part of that amount as is attributable to the period between the expected date of death and the notional date of death (the “lost period”) is to be assessed as follows—

   (a) the court is to estimate what (if anything) the pursuer would have earned during the lost period through the pursuer’s own labour or own gainful activity had the injuries not been suffered,

   (b) the court may, if it thinks fit, add to the amount so estimated (whether or not that amount is nil) an amount equivalent to all or part of what it estimates
the pursuer would have received by way of relevant benefits during the lost period had the injuries not been suffered, and

(c) the court is then to deduct, from the total amount obtained by virtue of paragraphs (a) and (b), 25% of that amount (to represent what would have been the pursuer’s living expenses during the lost period had the injuries not been suffered).

(7) In paragraph (b) of subsection (6), “relevant benefits” means benefits in money or money’s worth other than benefits—

(a) derived from the pursuer’s own estate, or

(b) consisting of such earnings as are mentioned in paragraph (a) of that subsection.

GENERAL NOTE

The overall purpose of the draft Bill is to repeal, and re-enact with certain amendments, the Damages (Scotland) Act 1976. The 1976 Act has been amended on numerous occasions and as a result its structure and clarity have suffered. The changes contained in the Bill are designed to modernise and simplify the law.

The draft Bill is structured differently from the 1976 Act. It deals first with the rights of the victim (section 1) and the extent to which those rights transmit to an executor (section 2), before moving on to deal with the rights of relatives (sections 3 to 8) and the extent to which those rights transmit to a relative's executor (section 9). Further provision is made in relation to rights transmitted to executors (section 10). The remaining provisions are of a general nature. This gives the draft Bill a clearer natural progression than the 1976 Act as amended.

NOTE

Section 1 makes provision for damages to be payable to a victim of personal injuries whose expectation of life has been reduced as a result of the injuries suffered. It permits a victim to claim solatium and damages for patrimonial loss.

Subsection (1) provides that persons may only claim damages in terms of the section if their date of death is expected to be earlier than it would have been if the injuries had not been suffered. Persons who have suffered personal injuries but whose expectation of life has not been diminished will continue to rely on the general principles of the law of delict.

Subsections (2) to (4) are concerned with a victim's claim for solatium. They re-enact section 9A of the 1976 Act in a slightly recast form, and in doing so implement recommendation 1. Subsections (2) and (3) make it clear that a victim is only entitled to solatium for loss of expectation of life where he was, is or is likely to become aware that his life expectancy has been reduced. As a result, where a victim of personal injuries is killed instantaneously his executor cannot recover solatium on behalf of the estate.
Subsection (4) provides that, where a victim claims solatium for loss of expectation of life as part of a wider claim for solatium, the court does not require to ascribe any part of the damages by way of solatium to loss of expectation of life.

Subsections (5) to (7) are concerned with a victim's claim for patrimonial loss arising from personal injuries. They re-enact, with certain amendments, section 9 of the 1976 Act.

Subsection (5) ensures that a victim's claim for patrimonial loss will take into account the period between his expected date of death and the date on which he would have been expected to die if he had not suffered the injuries. This period is referred to as the 'lost period'. Any damages received under subsection (5) are intended to restore the victim to the position in which he would have been had he not suffered the injuries. This subsection restates section 9(2)(a) of the 1976 Act, and it implements recommendation 2.

Subsection (6) specifies how patrimonial loss during the lost period is to be assessed. In order to implement recommendations 3 and 4, this differs from the computation presently carried out under section 9(2)(b) and (c) of the 1976 Act. In particular, subsection (6) is limited to damages for patrimonial loss during the lost period: under the 1976 Act a deduction was made in respect of reasonable living expenses against all damages for future patrimonial loss. In other words, a deduction was made for living expenses in the period between the date of decree and the victim's expected date of death, despite the fact that he was still alive and actually incurring living expenses.

Paragraph (a) of subsection (6) provides that the court is to estimate what the victim's earnings during the lost period would have been. This provision, although an equivalent appeared in Schedule 1, paragraph 1 to the Commission's draft Bill annexed to the Report on the Law Relating to Damages for Injuries Causing Death (Scot Law Com No 31), was omitted from the 1976 Act. Its inclusion is designed to make the basis of calculation clearer. Paragraph (b) restates the court's discretion to take into account benefits which do not derive from the victim's own estate. When added together, the victim's estimated earnings and benefits form his gross patrimonial loss during the lost period. This implements recommendation 3.

Paragraph (c) of subsection (6) goes on to provide that a deduction of 25% is to be made from the victim's gross patrimonial loss during the lost period. The purpose of this deduction is to represent the living expenses which the victim would have incurred had his life not been shortened by the injuries suffered. This provision implements recommendation 4. By deducting a fixed percentage, the Bill again departs from the practice under section 9(2)(c) of the 1976 Act, which provides that the court should take into account the victim's reasonable living expenses and reduce the sum for patrimonial loss accordingly. As noted above, section 9(2)(c) applies to damages from the date of decree forward. Paragraph (c) limits the deduction to damages for patrimonial loss during the lost period.

Subsection (7) defines "relevant benefits" in paragraph (b) of subsection (6). It draws on the wording of section 9(2)(b), but by placing this information in a separate subsection it seeks to increase the readability of subsection (6). The definition is intended to encompass benefits which accrue to the victim from third parties.
2 Transmission of deceased’s rights to executor

(1) There are transmissible to a deceased person’s executor (“E”) the like rights to damages, including a right to damages for non-patrimonial loss, in respect of injuries suffered by the deceased (“A”) and vested in A immediately before A’s death, being —

(a) personal injuries, or

(b) injuries which, though not personal injuries, are—

(i) injuries to name or reputation, or

(ii) injuries resulting from harassment actionable under section 8 of the Protection from Harassment Act 1997 (c.40).

(2) The “like rights” mentioned in subsection (1) do not include any right to damages by way of compensation for patrimonial loss attributable to any period after the date of death; and in determining the amount of damages for non-patrimonial loss payable to E by virtue of this section, the only period to which the court is to have regard is that ending immediately before A’s death.

(3) In so far as a right to damages vested in A comprises a right to damages for non-patrimonial loss in respect of such injuries as are mentioned in subparagraph (i) of subsection (1)(b), that right is transmissible to E only if an action to enforce the right is brought by A and is not concluded before A’s death.

(4) For the purposes of subsection (3) an action is not to be taken to be concluded—

(a) while an appeal is competent, or

(b) before any appeal taken is disposed of.

NOTE

Section 2 makes provision in relation to the transmission of the deceased’s right to sue to his executor. Under section 2 of the 1976 Act, when a person dies, his right to sue for damages in respect of personal injuries (as defined in section 10 of the 1976 Act) transmits to his executor. However, this is not unqualified: an executor has no right to seek solatium for future suffering, on the basis that the deceased’s death has ended his suffering. Furthermore, the deceased’s right to damages for patrimonial loss during the lost period does not transmit – instead, his dependent relatives may sue for loss of support. It is important to note, however, that the deceased does not require to die from personal injuries for his rights to transmit in terms of the section: where a deceased had suffered personal injuries and then died from an unconnected cause, his right to damages will still transmit.
In order to implement recommendation 6(a), section 2 of the draft Bill restates section 2 of the 1976 Act. In particular, subsection (1) provides that the rights to damages in respect of injuries which are vested in the deceased immediately before death are transmissible to his executor. As the draft Bill defines "personal injuries" differently to the 1976 Act, it has been necessary to insert section 2(1)(b) to make it clear that rights to damages in respect of injuries to reputation and arising from harassment will continue to transmit to the deceased's executor. Subsection (1) restates, with changes, subsection (1) in the 1976 Act.

Subsection (2) goes on to limit the extent of transmission by excluding the deceased’s right to damages for patrimonial loss after the date of death and by stating that non-patrimonial loss may only be taken into account for the period ending immediately before the deceased’s death. This is to avoid overcompensation where the deceased's relatives will have a claim for patrimonial loss in terms of section 4(2)(a), and to reflect the fact that the deceased's sufferings are taken (in law at least) to end with his death. Subsection (2) restates subsections (2) and (3) from the 1976 Act.

Subsection (3) restates section 2(4) of the 1976. It provides for the special case where the deceased had a right to damages for non-patrimonial loss arising from defamation, verbal injury or other injury to reputation. As injuries of these types are thought to be peculiarly personal to the victim, the right to damages may only transmit to his executor if the victim had raised an action to enforce the right before his death and the action had not been concluded by then. In other words, an executor may be sisted into a defamation action which has already been raised, but he cannot raise a new action in which he seeks damages only for non-patrimonial loss. If the victim had sustained patrimonial loss as a result of the defamation, however, his executor will have title to sue by virtue of subsection (1).

Subsection (4) explains what is meant by an action being concluded in subsection (3). Previously this was done by reference to section 2A(2) of the 1976 Act, but in the interests of clarity the opportunity has been taken to bring this rule together with the rest of the section.

3 Application of sections 4 to 6

Sections 4 to 6 apply where a person (“A”) dies in consequence of suffering personal injuries as the result of the act or omission of another person (“B”) and the act or omission—

(a) gives rise to liability to pay damages to A (or to A’s executor), or

(b) would have given rise to such liability but for A’s death.

NOTE

Section 3 implements recommendation 7. It introduces the provisions dealing with the rights of the victim's relatives to damages. It re-enacts in part section 1(1) of the 1976 Act. It provides that the rights of relatives contained in sections 4 to 6 apply where the victim ("A") died from personal injuries caused by the defender ("B"), so long as B would have been liable to pay damages to A if A had sued before his death. In this way, the relatives' right to sue is dependent on B's liability to A.
4 **Sums of damages payable to relatives**

(1) B is liable under this subsection to pay such sums of damages as are mentioned in subsection (2) to any relative of A; but except as provided for in section 5 no such liability arises if the liability to pay damages to A (or to A’s executor) in respect of the act or omission—

(a) is excluded or discharged, whether by antecedent agreement or otherwise, by A before A’s death, or

(b) is excluded by virtue of an enactment.

(2) The sums of damages are—

(a) such sum as will compensate for any loss of support which as a result of the act or omission is sustained, or is likely to be sustained, by the relative after the date of A’s death together with any reasonable expenses incurred by the relative in connection with A’s funeral, and

(b) such sum, if any, as the court thinks just by way of compensation for all or any of the following—

(i) distress and anxiety endured by the relative in contemplation of the suffering of A before A’s death,

(ii) grief and sorrow of the relative caused by A’s death,

(iii) the loss of such non-patrimonial benefit as the relative might have been expected to derive from A’s society and guidance if A had not died.

(3) An award under paragraph (b) of subsection (2)—

(a) is to be known as a “grief and companionship award”, and

(b) is not to be made in respect of mental disorder caused by A’s death.

(4) The court, in making an award under paragraph (b) of subsection (2) is not required to ascribe any part of the award specifically to any of the sub-paragraphs of that paragraph.

(5) In subsection (3)(b), “mental disorder” has the meaning given by section 328 of the Mental Health (Care and Treatment)(Scotland) Act 2003 (asp 13).

**NOTE**

Where section 3 applies, section 4 makes provision in respect of the damages which the defender may have to pay to the relatives of the victim. The victim's relatives may seek damages for patrimonial loss.
in the form of loss of support, and may seek what is to be known as a "grief and companionship award" to reflect their non-patrimonial loss.

Subsection (1) restates the rest of subsections (1) and (2) of section 1 of the 1976 Act. Section 3 of the draft Bill has already established that the defender would have been liable to pay damages to the victim, and subsection (1) goes on to provide that the defender is therefore liable to pay damages in terms of subsection (2) to any relative of the victim. This is qualified by providing that no liability to relatives will arise where the victim has discharged or excluded liability before his death, or where liability is excluded by an enactment. In restating the current law, this provision implements recommendation 8. The qualification is itself subject to an exception for mesothelioma cases, which are governed by section 5.

Where section 5 applies, the general principle in subsection (1) of section 4 is overridden by the special provisions in section 5 in order to give effect to recommendation 9. For further details, see the note on section 5.

Subsection (2) specifies the damages which a defender may be liable to pay to the deceased's relatives. Paragraph (a) deals with patrimonial loss and paragraph (b) with non-patrimonial loss.

Paragraph (a) re-enacts section 1(3) of the 1976 Act. This implements recommendation 6(b) by providing that relatives will have title to sue for patrimonial loss. We consulted on the possibility of abolishing this right and permitting the deceased's executor to recover damages for future patrimonial loss as well as past loss, but this approach was rejected. It should be noted that paragraph (a) does not give the deceased's relatives an unfettered right to seek damages for patrimonial loss. The damages are confined to two heads: first, the loss of support suffered by that relative after the deceased's death, and, secondly, reasonable expenses incurred in connection with the deceased's funeral. In limiting the recoverable patrimonial loss in this way, the provision implements recommendation 10.

Paragraph (b) re-enacts section 1(4) of the 1976 Act. A significant change is that the 1976 Act restricted compensation under this subsection to a subset of the deceased's relatives known as the "deceased's immediate family". As the definition of relative used in the draft Bill corresponds to that subset, there is no longer any need to refer to the deceased's immediate family in this paragraph. Furthermore, as relatives by affinity are not entitled to damages of any sort under the terms of the draft Bill, there is no need to reenact subsections (4A) and (4B) of section 1 of the 1976 Act. This simplifies the provision markedly. The elements for which the court may award compensation (sub-paragraphs (i) to (iii)) are unchanged in the draft Bill. It should be noted that the amount of compensation under paragraph (b) is at the discretion of the court. This paragraph implements recommendation 13(a).

Subsection (3) implements recommendation 13(b). It makes further provision in relation to awards under paragraph (b) of subsection (2). Paragraph (a) provides that such an award is to be known as a "grief and companionship award". At common law, the equivalent award was known as solatium. The 1976 Act as enacted provided that the statutory replacement would be known as a "loss of society award". When section 1(4) of the 1976 Act was amended by the Damages (Scotland) Act 1993, references to a loss of society award were removed, and in practice damages awarded under this section are simply known as a "section 1(4) award". The new name is more meaningful than referring to what would be the equivalent: a "section 4(2)(b) award."

Paragraph (b) of subsection (3) is intended to clarify what is meant by "grief and sorrow" in section 4(2)(b)(ii). Grief and sorrow it is submitted, are emotions ordinarily experienced as a consequence of the death of a loved one. However, there is some authority (Gillies v Lynch 2002 SLT 1420) to suggest that, where a relative suffers mental illness as a result of the deceased's death, damages for that mental illness should be awarded as falling within the heading of grief and sorrow. The draft Bill
contains express provision to the contrary for the avoidance of doubt: relatives who suffer mental illness in consequence of the deceased's death will, however, be able to rely on the general principles of delict if they can establish that the defender owed them a duty of care. This paragraph implements recommendation 14.

5 Discharge of liability to pay damages: exception for mesothelioma

(1) This section applies where—

(a) the liability to pay damages to A (or to A’s executor) is discharged, whether by antecedent agreement or otherwise, by A before A’s death,

(b) the personal injury in consequence of which A died is mesothelioma, and

(c) the discharge and the death each occurred on or after 20 December 2006.

(2) Liability arises under section 4(1) but is limited to the payment of such sum of damages as is mentioned in paragraph (b) of section 4(2).

NOTE

Section 5 forms an exception to the general principles of liability laid down in section 4(1) in cases where a victim dies of mesothelioma. In doing so, it re-enacts subsections (2A) and (2B) of section 1 of the 1976 Act which were inserted by the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007. It gives effect to recommendation 9.

Subsection (1) contains three criteria which must be met for section 5 to apply. Paragraph (a) states that the victim must have discharged the defender's liability to him before death. If the victim has not discharged liability, then his relatives have no need of the exception in section 5. They may rely on the general rule in section 4(1) and sue for both a grief and companionship award and loss of support, if appropriate. Paragraph (b) states that the personal injury from which the victim dies must be mesothelioma. The exception created by the 2007 Act was confined to mesothelioma sufferers on policy grounds and this approach has been followed. It should be noted that the victim's relatives cannot rely on the fact that the victim suffered from mesothelioma if he goes on to die from another cause. Finally, in terms of paragraph (c), both the discharge and the death must have taken place on or after 20 December 2006. This date was specified in the 2007 Act as the date from which the exception would apply (although the Act itself did not come into force until 27 April 2007).

Subsection (2) provides that, where the three criteria set out in subsection (1) are met, the defender will be liable in damages to the victim's relatives even though the victim had discharged the liability before his death. However, this liability is limited to damages for non-patrimonial loss: the victim's relatives may seek a grief and companionship award in terms of section 4(2)(b) but not damages for loss of support under section 4(2)(a).
6 Relative’s loss of personal services

(1) A relative entitled to damages under paragraph (a) of section 4(2) is entitled to include, as a head of damages under that paragraph, a reasonable sum in respect of the loss to the relative of A’s personal services as a result of the act or omission.

(2) In subsection (1), “personal services” has the same meaning as in section 9(1) of the Administration of Justice Act 1982 (c.53) (damages in respect of inability of injured person to render such services).

NOTE

Section 6 deals with the right of victims’ relatives to damages for loss of personal services which were provided by the victim before his death. This is presently contained in section 9(2) of the Administration of Justice Act 1982, which is to be repealed by section 13(b) of the draft Bill in order that it may be re-enacted by section 6. In non-fatal cases, the injured person may seek damages under section 9(1) of the 1982 Act in respect of his inability to render personal services as defined in section 9(3). Where the injured person dies of his injuries, a relative who is entitled to damages for loss of support can include as a head of damages a sum in respect of loss of the personal services which the deceased would have rendered to him (section 9(2)). It is considered that this provision fits more logically with the provisions of the draft Bill than it does in the 1982 Act. Re-enacting the provision will bring all of the relatives’ rights conveniently within the same piece of legislation.

Subsection (1) re-enacts section 9(2) of the 1982 Act, providing that a relative who is entitled to damages for loss of support may also include a claim for damages for loss of the victim’s personal services.

Subsection (2) defines “personal services” in subsection (1) by reference to section 9(1) of the 1982 Act. This refers to personal services as the services mentioned in section 9(3) of the 1982 Act, being services:

(a) which were or might have been expected to have been rendered by the injured person before the occurrence of the act or omission giving rise to liability,

(b) of a kind which, when rendered by a person other than a relative, would ordinarily be obtainable on payment, and

(c) which the injured person but for the injuries in question might have been expected to render gratuitously to a relative.

7 Assessment of compensation for loss of support

(1) Such part of an award under paragraph (a) of section 4(2) as consists of a sum in compensation for loss of support is to be assessed applying the following paragraphs—

(a) the total amount to be available to support A’s relatives is an amount equivalent to 75% of A’s net annual income,

(b) a relative’s income is to be disregarded,
(c) in the case of any other relative than—

(i) a person described in paragraph (a) of the definition of “relative” in section 14(1), or

(ii) a dependent child,

the relative is not to be awarded more in compensation for loss of support than the actual amount of that loss,

(d) if—

(i) no such other relative is awarded a sum in compensation for loss of support, the total amount mentioned in paragraph (a) is to be taken to be spent by A in supporting such of A’s relatives as are mentioned in subparagraphs (i) and (ii) of paragraph (c),

(ii) any such other relative is awarded a sum in compensation for loss of support the total amount mentioned in paragraph (a) is, after deduction of the amount of the sum so awarded, to be taken to be spent by A in supporting such of A’s relatives as are mentioned in those sub-paragraphs, and

(e) any multiplier applied by the court—

(i) is to run from the date of the interlocutor awarding damages, and

(ii) is to apply only in respect of future loss of support.

(2) In subsection (1)(c)(ii), “dependent child” means a child who as at the date of A’s death—

(a) has not attained the age of 18 years, and

(b) is owed an obligation of aliment by A.

NOTE

Section 7 makes detailed provision for the calculation of damages for loss of support awarded under section 4(2)(a). At present, the general principle is that a relative who seeks damages for loss of support must quantify the loss and cannot recover more than that sum from the defender. However, a special rule laid down in Brown v Ferguson (1990 SLT 274) applies where the relative seeking damages is the deceased’s spouse, civil partner, cohabitant or dependent child. While retaining the general principle that a relative cannot recover damages in excess of the loss suffered, this section makes significant changes to the way damages are assessed, particularly for the classes of relative to whom Brown v Ferguson applies at present. These changes give effect to recommendation 11.
Paragraph (a) of subsection (1) provides that the total amount available to settle all claims for loss of support is 75% of the deceased's net annual income. In the Report, it is argued that a deceased should be deemed to spend 25% of his income on himself, leaving 75% as available for support to relatives. In accordance with the policy laid out in paragraphs 3.35 and 3.36 of the Report, the court has no discretion to vary this proportion in line with individual circumstances. This paragraph gives effect in part to recommendation 11(c).

Paragraph (b) of subsection (1) provides that the income of a relative claiming damages is to be disregarded when assessing the sum due. Although a relative's income is currently disregarded in most cases (as the relative has to prove the actual loss), it is taken into account where the pursuer is the deceased's spouse, civil partner or cohabitant by virtue of the rule in Brown v Ferguson. This paragraph will end that practice, and in so doing it partially implements recommendation 11(a).

Paragraph (c) of subsection (1) restates the general principle that a relative must prove the actual loss of support suffered and can only recover damages to that extent, unless the relative falls within certain classes for which special provision is made. This exception applies to the deceased's spouse, civil partner or cohabitant and to any dependent children the deceased may have had, for whom provision is made in subsection (4). This paragraph implements in part recommendation 11(c).

Paragraph (d) of subsection (1) contains two exceptions to the general assessment of damages laid down in subsection (3). It applies where the deceased's spouse, civil partner, cohabitant or dependent child (i.e. the persons mentioned in section 7(1)(c)(i) and (ii)) seeks damages for loss of support.

Sub-paragraph (i) is concerned with the situation where the only pursuers fall within those classes. For example, the deceased's widow and three dependent children may seek damages. In this case, the deceased is deemed to have spent the full 75% of his net annual income which was available for the support of his relatives on those four people. Damages are awarded to these persons on this basis regardless of the degree to which the deceased actually supported them. It is for the courts to apportion damages among the pursuers, if there are multiple pursuers. Sub-paragraph (i) gives effect in part to recommendation 11(a).

Sub-paragraph (ii) applies where the deceased, in addition to supporting his spouse, civil partner, cohabitant or dependent child, was supporting another relative. That relative has to prove the actual loss of support suffered. This sum is then deducted from the 75% of the deceased's net annual income provided for in paragraph (a) and the sum left over is deemed to have been spent by the deceased on his spouse, civil partner, cohabitant or dependent child. Sub-paragraph (ii) implements recommendation 11(d).

Paragraph (e) makes provision in respect of the multiplier which will apply to the multiplicand obtained through the application of paragraphs (a) to (d). At present, multipliers are selected and apply from the date of death. As multipliers are discounted for future eventualities, damages calculated in this way are artificially reduced. Losses in the period between the date of death and date of the interlocutor awarding damages can be quantified. Paragraph (e) states that multipliers are only to be applied in respect of future loss of support and they should run from the date of the interlocutor. This paragraph implements recommendation 12.

Subsection (2) defines the term "dependent child" for the purposes of this section. It should be noted that the deceased may owe an obligation of aliment at his date of death to a child who is 18 or older (see Family Law (Scotland) Act 1985 section 1(5)(b)). This would typically include children in higher education. While these children may claim for loss of support, they do not benefit from the special provisions which apply to a dependent child, and must accordingly prove actual loss of support in terms of paragraph (c) of subsection (1). This subsection implements recommendation 11(b).
Further provision as regards relative’s entitlement to damages

(1) Subject to subsection (3), in assessing for the purposes of section 4 or 6 the amount of any loss of support sustained by a relative of A no account is to be taken of—

(a) any patrimonial gain or advantage which has accrued or will or may accrue to the relative, by way of succession or settlement, from A or from any other person, or

(b) any insurance money, benefit, pension or gratuity which has been, or will or may be, paid as a result of A’s death.

(2) In subsection (1)—

“benefit” means benefit under the Social Security Contributions and Benefits Act 1992 (c.4) or the Social Security Contributions and Benefits (Northern Ireland) Act 1992 (c.7) and any payment by a friendly society or trade union for the relief or maintenance of a member’s dependants, “insurance money” includes a return of premiums, and “pension” includes a return of contributions and any payment of a lump sum in respect of a person’s employment.

(3) Where A has been awarded a provisional award of damages under section 12(2) of the Administration of Justice Act 1982 (c.53), the making of that award does not prevent liability from arising under section 4(1); but in assessing for the purposes of section 4 or 6 the amount of any loss of support sustained by a relative the court is to take into account such part of the provisional award relating to future patrimonial loss as was intended to compensate A for a period beyond the date on which A died.

(4) In order to establish loss of support for the purposes of section 4 or 6, it is not essential for a relative to show that A was, or might have become, subject to a duty in law to provide support for, or contribute to the support of, the relative; but if any such fact is established it may be taken into account in determining whether, and if so to what extent, A would (had A not died) have been likely to provide, or contribute to, such support.

(5) Except as provided for in this Act or in any other enactment, no person is entitled by reason of relationship to damages in respect of the death of another person.

(6) In subsection (5), “damages” includes damages by way of solatium.

NOTE

Section 8 re-enacts subsections (5) to (7) of section 1 of the 1976 Act. Subsections (1) and (2) re-enact subsection (5) of the 1976 Act, subsection (3) re-enacts subsection (5A), subsection (4) re-enacts subsection (6) and subsections (5) and (6) re-enact subsection (7). In subsection (5), there is a change
in that reference is now made to 'any other enactment' rather than to the named provisions in subsection (7) of the 1976 Act. The other changes are largely for drafting reasons.

9  Transmission of relative’s rights to executor

(1) This section applies where liability to pay damages to a relative (“R”) has arisen under section 4 or 6 but R dies.

(2) If the right to damages is vested in R immediately before R’s death that right is transmissible to R’s executor (“E”); but in determining the amount of damages payable to E by virtue of this section, the only period to which the court is to have regard is the period ending immediately before R’s death.

(3) In a case where—

   (a) section 5 applies, and

   (b) R died before 27th April 2007,

any right of R to damages under that section is to be taken, for the purposes of subsection (2), to have vested in R on A’s death.

NOTE

Section 9 re-enacts section 1A of the 1976 Act. As subsection (1) states, it makes provision for the situation where a relative who has a right to damages under section 4 or 6 dies before that claim can be resolved.

Subsection (2) provides that any right to damages under section 4 or 6 which was vested in the relative immediately before his death, will transmit to the relative's executor. However, the executor can only pursue the claim for damages up to the relative's date of death. Damages are not payable for future loss as the relative's death would have brought to an end the support which he received in any case. Similarly, the grief and suffering felt by the relative is taken to end with his own death.

Subsection (3) makes special provision for transitional cases involving the relatives of mesothelioma sufferers. The Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007 came into force on 27 April 2007. However, the exception which it introduced (see section 5 above) was intended to apply where the victim's discharge of liability and his death occurred on or after 20 December 2006. As a result, the 2007 Act contained a transitional provision at section 1(4). Where a relative would have had a right to damages but died in the period between the victim's death and the coming into force of the Act, section 1(4) provided that the rights in question were to be taken to have vested in the relative as at the victim's date of death. In this way, the rights would be deemed to have vested in the relative before his death and accordingly they could transmit to his executor. Subsection (3) re-enacts this provision, as the triennium (for the purposes of the Prescription and Limitation (Scotland) Act 1973) has not yet expired and there may be cases where a deceased relative's executor could raise an action.
10 Enforcement by executor of rights transmitted under section 2 or 9

(1) Where a right is transmitted by virtue of section 2 or 9, the executor in question is entitled—

(a) to bring an action to enforce it, or

(b) if an action to enforce it was brought by the deceased but not concluded before the date of death, to be sisted as pursuer in that action.

(2) For the purposes of subsection (1)(b) an action is not to be taken to be concluded—

(a) while an appeal is competent, or

(b) before any appeal taken is disposed of.

NOTE

Section 10 re-enacts section 2A of the 1976 Act. It details the powers of an executor to enforce the rights which are transmitted on the death of a victim (by virtue of section 2) or a relative of the victim (by virtue of section 9). An executor may raise an action to enforce the deceased's right or, if the deceased had already raised an action, may be sisted as pursuer. Subsection (2) clarifies that an executor may also take or continue any appeal which would have been competent had the deceased taken it.

11 Executor’s claim not excluded by relative’s claim etc.

(1) A claim made by virtue of this Act by a deceased’s executor is not excluded by a claim so made by a relative of the deceased (or by such a relative’s executor).

(2) Nor is a claim so made by a such a relative (or by such a relative’s executor) excluded by a claim so made by the deceased’s executor.

NOTE

Section 11 in effect re-enacts section 4 of the 1976 Act.

12 Limitation of total amount of liability

(1) This section applies to an action directed against a defender (“B”) in which, following the death of a person (“A”) from personal injuries, damages are claimed—

(a) in respect of those injuries, by A’s executor, or

(b) in respect of A’s death, by any relative of A or by the executor of any relative of A.
(2) If it is shown that the liability arising in relation to B from the personal injuries in question—

(a) had before A’s death, by antecedent agreement or otherwise, been limited to damages of a specified or ascertainable amount, or

(b) is so limited by virtue of an enactment,

nothing in this Act makes B liable to pay damages exceeding that amount.

(3) Accordingly, where there are two or more pursuers, any damages to which they would (but for this section) respectively be entitled under this Act are, if necessary, to be reduced pro rata.

(4) And where two or more actions are conjoined the conjoined actions are to be treated, for the purposes of this section, as if they were a single action.

NOTE

Section 12 re-enacts section 6 of the 1976 Act. It deals with limitation of liability in cases where the victim's executor or a relative of the victim (or the executor of such a relative) seeks damages in respect of the injuries suffered by the victim or in respect of his death.

Subsection (2) provides that, where the victim had agreed before his death to limit the damages payable by the defender, or where there is a statutory limitation on the damages, the executor or relative may only recover damages up to the permitted amount. This subsection is intended to make the victim's agreement binding on his executor and on his relatives. This is justifiable in that the executor represents the victim's estate and so stands to be bound by the victim's agreements, and in that a claim made by relatives is dependent upon the victim's right, and so should not go beyond what the victim himself agreed.

As the victim is effectively capable of binding all persons who have a claim after his death, subsection (3) provides that the damages payable where there is a multiplicity of pursuers will be reduced pro rata if required in order to bring the total sum of damages within the amount agreed by the victim. Subsection (4) makes provision for conjoined actions.

13 Amendment of section 9 of Administration of Justice Act 1982

In section 9 of the Administration of Justice Act 1982 (c.53) (services to injured person’s relative)—

(a) after subsection (1) there is inserted—

“(1A) In assessing the amount of damages payable by virtue of subsection (1) above to an injured person whose date of death is expected to be earlier than had the injuries not been sustained, the court is to assume that the person will live until the date when death would have been expected had the injuries not been sustained.”,

(b) subsection (2) is repealed,
(c) in subsection (3), for the words “subsections (1) and (2)” there is substituted “subsection (1)”, and

(d) in subsection (4), for the words “subsection (2) above” there is substituted “section 6(1) of the Damages (Scotland) Act 2008 (asp 00) (relative’s loss of personal services)”.

NOTE

Section 13 amends section 9 of the Administration of Justice Act 1982. While section 9 of the 1976 Act makes provision in relation to patrimonial loss during the lost period, it appears that it does not extend to the 1982 Act. Accordingly, neither the victim nor his relatives can claim damages in respect of his inability to provide services during the lost period.

Paragraph (a) inserts a new subsection (1A) in section 9 of the 1982 Act which alters this position: it provides that, in assessing damages under subsection (1) in cases where the victim's expectation of life has been reduced, the court is to assume that he would have lived until his notional date of death had the injuries not been sustained. This provision, which reflects section 1(5) of the draft Bill, makes it clear that damages under section 9 of the 1982 Act are payable in respect of the lost period. In doing so, it implements recommendation 5(b).

Paragraphs (b) to (d) make changes to section 9 of the 1982 Act to allow the relatives' right to damages for loss of personal services to be brought into the draft Bill (section 6 above). Paragraph (b) repeals section 9(2) of the 1982 Act, as it is re-enacted in section 6(1) of the draft Bill. In consequence, the reference to subsection (2) is removed from subsection (3) by paragraph (c). In order to preserve the effect of subsection (4), a reference to section 6(1) of the draft Bill is substituted by paragraph (d) for the reference to subsection (2).

14 Interpretation

(1) In this Act, unless the context otherwise requires—

“personal injuries” means—

(a) any disease, and

(b) any impairment of a person’s physical or mental condition, and

“relative”, in relation to a person who has died, means a person who—

(a) immediately before the death is the deceased’s spouse or civil partner or is living with the deceased as if married to, or in civil partnership with, the deceased,

(b) is a parent or child of the deceased, accepted the deceased as a child of the person’s family or was accepted by the deceased as a child of the deceased’s family,
(c) is the brother or sister of the deceased or was brought up in the same household as the deceased and accepted as a child of the family in which the deceased was a child, or

(d) is a grandparent or grandchild of the deceased.

(2) In deducing a relationship for the purposes of paragraph (c) of the definition of “relative” in subsection (1), any relationship of the half blood is to be treated as a relationship of the whole blood.

(3) In any enactment passed or made before this Act, unless the context otherwise requires, any reference to a loss of society award is to be construed as a reference to a grief and companionship award.

NOTE

Section 14 makes provision for interpreting the Bill. It corresponds to section 10 of and Schedule 1 to the 1976 Act.

Subsection (1) defines "personal injuries" and "relative". The definition of "personal injuries" in the 1976 Act has been amended twice. Paragraph 3 of the Schedule to the Damages (Scotland) Act 1993 added the words "and injury resulting from defamation or any other verbal injury or other injury to reputation". Section 8(8) of the Protection from Harassment Act 1997 added the words "or injury resulting from harassment actionable under section 8 of the Protection from Harassment Act 1997".

In the draft Bill, these amendments have been removed and the definition has reverted, in essence, to the one contained in the 1976 Act as enacted. This approach has been taken in order to simplify and clarify the definition, and to add greater intellectual coherence to it. In the rare cases where injury to reputation or harassment causes impairment to a person's physical or mental condition, this will continue to be a personal injury and the victim will have a right to damages accordingly. Insofar as injury to reputation was concerned, however, the 1993 Act was chiefly concerned with transmissibility of rights to executors. This end has been achieved by different means in the draft Bill (see the note to section 2).

The definition of "relative" has changed significantly in the draft Bill. At present, there are two classes: relatives generally (as defined in Schedule 1 to the 1976 Act) and the deceased’s immediate family (as defined in section 10(2) of the 1976 Act). The latter group is a subset of the former, and while any relative may seek damages for loss of support, only the deceased’s immediate family may seek a "section 1(4) award" for non-patrimonial loss (see the note to section 4 of the draft Bill). This distinction is swept away in the draft Bill as a result of the new approach which has been taken.

In effect, "relative" in the draft Bill encompasses the group known as the deceased’s immediate family in the 1976 Act. This implements recommendation 15. The definition is greatly simplified as a result, and it has been redrafted to reflect the wider changes in family law (for example, the status of cohabitants, the creation of the status of civil partner and the abolition of illegitimacy). As a consequence, there is no need to re-enact the definition of the deceased person’s immediate family contained in section 10(2) of the 1976 Act.

Section 10(3) of the 1976 Act provides that references to any other Act are to that Act as amended. It has not been re-enacted because there is no need to insert an express provision of this nature into

15 Minor and consequential amendments

Schedule 1 to this Act, which contains minor amendments and amendments consequential on the provisions of this Act, has effect.

16 Repeals

The enactments mentioned in schedule 2 to this Act are repealed to the extent mentioned in the second column of that schedule.

17 Saving

Nothing in this Act affects proceedings commenced before section 16 comes into force.

NOTE

The 1976 Act is to be repealed by section 16 and schedule 2 on a day appointed by the Scottish Ministers. However, it may be the case that, on that day, there are ongoing proceedings which were commenced under the 1976 Act. Section 17 ensures that the 1976 Act will continue to apply to those actions. It should be noted, however, that the test is whether proceedings have been raised. If a victim suffers personal injuries before section 16 comes into force but does not raise proceedings until after that date, the new regime will apply to those proceedings.

18 Transitional provision etc.

(1) The Scottish Ministers may, by order made by statutory instrument, make such incidental, supplemental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, or in consequence of, this Act.

(2) Subject to subsection (4), a statutory instrument containing an order under subsection (1) is subject to annulment in pursuance of a resolution of the Parliament.

(3) An order under subsection (1) may make different provision for different cases or for different classes of case.

(4) An order under subsection (1), if it includes provision amending or repealing an enactment contained in an Act, is not made unless a draft of the statutory instrument containing the order has been—

(a) laid before, and
(b) approved by resolution of, the Parliament.

19 Short title, Crown application and commencement

(1) This Act may be cited as the Damages (Scotland) Act 2009.

(2) This Act binds the Crown.

(3) The provisions of this Act, except this section, come into force on such day as the Scottish Ministers may by order made by statutory instrument appoint.

(4) Different days may be so appointed for different provisions and for different purposes.
SCHEDULE 1
(introduced by section 15 )

MINOR AND CONSEQUENTIAL AMENDMENTS

Sheriff Courts (Scotland) Act 1907 (c.51)

1 In Schedule 1 to the Sheriff Courts (Scotland) Act 1907 (c.51) (ordinary court rules), in the definition of “relative” in rule 36.1(2), for the words “meaning assigned to it in Schedule 1 to the Damages (Scotland) Act 1976” there is substituted “same meaning as in the Damages (Scotland) Act 2009”.

Prescription and Limitation (Scotland) Act 1973 (c.52)

2 (1) In section 18 of the Prescription and Limitation (Scotland) Act 1973 (actions where death has resulted from personal injuries), in subsection (5), for the words “Schedule 1 to the Damages (Scotland) Act 1976” there is substituted “the Damages (Scotland) Act 2009”.

(2) In section 22C of that Act (actions under the Consumer Protection Act 1987 where death has resulted from personal injuries), in subsection (6), for the words “Damages (Scotland) Act 1976” there is substituted “Damages (Scotland) Act 2009”.

Administration of Justice Act 1982 (c.53)

3 (1) In section 10(b) of the Administration of Justice Act 1982 (assessment of damages for personal injuries), for the words “section 2(1) of the Law Reform (Personal Injuries) Act 1948” there is substituted “section 8 of the Social Security (Recovery of Benefits) Act 1997 (c.27)”.

(2) In section 13(1) of that Act (supplementary), for the definition of “personal injuries” there is substituted—

“‘personal injuries’ means—

(a) any disease, and

(b) any impairment of a person’s physical or mental condition;”.

Companies Act 1985 (c.6)

4 In section 651 of the Companies Act 1985 (power of court to declare dissolution of company void), in subsection (5)(b), for the words “Damages (Scotland) Act 1976” there is substituted “Damages (Scotland) Act 2009”.
Consumer Protection Act 1987 (c.43)

5 (1) In section 1 of the Consumer Protection Act 1987 (purpose and construction of Part 1), in subsection (2), for the words “Damages (Scotland) Act 1976” there is substituted “Damages (Scotland) Act 2009”.

(2) In section 6 of that Act (application of certain enactments etc.)—

(a) in subsection (1)(c), for the words “section 1 of the Damages (Scotland) Act 1976” there is substituted “sections 3 to 6 of the Damages (Scotland) Act 2009”, and

(b) in subsection (2), for the words “Damages (Scotland) Act 1976” there is substituted “Damages (Scotland) Act 2009”.

Coal Mining Subsidence Act 1991 (c.45)

6 In section 32 of the Coal Mining Subsidence Act 1991 (compensation for death or disablement), in subsection (2)(c), for the words “Damages (Scotland) Act 1976” there is substituted “Damages (Scotland) Act 2009”.

Merchant Shipping Act 1995 (c.21)

7 In Part 2 of Schedule 7 to the Merchant Shipping Act 1995 (Convention on Limitation of Liability for Maritime Claims 1976), in paragraph 6, for the words “Damages (Scotland) Act 1976” there is substituted “Damages (Scotland) Act 2009”.

Damages Act 1996 (c.48)

8 In section 7 of the Damages Act 1996 (interpretation), in subsection (2), for the words “meaning given by section 10(1) of the Damages (Scotland) Act 1976” there is substituted “same meaning as in the Damages (Scotland) Act 2009”.

Health and Social Care (Community Health and Standards) Act 2003 (c.43)

9 In Schedule 10 to the Health and Social Care (Community Health and Standards) Act 2003 (recovery of NHS charges: exempted payments), in paragraph 7, for the words “section 1 of the Damages (Scotland) Act 1976 (c.13)” there is substituted “any of sections 4 to 6 of the Damages (Scotland) Act 2009 (asp 00)”.

Companies Act 2006 (c.46)

10 In section 1030 of the Companies Act 2006 (when application to the court may be made), in subsection (6)(b)(ii), for the words “Damages (Scotland) Act 1976 (c.13)” there is substituted “Damages (Scotland) Act 2009 (asp 00)”.

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NOTE

Schedule 1 makes minor and consequential amendments to other enactments. In the majority of cases, this involves updating references to the 1976 Act. In paragraph 3(1), the opportunity has also been taken to update a reference in the Administration of Justice Act 1982 to the repealed Law Reform (Personal Injuries) Act 1948, and paragraph 3(2) is intended to ensure consistency between the definition of "personal injuries" under that Act and the new definition used in the draft Bill. In relation to paragraph 4, it should be noted that Schedule 16 to the Companies Act 2006 prospectively repeals section 651 of the Companies Act 1985.
### REPEALS

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Appendix 2: Outline of current law

(Reproduced from Part 2 of the Commission’s Report)

Introduction

2.1 In this Part we outline the current law relating to damages for wrongful death and examine who is entitled to make a claim for damages.

2.2 When a person suffers injury or disease as a result of the actions or omissions of another, Scots law recognises the wrong by allowing reparation to be claimed from the wrongdoer. Reparation takes the form of damages, intended to compensate the injured person for the loss, injury and damage he has sustained. Where the person dies as a result of the injury or disease, the right to claim damages passes to the executor. The victim's relatives may also have a separate claim for the loss of support and grief and distress that they have suffered because of the death. Awards of damages are compensatory in nature, not punitive: the aim is to put the victim – or his family – in the position in which he would have been had he not been injured, so far as money can achieve this.

2.3 The Damages (Scotland) Act 1976 regulates awards of damages in cases of wrongful death. Part 2 of the Administration of Justice Act 1982 relates to damages for personal injuries more generally and should be read in conjunction with the 1976 Act.

The victim's claim

2.4 Where a claim for damages for personal injury is made, it is the practice to divide it into various heads of damages to assist in quantifying the claim. While this aids the court, it must be remembered that the various heads of damages do not constitute discrete claims: there is a single claim which is regarded as falling into several parts for the purpose of quantification. When assessing damages, the court will consider both the patrimonial and non-patrimonial loss which the victim has suffered. Patrimonial loss consists of economic loss as a result of the personal injuries. Non-patrimonial loss takes account of the emotional distress, pain and suffering which the victim has experienced. Damages for non-patrimonial loss are known as solatium. A victim may claim for loss suffered up to the date of proof and also for future loss.

The victim's right to claim for patrimonial loss

2.5 The victim's claim for damages for patrimonial losses up to the date of proof may include compensation for loss of earnings, the cost of reasonable medical expenses, the cost of necessary services rendered to the victim by a relative and the costs arising from

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40 Damages (Scotland) Act 1976, s 2(1).
41 Irving v Hiddleston 1998 SC 759
42 Administration of Justice Act 1982, s 8. See para 2.8 below
the victim's inability to render gratuitous services to his family.\textsuperscript{43} As these losses will already have occurred they can be precisely quantified.

2.6 At proof, the court will look forward and assess the amount of economic loss likely to be suffered in the future. This may include loss of future earnings, the cost of future maintenance, nursing and medical care, the cost of future necessary services rendered to the victim by a relative\textsuperscript{44} and costs arising from the victim's inability to render gratuitous services to his family.\textsuperscript{45} The projection that the court will make as to future patrimonial loss is a question of fact in each case, although conventions have developed to assist quantification. Of these, the method used to calculate the victim's loss of future earnings is the most important. First the court determines the victim's net annual earnings at the date of proof.\textsuperscript{46} This figure is the multiplicand. A multiplier is then found by reference to the Ogden Tables,\textsuperscript{47} which provide actuarial data for this purpose.\textsuperscript{48} The product of the multiplier and multiplicand provides a lump sum which is intended to provide a fund in lieu of the victim's income until his death. At that point, both the capital sum awarded and the income from having invested it should be exhausted.

2.7 Section 9(2)(a) of the 1976 Act provides that, when quantifying future loss, the court will assume that the victim will live until the date when he would have been expected to die if he had not suffered the injuries. This date is known as the "notional date of death". This provision allows the victim to recover damages for the "lost period", which is the period between his expected date of death and his notional date of death. In assessing patrimonial loss during the lost period, the court may also have regard to income received from other sources\textsuperscript{49} and it will make a deduction for the victim's reasonable living expenses.\textsuperscript{50}

\textit{The victim's right to claim for personal services under the Administration of Justice Act 1982}

2.8 Where a victim of personal injuries requires assistance from a relative in consequence of those injuries, he may sue for a sum representing reasonable

\textsuperscript{43} Administration of Justice Act 1982, s 9. See para 2.9 below.
\textsuperscript{44} Administration of Justice Act 1982, s 8.
\textsuperscript{45} Administration of Justice Act 1982, s 9
\textsuperscript{46} This may be adjusted to take account of the victim's probable promotion or early retirement. The court may decide that it requires to use different multiplicands to reflect different stages in the remainder of the victim's life. The court will not, however, attempt to speculate on future rates of taxation or National Insurance contributions
\textsuperscript{47} Actuarial Tables for Use in Personal Injury and Fatal Accident Cases ("The Ogden Tables"). The 6th edition of the Tables provides detailed guidance on how the courts should assess awards of damages. The Tables and explanatory notes are published by the Government Actuary's Department and are available online at http://www.gad.gov.uk/Documents/Ogden_Tables_6th_edition.pdf.
\textsuperscript{48} The Ogden Tables are now the starting point in selecting a multiplier: \textit{Wells v Wells} [1999] 1 AC 345; \textit{McNulty v Marshalls Food Group Ltd} 1999 SC 195.
\textsuperscript{49} Damages (Scotland) Act 1976, s 9(2)(b).
\textsuperscript{50} Damages (Scotland) Act 1976, s 9(2)(c).
remuneration for the necessary services which have been provided by that relative, together with any related expenses which were reasonably incurred. The victim is obliged to account to the relative for any damages recovered under this provision. The victim may also claim in respect of necessary services which will be rendered after the date of decree. It is thought that damages for necessary services may only be recovered up to the victim's expected date of death and not to his notional date of death, as services cannot be rendered during the lost period.

2.9 Where a victim of personal injuries provided personal services gratuitously to a relative and he is no longer able to do so as a result of those injuries, he may claim damages in terms of section 9 of the 1982 Act. This applies to services which the relative would otherwise ordinarily have to pay for. The damages are intended to stand as payment for the provision of these services to the relative by someone other than the victim. Again, a claim under this section is based on the victim's expected date of actual death, meaning that there is no compensation for inability to provide personal services during the lost period.

The victim's right to claim for non-patrimonial loss

2.10 Where a victim has sustained personal injuries, he may claim damages for the pain and suffering which he endures as a result of those injuries. This head of damages is known as solatium. In addition to damages for pain and suffering, the victim may include a claim for the distress and anxiety suffered due to the knowledge that his life expectancy has been reduced by the injuries. The victim must, however, be aware, or be likely to become aware, of his shortened life expectancy in order to obtain damages. For instance, a victim of a car crash who is left comatose and who subsequently dies without regaining consciousness has no claim for loss of expectation of life as he was not actually aware of his shortened life expectancy. On the other hand, a victim who is left paralysed but is aware of his impending death would receive damages to compensate for his distress and anxiety at knowing that his life expectancy was shortened. More generally, a victim must in fact experience pain and suffering before a claim for solatium can be made.

51 Administration of Justice Act 1982, s 8(1).
52 Administration of Justice Act 1982, s 8(2).
53 Administration of Justice Act 1982, s 8(3).
54 Discussion Paper para. 3.17
55 Administration of Justice Act 1982, s 9(1) and (3).
56 Administration of Justice Act 1982, s 9(3)(b). The definition of 'personal services' has been interpreted widely by the courts: see Ingham v Russell (Transport) Ltd 1991 SC 201
57 Damages (Scotland) Act 1976, s 9A
58 Damages (Scotland) Act 1976, s 9A(1)(b).
59 However, in Sellar's Curator Bonis v Glasgow Victoria and Leverndale Hospitals 1973 SLT (Notes) 3 (where the victim was in a state of spastic quadriplegia and had no appreciation of her condition) the court awarded an award for solatium equivalent to an award made in a similar case where the victim had a full appreciation of his condition, Lord Leechman stating "I find little to choose between them". In Steward v Greater Glasgow Health Board 1976 SLT (Notes) 66, Lord Keith considered that the issue in regard to solatium was not one of subjective pain and suffering but objective loss of amenities, although he then went on to consider that as the victim had no appreciation of her cosmetic defect no damages were awarded for solatium on the basis of it.
2.11 In assessing non-patrimonial loss, a distinction is made between pain and suffering already experienced and pain and suffering which is likely to be experienced in the future. The reason for this distinction is that past loss can be quantified at proof whereas future loss involves a degree of speculation. The distinction is also important in that interest is awarded on *solatium* for pain and suffering in the past, but not for future pain and suffering.  

**The executor's rights**

2.12 Where a victim dies as a consequence of his personal injuries, he may not have survived long enough to have been awarded damages or even to have raised a claim. In these cases, section 2 of the 1976 Act provides that the victim's right to claim damages in respect of his injuries transmits to his executor. The executor can continue an action raised by the victim, or he can initiate an action on behalf of the victim's estate. In either case the executor may claim for both patrimonial and non-patrimonial loss, but as we shall see, this right is limited. An award of damages to the executor forms part of the victim's estate, which then falls to be distributed according to the law of succession. It is common for damages obtained in this way to be distributed to the victim's relatives in the course of the distribution of his estate.

2.13 Section 4 of the 1976 Act provides that a claim by an executor is not affected by the existence of a claim by a relative and vice versa. As we see below, the deceased's relatives may also have title to sue for damages. Whereas a living victim has the right to sue for both past and future loss, on his death title to sue is divided between his executor and his relatives. This is done to prevent double compensation. Section 4 ensures that the two actions arising from the same set of facts will not act to bar each other from proceeding.

**The executor's rights to claim for patrimonial loss**

2.14 An executor is entitled to claim on behalf of the victim's estate for the patrimonial loss sustained by the victim up to the date of his death. Unlike the victim, the executor cannot sue for future losses such as loss of earnings. This is intended to prevent double compensation, as the deceased's relatives may make a separate claim for loss of support.

2.15 The right to claim damages for necessary services rendered by a relative to the victim before his death also transmits to the victim's executor. Where a victim was

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60 *Smith v Middleton* 1972 SC 30.
61 Damages (Scotland) Act 1976, s 2A(1)(a).
62 Damages (Scotland) Act 1976, s 2A(1)(b).
63 See paras. 2.14 and 2.17 below.
64 Paras 2.18 – 2.27
65 Damages (Scotland) Act 1976, s 2(2).
66 Administration of Justice Act, s 8
67 Damages (Scotland) Act 1976, s 2(1).
unable to provide a relative with personal services during the period after his injury and before his death, the victim's right to claim damages for that period transmits to his executor.

The executor's rights to claim for non-patrimonial loss

2.16 The victim's executor may claim *solatium* for the pain and suffering that the victim endured up to the date of his death. In assessing the executor's claim the court may have regard to the extent to which the victim suffered as a consequence of being aware that his life was going to end prematurely.

2.17 Where a victim is killed instantaneously, the executor has no right to claim *solatium* as the victim would not have endured pain and suffering and would not have been aware that his expectation of life had been reduced by the injuries. In cases of instantaneous death no patrimonial loss is sustained between the date of injury and the date of death. Accordingly, the executor will have no claim for damages. The victim's relatives will be the only people with title to sue. If the victim has no eligible relatives, it follows that no damages are payable in respect of his death.

The relatives' rights

2.18 The victim's relatives have title to sue for damages in respect of the patrimonial and non-patrimonial loss which they sustain in consequence of the victim's death from personal injuries. This compensates them for their loss and it is not a transmission of the victim's rights to them. However, the relatives' rights are dependent in the sense that they are only enforceable if the responsible person would have been liable to pay damages to the victim had he lived. Consequently, the general rule is that if before his death a victim excludes or discharges the responsible person's liability to pay damages, the relatives' rights will also be discharged. Similarly, if the victim's claim is time-barred because it was not commenced within the triennium, the relatives' claims will also be time-barred.

The relatives' rights to claim for patrimonial loss

2.19 The victim's relatives have a right to claim damages for patrimonial loss arising from the loss of his financial support. In order to make a claim for loss of support, it must be shown that, prior to his death, the victim was providing financial assistance to

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68 Damages (Scotland) Act 1976, s 2(3).
69 Damages (Scotland) Act 1976, ss 9 and 9A.
70 The courts have refused to accept that an award of *solatium* can be made in respect the deceased's fear of impending death in a fatal accident when he did not suffer personal injuries before he was killed: *Hicks v Chief Constable of South Yorkshire Police* [1992] 2 All ER 65.
71 Damages (Scotland) Act 1976, s1(1).
72 Damages (Scotland) Act 1976, s 1(2). ss. 1(2A) and (2B) provide an exception for mesothelioma sufferers. See paras 2.24 and 2.25 below
73 Prescription and Limitation (Scotland) Act 1973, s 17
74 Damages (Scotland) Act 1976, s 1(3).
the relative.\textsuperscript{75} This means that if, for example, the victim was a baby or young child, the parents' claims are restricted to an award for non-patrimonial loss as they were not being financially supported by the victim. Where the victim is a parent, his adult children are unable to sue for patrimonial loss unless the victim was still supporting them financially.

2.20 In calculating loss of support, it is generally for the relative to prove the actual loss sustained. However, where the pursuer is the deceased's spouse, civil partner or cohabitant, or his dependent children, the loss is calculated in accordance with a formula laid down by Lord Sutherland in \textit{Brown v Ferguson}.\textsuperscript{76} In either case, the Ogden Tables are then used to find an appropriate multiplier.\textsuperscript{77} In addition to loss of support, the victim's relatives may also claim for the "reasonable funeral expenses" which they incur.\textsuperscript{78}

2.21 For the purposes of determining who is entitled to claim patrimonial loss, the 1976 Act defines 'relative' widely.\textsuperscript{79} A detailed list is provided in Schedule 1 to the 1976 Act.\textsuperscript{80} Relatives by marriage are included,\textsuperscript{81} as are former spouses and civil partners.\textsuperscript{82} Relationships by affinity now also arise through civil partnership as well as through marriage.\textsuperscript{83} However, as actual loss of support must be proved by all relatives except the deceased's spouse, civil partner or cohabitant and dependent children, the relatives who have title to sue will be limited to those who were in fact financially dependent on the deceased.

\textit{The relatives' rights to claim for personal services}

2.22 As noted above, a victim of personal injuries may claim compensation in respect of his inability to provide personal services to his relatives.\textsuperscript{84} Where a victim dies as a result of these injuries, his relatives may include a claim for personal services as an additional head of damage under section 1(3) of the 1976 Act.\textsuperscript{85} The claim is then determined in accordance with section 9 of the 1976 Act, allowing compensation for lost personal services up to the victim's notional date of death.\textsuperscript{86}

\textsuperscript{75} Title to sue is not restricted to those relatives to whom the victim owed an obligation of aliment: Damages (Scotland) Act 1976, s 1(6).
\textsuperscript{76} 1990 SLT 274. For a fuller discussion of this rule, see paras. 3.39 – 3.44 of the Commission’s Report
\textsuperscript{77} \textit{McNulty v Marshalls Food Group Ltd} 1999 SC 195
\textsuperscript{78} Damages (Scotland) Act 1976, s 1(3).
\textsuperscript{79} Damages (Scotland) Act 1976, s 10(1) and Sch 1
\textsuperscript{80} See Appendix C to the Commission’s Report
\textsuperscript{81} Damages (Scotland) Act 1976, Sch 1 para 2(a).
\textsuperscript{82} Damages (Scotland) Act 1976, Sch 1 para 1(f) and (g)
\textsuperscript{83} Civil Partnership Act 2004, ss 246 and 247 and Sch 21 (as amended by SSI 2005/568).
\textsuperscript{84} Administration of Justice Act 1982, s 9(1).
\textsuperscript{85} Administration of Justice Act 1982, s 9(2).
\textsuperscript{86} Damages (Scotland) Act 1976, s 9(2)(a).
The relatives' rights to claim for non-patrimonial loss

2.23 The victim's relatives also have a right to sue for non-patrimonial loss suffered by them as a result of the victim's death. However, this only extends to relatives who are members of the deceased's 'immediate family'. Section 10(2) of the 1976 Act defines the deceased's immediate family as including those relatives falling within paragraph 1(a) to (cc) of Schedule 1, namely (i) the deceased's spouse or civil partner; (ii) the deceased's opposite sex or same sex cohabitant; (iii) the deceased's parents or children; (iv) any person who was accepted by the deceased as a child of the family; (v) any person who accepted the deceased as a child of the family; (vi) any person who was the brother or sister of the deceased or was brought up in the same household as the deceased and was accepted as a child of the family in which the deceased was a child; (vii) any person who was a grandparent or grandchild of the deceased. Those who are related only by affinity are excluded.

2.24 An award of damages for non-patrimonial loss is currently known as a 'section 1(4) award' rather than solatium. It is intended to compensate the deceased's relatives for:

"(a) distress and anxiety endured by the relative in contemplation of the suffering of the deceased before his death;

(b) grief and sorrow of the relative caused by the deceased's death;

(c) the loss of such non-patrimonial benefit as the relative might have been expected to derive from the deceased's society and guidance if the deceased had not died.".

2.25 In making a section 1(4) award, the court is not required to allocate damages to one or other of the above elements, although it may do so if it thinks fit. The award may encompass past and future loss. However, it is not necessarily the case that an older person will get a smaller award for future loss on the death of his or her spouse than a younger person, as the court may consider there to be enhanced grief from bereavement after a longer married life. This illustrates the need to take into account all the facts and circumstances of the case when making a section 1(4) award.

Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007

2.26 Section 1(2) of the 1976 Act precludes a claim by a relative where the victim settled his claim or was awarded damages prior to his death. This was considered to be particularly harsh in cases where the victim died from mesothelioma. Where persons are diagnosed with mesothelioma their life expectancy is approximately 15 months. Before the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007 was introduced,
mesothelioma sufferers faced a difficult choice between pursuing their claims for damages while alive, or refraining to do so in order to allow their relatives to claim a higher award after their death.

2.27 In order to address this issue, the 2007 Act amended the 1976 Act by disapplying section 1(2) of the 1976 Act in relation to damages for non-patrimonial loss where the victim's personal injury is mesothelioma. As a result, the victim's immediate family may also claim damages for distress, grief and loss of society under section 1(4) of the 1976 Act after the victim's death, even if the victim has already settled his claim.

Transmission of the relatives' rights to claim damages

2.28 If a relative of the victim dies before obtaining an award of damages then that relative's claim will transmit to his executor under section 1A of the 1976 Act. his includes damages for both patrimonial and non-patrimonial loss. However, in assessing the amount of damages to be awarded to the relative's estate, the court will have regard only to the period up to the date of the relative's death.

91 A relative's claim for patrimonial loss under section 1(3) of the 1976 Act will, however, continue to be barred by section 1(2)

92 The victim and the relatives will be able to sue in one action, the relatives' claims being sisted until after the victim dies; see Dow v West of Scotland Shipbreaking Co Ltd and Another [2007] CSOH 71, unreported. See Rules of the Court of Session Rule 43.20

93 Inserted by the Damages (Scotland) Act 1993, s 3.
Appendix 3: List of Commission’s recommendations

(The paragraph numbers refer to paragraphs of the Commission’s Report)

1. A victim should continue to receive damages for loss of expectation of life as part of an award of *solatium* only if he is, or was at any time, aware, or is likely to become aware that his life will end prematurely.

   (Paragraph 3.2; Draft Bill, section 1(1), (2) and (3))

2. A victim should continue to be able to claim damages for any patrimonial loss sustained between –

   (i) the date of decree and the date when he is expected to die; and

   (ii) the date when the victim is expected to die and the notional date of death, i.e. the lost period.

   (Paragraph 3.4; Draft Bill, section 1(5))

3. For the purposes of the lost period patrimonial loss should continue to include the victim's earnings and any benefits in money or money's worth derived from sources other than the victim's own estate.

   (Paragraph 3.5; Draft Bill, section 1(6)(a) and (b))

4. For the purposes of the lost period a deduction should continue to be made for the victim's reasonable living expenses: these should be taken to be 25% of the victim's net income during that period.

   (Paragraph 3.9; Draft Bill, section 1(6)(c))

5. (a) A claim under section 8 of the Administration of Justice Act 1982 should continue to exclude the lost period.

   (Paragraph 3.11; No amendment to section 8 of the 1982 Act))

   (b) A claim under section 9(1) of the Administration of Justice Act 1982 should include damages in respect of the victim's inability to provide gratuitous personal services to his relatives during the lost period.

   (Paragraph 3.11; Draft Bill, section 13(a))

6. (a) The executor's right to sue for patrimonial loss should continue to be restricted to the loss sustained by the deceased up until the date of death.

   (Paragraph 3.17; Draft Bill, section 2(1) and (2))
(b) The deceased's dependent relatives should continue to have a right to sue for loss of the deceased's support.

(Paragraph 3.17; Draft Bill, sections 3, 4(1) and (2)(a))

7. The right of a relative of the deceased to sue for damages should continue to be a dependent right in the sense that the relative cannot sue unless the defender would have been liable to the deceased if the deceased had claimed damages for personal injuries before his death.

(Paragraph 3.18; Draft Bill, section 3)

8. The right to sue on the death of a relative should continue to be extinguished if before he died the deceased had discharged the responsible person's liability to him or his executor.

(Paragraph 3.23; Draft Bill, section 4(1))

9. Where a victim dies of mesothelioma, his relatives should retain title to sue for non-patrimonial loss although the victim has excluded or discharged liability before his death.

(Paragraph 3.29; Draft Bill, section 5)

10. A relative should continue to be able to recover damages only for the patrimonial loss sustained by her as a consequence of the loss of the deceased's financial support.

(Paragraph 3.34; Draft Bill, section 4(2)(a))

11. (a) Where the pursuer is the deceased's spouse, civil partner, cohabitant or dependent child the deceased is to be taken as having used 75% of his net income to support his family and the pursuer's earnings are to be ignored;

(b) For these purposes a dependent child is a child of the deceased, or a child accepted by the deceased as a child of his family, who is under the age of 18 and to whom the deceased owed an obligation of aliment at the time of his death;

(c) In all other cases, the pursuer must establish the amount of financial support he received from the deceased: this cannot exceed 75% of the deceased's net income;

(d) Where the pursuers are the deceased's spouse, civil partner, cohabitant or dependent child, and also another relative whom the deceased was supporting, the amount of the latter's support must be deducted from the 75% of the deceased's
net income which the deceased is to be taken to have used to support his partner and dependent children.

(Paragraph 3.44; Draft Bill, section 7)

12. The relative's loss of support should be divided into past loss and future loss, and that a single multiplier should run from the date of the interlocutor awarding damages in respect of future loss only.

(Paragraph 3.46; Draft Bill, section 7(1)(e))

13. (a) The relatives of a deceased should continue to have title to sue for non patrimonial loss;

(Paragraph 3.52; Draft Bill, section 4(2)(b))

(b) An award of damages for non-patrimonial loss should be called a "grief and companionship award".

(Paragraph 3.52; Draft Bill, section 4(3)(a))

14. A grief and companionship award should not include damages in respect of a mental illness suffered by a relative as a consequence of the victim's death.

(Paragraph 3.53; Draft Bill, section 4(3)(b) and (5))

15. The right to sue for patrimonial as well as non-patrimonial loss should be restricted to those relatives of the deceased who currently constitute the deceased's immediate family.

(Paragraph 3.57; Draft Bill, section 14, definition of "relative")