Introduction

The intention of the proposal is to repeal the Damages (Scotland) Act 1976 and replace it with a new Act, restating the law in a clearer and simpler form; and for connected purposes such as making provision for a new method of calculating damages recoverable by relatives where a person dies as a result of personal injuries.

In 2007, The Scottish Law Commission (SLC) published a discussion paper on damages for wrongful death. The discussion paper produced 15 formal responses and the majority of these expressed support for the idea of reform in the areas contained in a draft Bill. The SLC considered the responses; it was assisted throughout its deliberations by an advisory group of legal practitioners and academics. The group provided comment and practical advice during the process, in particular on issues that emerged from the discussion paper.

In September 2008, the SLC published its Report on Damages for Wrongful Death containing its recommendations and including a draft bill.

A draft proposal for a Member’s Bill to implement the recommendations of the SLC was lodged in the Parliament on 29 April 2009, together with a statement of reasons which referred to the Report. The proposal was referred to the Justice Committee. The Committee considered the issue at its meeting on 2 June 2009 and decided, by division, that it was not satisfied with the reasons given by the Member for not consulting and that further consultation was needed.

The Member issued a consultation document on 31 July 2009; consultation ran until 26 October 2009. A number of late submissions were received after the closing date; they were accepted and have been included in this analysis.

The consultation document was made available from a link on the Proposals for Members’ Bills webpage on the Scottish Parliament website (http://www.scottish.parliament.uk/business/bills/membersBills.htm). It was also sent to 23 organisations and individuals with an interest in this issue.

Scottish Law Commission’s Report

The SLC published its Report on Damages for Wrongful Death on 30 September 2008 and made a number of recommendations for changes to the law of damages in cases where a person dies as a result of personal injuries.
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.

In its *Report*, the SLC 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. The final list of recommendations totalled 15. The SLC attached to its *Report* a draft bill, with explanatory notes, entitled the Damages (Scotland) Bill which gave effect to the SLC’s recommendations.

**Scottish Government**

The Cabinet Secretary for Justice, Kenny MacAskill MSP, in reply to an oral Parliamentary Question from Bill Butler MSP on 23 April 2009, assured the Member that officials were considering the SLC’s report along with two other recent reports on damages. While the Scottish Government was aware that the law needed to be updated, consideration was being given to whether it would be better to make changes “piecemeal” or whether it would be “better to take time to adopt a more consolidated approach”.

**General**

In total 14 responses were received, they were made up of the following organisations and individuals:

- 5 trade unions
- 1 solicitor’s office
- 3 insurance forums
- 2 individuals
- 2 law commission/societies
- 1 faculty of advocates

<table>
<thead>
<tr>
<th></th>
<th>Number</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Support</td>
<td>9</td>
<td>64</td>
</tr>
<tr>
<td>Support with certain amendments</td>
<td>5</td>
<td>36</td>
</tr>
<tr>
<td>Total</td>
<td>14</td>
<td>100%</td>
</tr>
</tbody>
</table>

Of the 14 responses to the consultation, 64% of respondents fully supported the terms of the proposals.

36% supported the proposals but subject to certain amendments which included: opposition to any suggestion that the pursuer’s income should be disregarded; division of a relative’s loss of support claim into past and future losses (proof date); approach to compensation; concerns about the set 25%
and 75% allowances made for living expenses and dependency respectively; the approach to multipliers; exclusion of mental illness.

Responses

The consultation document posed eight questions; the responses to each are outlined below.

Question 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 (paragraphs 2.1-2.9)? If you do not agree, please explain why not.

Thirteen (83%) respondents answered this question giving their support to the existing law being repealed and consolidated or re-enacted, subject to certain amendments, and agreed that the law had been the subject of much amendment and judicial scrutiny and a consolidation would be helpful.

The Association of Personal Injury Lawyers (APIL) was very supportive and restated its comments (previously made in its submission to the Scottish Law Commission) that “we believed the discussion paper succinctly summarises the current law and makes proposals which will be of significant benefit to people whose relatives have been wrongfully killed”.

On the other hand the Association of British Insurers (ABI) was more unsure and responded that it “agree[d] in principle that the approach to compensation should be amended to take into account changing economic realities; however, we are not convinced that the proposals outlined in the draft bill will achieve this”.

Question 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 (paragraphs 4.1-4.4);

To Question 2(a), ten (71%) respondents agreed that the fixed deduction of 25% of the victim’s net annual income represented reasonable living expenses.

The Forum of Scottish Claims Managers felt that “we are making a large concession from a defenders’ perspective and do so in the interest of narrowing the areas where dispute arises and to facilitate quicker compensation”.
In agreement with the bill proposals, APIL considered that “a fixed deduction would spare bereaved families the current trauma of a deeply intrusive enquiry into the financial history of the deceased,……. and would better reflect the changing arrangements within households”.

In its response, the Associated Society of Locomotive Engineers and Firemen (ASLEF) agreed that “a standard and consistent figure would make the process far clearer. Trawling through financial records of bereaved family for this unnecessary purpose causes unnecessary anguish”.

While the Law Society of Scotland, the Obligations Law Sub-Committee, welcomed the bill proposal there was concern that the assumption that the deduction applied should be 25%. “The Sub-Committee is broadly supportive of this measure and believes it will assist with the resolution of many low-value cases…….Such a hard-and-fast rule may not be suitable for complex or high-value cases. One possible solution would be to allow the rule to be challenged where exceptional cause is shown”.

Three (21%) disagreed on having a fixed deduction and felt that an assessment of the victim’s claim should be a question of fact and circumstance in every case. ABI, although it agreed there were advantages by simplifying the process, stated that “fixing the amounts concerned in legislation will restrict the future flexibility of courts and may make it difficult to take into account future changing economic realities”.

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 (paragraphs 5.1-5.2)?
If you do not agree, please explain why not.

To Question 2 (b), six (43%) agreed with the proposal with a further six (43%) offering no comment.

Thompsons Scotland (Solicitors) deemed that the SLC included recommendation 5(b) to distinguish section 9 services from section 8 services and that the Commission proposed no change, merely a clarification. However, Thompsons suggested that section 9 of the 1982 Act should be reviewed as it felt that errors in this part of the Act had not been addressed by the SLC draft Bill.

Question 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
In answering Question 3(a), eight (57%) of respondents supported the SLC’s recommendations Nos 11(a)-(d).

Unite the Union Scotland stated that “a standard formula will provide greater consistency, transparency and piece of mind for the loved ones of the deceased. Furthermore, it could also reduce the considerable delays in resolving awards and outcomes that many families presently face”.

Only two (14%) disagreed and commented that simplicity is not a virtue. The Forum of Insurance Lawyers (Scotland) (FOIL) stated that “in fatal cases fairness has to be balanced with expediency to avoid disproportionate expense”.

(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;

On Question 3(b), three (21%) agreed subject to the deduction of the pursuer’s earnings.

ASLEF agreed that “taking into account the widow or widower’s income can often lead to a family receiving no compensation for the death of a loved one, even if they made a substantial contribution to the household income” and pointed out that “their earnings at that time may be high, leading to low compensation, but it does not mean that they would continue to earn at such a rate, especially if they have to take a greater role in child care due to the loss of a family member”.

However, one respondent remained unconvinced and felt further financial assessment would need to be done to measure the effect this change would have on a range of situations.

(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;

There was support from five (36%) respondents who felt this allowed a fair balance to be struck between actual loss and a theoretical future loss.

(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;

Again, there was support from five (36%) respondents and it was agreed that this was a significant improvement on the current situation. It was felt that 75% was a fair amount and removed some of the burden of calculating claims.

(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;

Six (43%) agreed with one suggesting the inclusion of those 18 or over in full time further education. Eight (57%) did not answer this question.

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 (paragraphs 6.1-6.5)?
If you do not agree, please explain why not.

In support, five (36%) respondents agreed that a single multiplier should run from the date of interlocutor awarding damages in respect of future loss.

Of the four (29%) who disagreed they remained of the view that any multiplier should be calculated from the date of death.

One respondent favoured the Ogden approach regarding multipliers and loss of support.

Question 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 (paragraphs 7.1-7.5)? If you do not agree, please explain why not.

In responding two (14%) respondents agreed with Question 4 while two (14%) had reservations over rights of more distant relatives.

A further four (29%) respondents disagreed. The STUC considered “it does not seem necessary to draw an arbitrary line as to who can claim when the important test is whether actual loss can be demonstrated”. FOIL was not clear as to why the Commission seeks to apply a “one size fits all” approach.

Question 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 (paragraphs 8.1-8.3)? If you do not agree, please explain why not.

Six (43%) respondents agreed with recommendation No 14 and foresaw this as being a contentious issue that would focus more on the potentially disputed mental wellbeing of the survivor rather than on the impact of their loss. There were concerns expressed over the award being called the “grief and companionship award”.

Another four (29%) respondents thought a claim for damages in respect of mental illness should be brought in a separate action as mental illness is difficult to define and assess.

A further four (29%) offered no comment.

**Question 6**

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

Amongst the 14 respondents to this question, six (43%) respondents thought that there would be no additional costs and outlined the savings that could be made as: simplification of calculation process; diminution in argument for lost years and lost of support and the surviving spouse’s income; more efficient compensation process and reduced legal costs. One respondent thought that its implications were revenue neutral or positive. Only one expressed concern that some of the recommendations would inevitably lead to increased costs. None of the respondents were able to supply any detailed costings.

**Question 7**

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

On the question of equal opportunities four (29%) of respondents considered the proposed bill would have a positive impact and support the principle of equal treatment. Eight (57%) made no comment and two (14%) felt that there was either no impact or they were unaware of any.

**Question 8**

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

The majority of the responses were in favour of the proposal and one respondent offered to provide evidence in support of the proposal if necessary.
One respondent stated that they would have liked the Scottish Government to have taken action on SLC’s proposals.

From those in support of the proposal there was a consensus that compensation to a family should, as much as is possible, leave it in the same financial position as prior to the incident.

Summary

Overall it was considered that the current Damages (Scotland) Act 1976 had served its purpose and the proposed new bill would function in a similar manner but would better reflect the current social and family structures in Scotland.

In general most of the respondents supported the SLC’s view that radical reform is not required but that there were a small number of important areas where improvements could be made.

Unite the Union Scotland stated in their final paragraph that “it is clear now and more than ever that Scotland’s workforce need a strong and dependable legislative framework” and finished by stating that the proposal “will ensure some financial stability and reliability from the legal system in difficult times”.

Conclusions

The responses to the consultation have provided a number of suggested amendments that the Member will consider and may use to refine policy before submitting a draft bill.

November 2009